

DEBATING AGENT OF ACTION COUNTERPLANS (I): MORGAN POWERS & EXECUTIVE ORDERS

by
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By the end of last year's academic achievement season, agent of action counterplans were well established as a generic of choice, and the early indication is that they will have a similarly dominant influence in privacy debates. While the summer experience of students at the Dartmouth Debate Institute may be atypical, almost every round there came down to an agent counterplan, a Clinton popularity/political capital position, a privacy critique, and associated theory attacks. The strategic benefits are plain to see - agent counterplans often capture the case advantage and open the way for political process arguments - and on that account if no other the politics/agent CP/critique strategy is likely to disproportionately dominate the top of the circuit.

There is another considerable strategic benefit, which derives from how intermingled real world privacy protection would likely be implemented. Because Congressionally enacted (and presidentially signed) laws end up enforced in the courts as a matter of normal process, a counterplan which uses only the courts is, from the start, inoculated against many of the most obvious counterattacks. After all, since the plan probably relies on the courts as well, normal objections to the efficacy of judicial action cannot be advanced without subverting the plan's solvency as well. While the reverse is less often true (that is, court decisions may or may not depend on regulatory or legislative action for their implementation), there are occasions when cleverly written Congress counterplans can enjoy the same benefit - sidestepping disadvantages run against them in the 2AC as applicable to both plan and counterplan alike.

Because the privacy topic is oriented around the expansion of fundamental legal rights, debates will often center on whether federal judicial or legislative action is best suited to privacy protection. The rest of this essay introduces some of the basic issues likely to arise in these debates, closing with some strategic recommendations.

Of course the range of counterplans using agents different from (or subsumed within) the Federal Government is much

wider than those few discussed here. This essay does not review the merits of state legislative or judicial action, although those will obviously be viable strategies in certain debates. It does not review the complicated literatures surrounding the Congressional delegation power, though in some debates the delegation/nondelegation issue will arise. Nor does it review the range of potential international action counterplans available on this topic, most of which would presumably involve either consultation or harmonization of American privacy policy with the European Union - it was only little more than a month ago that U.S. business representatives agreed with their E. U. counterparts on a framework for data privacy protection, talks undertaken in the effort to avoid potential trade conflicts from erupting over this country's less extensive privacy protection. In a later essay I'll discuss Congressional delegation and court action more fully.

Let's briefly consider one relevant theoretical matter before moving into the substantive issues raised by the Morgan Power and executive order alternatives. Some, on hearing alternative agent counterplans, will immediately wonder whether they are "plan-inclusive," and if so, reach for their prepared theoretical objections to so-called PICS ("they're unfair since they make us attack our own case, putting us in a no win situation," or "PICS lead to trivial distinction counterplans: does the plan budget a penny less for funding - the net benefit is 'penny saved, penny earned'"). But this question is not always easily answered, and debaters will find that sometimes the counterplan is plan inclusive, when other times (even most of the time) it isn't. The state counterplan, for instance, does not seem at all plan inclusive - it uses wholly different systems of government, totally different funding and enforcement authorities, and even if the required actions are similarly worded, they are necessarily different when carried out in such different contexts.

What about a Supreme Court counterplan? Here the question is more difficult. If the plan has Congress pass a law, which the President signs and the Supreme

Court enforces, then the counterplan to simply have the Court initiate action which it then enforces as it would other decisions might well be plan inclusive. Or is it? Even if the outcome is very similar, one might argue the mandates of the plan are essentially different from the counterplan. And if we decide otherwise, wouldn't every counterplan become plan-inclusive, if only because both the plan and counterplan share similar language regarding "normal means", "enforcement," and "funding"?

Since there is, in certain quarters, a growing hostility to plan-inclusiveness, and since affirmatives often feel it necessary to overkill the theory voter sometimes attached to it, it will be tempting to run the PICS objection - I simply advise that you be cautious in doing so. If you claim the counterplan is plan-inclusive, you may simply be tying your own hands by constraining your ability to run disadvantages against the counterplan.

