A Coach's Notes[1]

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Resolved: Executive orders should require congressional review.

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Introduction

This is the State Finals edition of the 2016-17 CDA season. Previous year's editions can be found through the Training Materials page on the CDA web site. Accompanying this document are my notes from the final round presented in two formats, transcript and flow chart.

These Notes are intended for your benefit in coaching your teams and for the students to use directly. I hope that you will find them useful. Please feel free to make copies and distribute them to your debaters.

I appreciate any feedback you have, good and bad. The best comments and suggestions will find their way into subsequent issues. I would also consider publishing signed, reasoned comments or replies from coaches or students. So if you would like to reply to my comments or sound off on some aspect of the debate topic or the CDA, I look forward to your email.

Behavior and Reputation

At State Finals the First Affirmative began the 1AC and the 1AR with a "shout out" to a school that wasn't even in the final round. As I recall it, he thanked the school that he was in final round and they were not. I've seen a lot of debates over the years. I've heard a lot of introductions. Many debaters thank various people for their help; others express gratitude for having come this far; others congratulate their opponents for being there to compete with them. But I've never heard anything like this before. I'm not sure what the right word is: "odd"? "boastful"? "crass"? "obnoxious"? If you were there I am sure you have your own opinion.

And it was a shame, because I thought it was one of the better State Finals final rounds that we have had. The teams were both talented and evenly matched. They stayed with their contentions from start to finish. They replied to their opponents, and replied to the replies. It's hard to judge overall quality of CDA debate based on the few rounds I'm able to see in a season, but I can only think of one round I saw all year that was better. And this round compared well to debates I recall from past years. I don't understand why a debater would want to taint the result for, as far as I can tell, no reason.

I don't know if high school debaters pay serious attention to their reputation as debaters. I almost certainly didn't appreciate the impact mine had at that age. But when I looked back at some of the close decisions, and the courtesies we were shown, I realized it made a difference.

You are being watched, as the lead in to the TV show *Person of Interest* put it. And you are being judged, always and everywhere. There is nothing sinister or suspicious about this. Human beings observe each other, and form opinions based on what they see. It's perfectly natural and unavoidable. We all do it without even thinking about it.

But the people at a debate tournament aren't strangers you will never see again. The team at the next table may be your opponent in round 2. That adult across the room may be the judge. And if not at this tournament, then perhaps next month or next year. And you may see your peers again in college or after.

Few things in life are clear cut. We can all use the benefit of the doubt sometimes. Should the rank be 2 or 3? the points 26.5 or 27? do I buy that solvency argument or not? I'd like to think my partner and I won all the close ones because we were that good. But as I think back it didn't hurt that we were respected and well liked.

Think about it.

Don't Concede the Harm

There is a natural tendency to action. We hear about something bad, we want to fix it. But as you get older you realize that most things don't get fixed: the problem solves itself. Take two aspirin and call me in the morning.

Too often CDA teams concede the harm when on Negative, implicitly or explicitly agreeing with the Affirmative that "something" needs to be done. I judged four rounds at State Finals and not one Affirmative team demonstrated that Executive Orders are a problem in the status quo. They may have mentioned a few examples, but they did not demonstrate harm. Aff seemed to assume that simply naming a particular Executive Order was enough.

Look at the flow of the final round. The 1AC has the following examples:

Example as presented	Problem with example
FDR ordered Japanese internment	Order was upheld by the Supreme Court.[2] While the packet doesn't tell you Congress funded the program, it does mention a 2012 law passed by Congress permitting essentially the same thing.[3]
Bush secretly authorized NSA surveillance on emails and phone calls…	...to counter terrorism against the US.[4] And that's bad how?
Jackson vetoed a bill extending the charter of the Second Bank of the United States.	That was veto, not an Executive Order. He did order US government funds withdrawn from the bank and deposited in other institutions.
Trump ordered a travel ban from seven countries.	First order was stayed by the courts within seven days. Second order was stayed within one day.

In each case Aff simply stated the example, with no explanation as to why they were a problem. Most would agree Japanese internment was a national shame, but the others are not obviously harmful. All four of these examples can be explained in Neg's favor.

The packet also includes quite a few other examples of Executive Orders, like the Emancipation Proclamation,[5] and Truman's order integrating the military.[6] Would Congress have passed those if asked? That is not at all certain. Was the President right to take these actions? I'd be happy to argue in favor.