When Congress Judges: The Morgan Powers Counterplans

A considerable amount of legal and policymaking commentary has centered on the respective merits of court and congressional action. One argument, very familiar to debaters from last year's education topic, centers on Gerald Rosenberg's "hollow hope" position. Rosenberg, a political scientist at the University of Chicago, defends the desirability of congressional action in his book of that title (published in 1991). He sees the court as a "litigation lure" able to divert social justice movements into overcommitting their resources to lawsuits. But the lure is dangerous since in Rosenberg's view court action has historically failed to transform the scene of social action for the better. Cases may be won, one at a time, only confirming the judgment of movement planners to proceed with more expensive litigation strategies, but fundamental injustice continues. And, worse yet, since court action usually fails to spark national deliberation (unlike, in Rosenberg's telling, public and open congressional action), movement opportunities to evoke real national dialogue are lost.

There is a fairly sophisticated set of

Rosenberg defenses and critiques. Much of the anti-Rosenberg critique has accused him of too narrowly defining the possibility of legal "success." That is, Rosenberg tends not to count litigation as successful unless it produces an immediate payoff or transformative result. Some who defend the legal system have insisted, by contrast, that publicly discernible responses to court rulings may take many years to materialize, but cannot be discounted or ignored on that account.

Beyond the normal literature contrasting the efficacy of court and legislative action (and it is truly a vast literature) is a smaller and more technically challenging literature centered on the so-called "Morgan Powers Doctrine." To some extent the Morgan Powers counterplan was run on the education topic, but undoubtedly the nature of this year's topic will produce much more concentrated attention, especially on the national circuit.

Even casually informed students of the American Constitution understand it is organized on the principle of "separation of powers," both between federal and state action and among the branches of government (legislative, judicial, executive). It has been long settled law that the Supreme Court is the final arbiter of constitutional principle, and that Congress has little or no explicit power to overturn or challenge specific rulings. Of course, one must speak carefully here from the outset, since the Supreme Court is not powerful beyond congressional check: the constitution gives the Congress power of the purse even over the courts (and the related power to establish new courts), power to confirm federal judges and remove them for serious misconduct, and the power to specify the jurisdiction of the courts. But as you can see these congressional checks are all very general, and do not, on the surface, appear to give Congress any legitimate authority to specifically contradict or legislate away a Supreme Court ruling.

But on purely tactical grounds, negative teams arguing against Court action plans will want to have a legitimate mechanism by which the Congress could reach the same result independently, and the Morgan Power doctrine provides the most defensible one. The phrase references a 1966 Supreme Court decision called *Katzenbach v. Morgan*. There the Warren Court upheld section 4(3) of the Voting Rights Act of 1965, a provision which essentially nullified New York's English literacy requirement for vot-

ing. The problem raised by the V.R.A. provision is that seven years before the Court had specifically upheld such requirements, ruling in *Lassiter* that tests did not necessarily violate the fourteenth and fifteenth amendments. The issue in *Katzenbach* was whether the Congress had overreached by passing section 4(e), by essentially legislating to overturn a Supreme Court ruling. The Court rules that it had not - for the majority, Justice Brennan said all Congress had done, and had the right to do, was implement the language of the 14th amendment, which enables enforcement by "appropriate legislation." The majority ruled that it was the right of Congress to enact laws which expanded the range of constitutional liberty, but under no circumstances did it have the power to restrict it.

The Morgan Power has been very rarely invoked, mainly because the Congress has not often looked for a specific way to legislate away a Supreme Court decision. And the Court has not often revisited the Morgan Power doctrine since 1966. But the issue reemerged in the mid-1980's when Stephen Galebach, a pro-life lawyer, proposed that the Congress use the Morgan Power to nullify *Roe v. Wade*. His point, outlined in an article in the *Human Life Review*, was that Congress should consider passing legislation to make *Roe* irrelevant by finding, as a matter of fact, that life begins at conception (such a finding would completely undo the logic underlying the trimester system of reproductive rights regulation and protection established by *Roe*).

The pro-life debate in the 1980's (and such a law, though introduced, was never passed) illustrates the complexity of the Morgan Power. A Morgan Power counterplan would not just have the "Congress overturn *Whren v. U.S.*," for example, nor could it, since congress lacks the power to pass laws specifically striking down Court decisions (to do so would violate the separation of powers). But they do have the power, under the specific circumstance where doing so would expand rights, to pass legislation that (either by redefining a fact situation or striking down a legislatively permitted practice) would directly subvert a Court's decision. Although rarely used, the Court has upheld this use of congressional power, and since Court plans on this topic are all in the "expand rights" direction, the counterplan to have Congress do basically the same thing through use of its Morgan Powers seems reasonable.

There are considerable problems with the Morgan Power counterplan, some of which were enumerated back in the days of the Human Life Bill. At the time the objections were quite heated. Some argued such a bill was an unlawful use of congressional power since the law would have subverted (and not expanded) a fundamental right. Others produced arguments regarding the *Katzenbach* ruling, claiming the case was wrongly decided. On the other side were those who defended the Morgan Power and its use as a necessary check on judicial activism.

One of the most important essays on the Morgan Power was published some time ago by Yale Law Professor Stephen Carter (he has since written best sellers on integrity and affirmative action). Carter's 1986 *University of Chicago Law Review* essay ("The Morgan 'Power' and the Forced Reconsideration of Constitutional Decisions") takes a mixed view. Without taking a position on the merits or constitutionality of the proposed Human Life Bill, Carter discusses the place of potential congressional action within the broader context of a national dialogue, where some benefit might come from forcing the Supreme Court to occasionally reevaluate its own past decisions. Start by reading the Carter essay if you want a better understanding of the intricacies involved or want some good ideas about how to answer the counterplan.

Teams wishing to use the Morgan power to legislatively oppose court action need to carefully draft the counterplan to avoid tripping into massive separation of powers problems, and must be mindful of the complex intersections of state and federal laws that may come into play in specific cases. For instance, on the issue of parental notification, where the statutes in question are all enacted at the state level, it is a bit unclear how the Congress might act to legitimately undo state law, especially given the increased deference to federalism shown by the Court in recent years. On the other hand, the parental notification case might prove no more constitutionally difficult than the Voting Rights use of Morgan Powers in the 1960's, where the Congress simply enacted federal legislation to prohibit the states (especially in that case New York) from imposing their literacy tests on (in that instance) citizens educated in Puerto Rico.

Also remember this: The Morgan Power counterplan does not hold up well against cases claiming Supreme Court ac-

tion is necessary to advance some symbolic objective. Consider the *Korematsu* affirmative, which proved very popular at several of the major summer programs. In its infamous *Korematsu* decision, the Supreme Court upheld the government's program of quarantining Japanese Americans on the west coast in the aftermath of Pearl Harbor. The case has the Court explicitly overturn its earlier decision, and argues such a reversal will send a powerful symbolic message which has not yet been sent, even by the enactment of congressional compensation for the victims of internment. Should the negative counterplan to have the Congress take Morgan Power action (in this case the counterplan might "vacate" the decision by issuing a finding of fact that Japanese Americans posed no actual security threat to the United States government), they probably do not capture the symbolically important benefits of actual reversal. After all, the decision may be "nullified" by the counterplan but would remain on the books. And perhaps the symbolic import of reversal can only be achieved if the Court comes to a reversal decision on its own, without prodding by the Congress.

When Presidents Legislate: The Executive Order Counterplan

A discussion of presidential executive order can be a brief one, since the range of presidential power on the typical affirmative is slight. This is not to deny the president's occasionally significant range to maneuver. Early in the summer President Clinton made a highly publicized announcement of his executive order prohibiting federal agencies from using the results of genetic tests as the basis for discriminatory action. The order was entirely symbolic, since no agency other than the Pentagon uses genetic testing or plans to, and the order specifically exempted the Pentagon. But Clinton's point was to draw attention to the issue by use of his "bully pulpit." It is perhaps telling that although Clinton challenged private sector companies to match his prohibition (he lacks the direct authority to order private entities to act), not a single insurance company stepped forward to accept the challenge.

Nonetheless, there is evidence connecting privacy claims to the executive order authority of the President. And in certain contexts, where for example the plan is eliminating a program undertaken at the total discretion of a regulatory agency (e.g., the FAA's "terrorist profiling" program, the

Bureau of Prisons policy of strip searching certain inmates and pretrial detainees, the National Security Agency's "Echelon" program, or perhaps the Pentagon's regulations making adultery in the military relevant to judgments about the character of service personnel), the possibility of executive order may actually solve for the case. Of course in these instances the plan itself might issue an executive order as the main solvency mechanism.

The presidential authority to issue executive orders is legally limited. As in the case of the Congress/courts debate, presidential attempts to legislate *via* dictate will soon encounter serious separation of powers problems. In fact, the executive order principally (some would say only) exists so the president can specify for his own staff and for federal employees how he wishes his policies to be implemented. Of course since the federal bureaucracy overseen by the president is a large one, this is not an insubstantial power. And executive orders can have a kind of multiplier effect: a fair housing order implemented many years ago (which in part prohibited agencies from doing business with discriminatory housing providers) pertains to something like a full 25% of the nation's housing stock. There is strong evidence that President Clinton has shown an eager willingness to press the limits of his E. O. power - for instance, he has federalized millions of acres of parkland with the stroke of his pen, a fact which as infuriated his conservative critics. And executive orders can occasionally spark either Congressional legislation (which would extend the reach of an order even further) or raise public consciousness so action is eventually undertaken that would regulate everywhere.

But in the typical situation executive orders will simply not capture the majority of the case advantages. And in cases where the counterplan has the President order massive changes in federal policy, the evidence for Congressional backlash is fairly strong (of course this may only reinforce the counterplan's effort to force a particular Clinton debate, so be careful).

Concluding Strategic Recommendations

In thinking through your responses to the major federal government agent of action counterplans, the normal categories of response often pertain, and should not be forgotten in the heat of the debate. Agent counterplans should be permuted, since doing so almost always achieves double

solvency for the plan. But more than this, consider how permutations can also sidestep the normal net benefit claims made by agent counterplan defenders. To what extent would Clinton really be blamed or credited for the plan if it happened in the aftermath of Congressional or Supreme Court action? And to what extent would the court's legitimacy be preserved were it to act in the aftermath of Congressional action stripping their authority to rule? In both cases, persuasive accounts could be offered for why the "do both" permutation not only achieves a double benefit, but also for why doing both better turns the disadvantage than adopting the counterplan alone.

One must be careful in specifying the nature of the permutation, however. The best net benefit stories usually flow from permutations that envision sequenced adoption (that is, the Congress counterplan might be done first, then the presidential plan - such a sequence would deny Clinton credit since he would appear to be either following the Congress or coerced by their leadership). But many judges have difficulty with order-of-adoption permutations. For example, if the sequence envisions doing the counterplan first, and then the plan, some might say the permutation is an "intrinsicness" permutation - and illegitimate on that account - since the permutation achieves its benefit thanks to a fiat delay that is neither in the plan nor the counterplan text.

Most of the other objections to time frame permutations rehearse tired and ultimately unpersuasive caricatures. Some will argue that time frame permutations make all counterplans uncompetitive, since even mutually exclusive actions can be made consistent when sequenced through time. But that ignores the requirement that permutation advocates elaborate a net benefit to the sequencing, which can be very difficult, especially when the plan and counterplan propose mutually exclusive action.

Others insist on hearing solvency evidence particular to the sequencing (a demand virtually impossible to satisfy), as a way of illustrating what they see as the contrived nature of the sequence. But that objection ignores how much the actual domains of lawmaking rely on sequencing as productive of effective compromise and good policy formation. Those old enough to remember the heated debates of the 1980's over whether the United States should give support to the Nicaraguan "contras" will recall that a kind of time frame permutation

ultimately broke the legislative stalemate. President Reagan sought full support for the contras, who he praised as the "moral equivalent of the Founding Fathers." His congressional opponents, motivated both by their horrified reaction to alleged contra human rights atrocities and by the desire to open up a space where the ruling Sandinistas could govern undiverted by revolution, insisted that aid be terminated. The solution? A compromise which permitted short-term funding, to be followed by an outcomes review. Should atrocities be uncovered, aid would be revoked. If the contras appeared pro-democratic, then aid would continue. Reagan favored the outcome since it got short-term aid to his allies, and because of his confidence that the contra leadership would survive close scrutiny. The Democratic opposition went along both because the deal got them off the hook for what might turn into a "who lost Nicaragua?" contest, and because they were confident the contras would fail any reasonable tests. Time frame arrangements like this are far more typical in Congressional-Presidential dealmaking than is often recognized by diehard opponents of their use in academic debate.

There is no reason not to advance the other major categories of theoretical response, although they should be argued quickly, and not permitted to bog down the rest of the debate. Arguments against dispositionality or conditionality, the existence of negative fiat, or the legitimacy of plan-inclusive counterplans (if they apply) can be quickly advanced.

An unfortunate but growing phenomenon is to make all of these theory arguments into voting issues, a process that quickly derails even sophisticated debates into a melee of reverse voting issue claims and impossible-to-adjudicate fairness arguments. I don't know a single judge who enjoys deciding debates that come down to asserted and competing theory claims, and as a result debaters should beware making substantial time investments in them unless they are truly winnable. It is far better, in my opinion, to impact the theory argument as nullifying the counterplan, rather than insisting the negative should lose since they said (for example) the word "conditional."

Some teams will decide the best course of action against agent alternatives (especially those internal to the federal government) is simply not to specify the particular agent who will implement the plan. There is something to recommend such a strategy:

after all, one might say that the affirmative is not required to specify beyond the level of the resolution, and therefore not obligated to say which bureaucrat in the Federal Bureau of Prisons shall actually sign off on the prison privacy policy. Regardless of these claims, though, specification is the better course of action. Failure to specify will not sidestep the theoretical problems - your opponent will probably just run an "agent specification" theory objection to the plan, either cast as a theory argument, a vagueness objection ("reject them because their plan is too vague, since it doesn't say who implements it"), or a topicality violation ("without specification there is no guaranteed action, and so they are probabilistically topical"). Or they might argue, more subtly, a topicality violation arguing the plan does not strengthen privacy protection since it fails to create a new "legal remedy" (a topicality argument popular at several of the major summer programs), wait for you to specify what your remedy is, and then tie you to it for agent specification purposes (that is, when you answer the violation by saying "we meet - we create a legally actionable right enforced by the Supreme Court," you have answered the agent question despite the silence of the plan text). Given all this, and since these counterplans can be anticipated, why not just think carefully through the issues specific to your affirmative and pick the most defensible agent?

It is absolutely imperative that, when answering agent counterplans, an aggressive strategy be undertaken to beat back net benefit claims. Read evidence that the branch of government defended in the counterplan cannot solve, or solves less effectively than the plan. Run disadvantages against the counterplan to give yourself an offensive alternative to a 2NR "we capture the case, and so any risk of Clinton outweighs" oration.

The potential solvency objections are scattered throughout the privacy literature. Consider a narrow but potentially useful "alternative grounds" counterplan, a category of agent action we have not yet considered. Let's say the plan has the Supreme Court strike down state parental notification statutes (they might claim a reproductive rights advantage), and, to make themselves sound more topical, the affirmative implements the decision by having the Court issue their ruling based on penumbral privacy rights (as they did in the most famous abortion rights decision, *Roe v. Wade*). The

negative might then counterplan by also having the Court strike down parental notification statutes, but on different grounds (e.g., on equal protection grounds - that is, the Court would rule parental notification unconstitutional since notification requirements unduly burden pregnant women while leaving men untouched by the law).

While the difference of grounds seems, at first glance, trivial (after all, if we accept this counterplan, what is to prevent a counterplan next weekend which does the plan, but has the Court rule 6-2 instead of 8-1?), there is a decent legal literature centered on the question of whether the "equal protection" language of the Constitution better protects privacy than other available remedies. This is especially so in the "racial profiling" literature, since the *Whren* decision explicitly mentioned the possibility of an equal protection alternative, a fact which as evoked much commentary in the law reviews. Much of this literature provides good affirmative responses, on solvency and other grounds. For example, to win an "equal protection" claim one typically has to prove the legislature purposely intended to discriminate against a protected class - a high burden of proof compared to the relatively lower threshold normally accompanying penumbral privacy rights claims.

The point is this: the privacy literature pervasively discusses the relative merits of alternative actors. Look for such evidence from the first time evidence is cut for the affirmative, and organize the 1AC story to anticipate obvious agent alternatives. In case of Congress vs. Courts, a variety of alternative arguments are advanced. Some assert that court action is likely to provoke congressional attempts to "rollback" the decision. Others argue that congressional action prompt judicial rollback. A lot of evidence has been written indicting the ability of the Supreme Court to see its decisions enforced by the lower courts, but conversely there is good evidence indicting the power of the Congress to see its will implemented by executive agencies. And there is also a considerable literature which speaks to the question of whether judicial or legislative action is more or less likely to move forward the public conversation or (in the case of the Hollow Hope position) advance the cause of social movements. Take these literatures seriously: they will become an important part of the national circuit's response to persuasive and often compelling cases for strengthening privacy protection.

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