There are a lot of other arguments in favor of not fettering the President. Executive Orders are how Presidents put laws into effect. Many laws are vague about details, or explicitly give the President authority to fill in the details. The Supreme Court has made it clear that Executive Orders are legal if they meet certain conditions.[7] When the new President is from a different party than his (or her) predecessor, voters expect policies

[2] See packet page 5.
[3] See packet page 5
[4] See packet page 5.
[5] See packet, page 6.
[6] See packet, page 7.
[7] See packet, page 3.

will change, and so will the content of Executive Orders. There is plenty of grounds for Negative to argue that there is nothing going on here but politics as usual, and Executive Orders are on balance beneficial.

If there is no problem to solve, there is likely no reason to adopt the resolution. Don't concede the harm: make Aff prove it.

Judicial Review vs Judicial Review

Of course, if you offer a counterplan then you have to accept the harm, and Neg does that in this round. That probably cost them the decision. Remember most judges don't fully understand counterplans, and often assume it shifts the burden of proof to Neg from Aff. I don't think that is true, but a counterplan definitely shifts the debate from Aff plan vs status quo to Aff plan vs Neg counterplan.

There are two reasons the counterplan was a bad choice in this debate. The first reason is that, as just discussed, there is a very strong argument that there is nothing that needs fixing. By agreeing there is a problem Neg gives up a lot, including the chance to refute the Aff examples in detail. Showing your opponent's evidence supports your case is a particularly effective rebuttal.

The second reason is that the counterplan is just a minor improvement over the status quo. Instead of immediate recourse to the US Courts of Appeal, Neg wants to go directly to the Supreme Court. The Trump immigration order was stopped promptly twice by the regular judicial process. While I have been considering using this topic for over a year—since Obama's "I've got a pen, and I've got a phone" statement in January of 2014—the immigration order certainly raised its profile and was well publicized. No debater should have been unfamiliar with this example.

If the status quo is doing something to deal with a potential problem, you don't have counterplan to make it more effective. Simply emphasize the effective aspects of the status quo. Force the Affirmative to demonstrate a harm and inherency—that the status quo is incapable of acting—by explaining the problem, if any, is being managed.

In this case, any act by the Executive Branch (or the Legislative Branch for that matter) can currently be challenged in court. There are any number of interest groups willing and able to challenge Executive Orders they do not like. When time is of the essence, courts can issue an immediate stay (e.g., Trump's immigration order); otherwise the normal process of hearings and appeals is sufficient (e.g., Obama's immigration order). There is no reason to believe congressional review would be superior in any way, especially given the extreme partisanship shown over the past decade.

Competitive Counterplans

There is a third problem with the particular Negative counterplan in this round: it's not ***competitive***. Aff comes close to recognizing this, but doesn't quite get there.

"Competitive" here is a term of art in debater theory. When Aff introduces a plan, even if simply to adopt the resolution, the debate is between two options. The judge can agree with the Affirmative that the plan is superior to the status quo and vote Aff. Or the judge

can agree with the Negative that the plan is inferior to the status quo, or at least the Aff hasn't demonstrated any significant benefit, and vote Neg.

When Neg introduces a counterplan, there are now four options, or ***permutations***, to consider:

1. stay with the status quo;
2. adopt the plan;
3. adopt the counterplan; or
4. adopt both the plan and the counterplan!

By introducing a counterplan, Neg and Aff now agree that neither supports the first option, staying with the status quo. In this round, as in most rounds, they argue between the second and third options. But notice that if the fourth option, do both, is the best choice, then, since it includes the plan/resolution, it is a vote for Aff.

By introducing a counterplan, Neg gives Aff two paths to victory: adopt the plan, or adopt both the plan and the counterplan. If Neg spends most of its time touting the virtues of the counterplan, it only makes things worse. Aff can stand up and say, "We agree the counterplan is a great idea. Let's do both, which includes adopting the resolution and vote Aff!" Even if Neg shows the counterplan is better than the plan, so long as the combination is better than either alone, the combination should win.

There are two approaches for Neg to avoid this predicament. The cleanest is for the counterplan to be competitive. A ***competitive counterplan*** is one that for structural reasons cannot be adopted if the plan is adopted, or if it is adopted prevents the plan from being adopted. For example, suppose the Negative counterplan is to ban Executive Orders not explicitly authorized under the Constitution as Commander-in-Chief or by laws passed by Congress. There would be nothing for Congress to review, either because it has no Constitutional authority to do so in the first instance (and in any case the President's use of the military is ultimately limited by the need for funding approved by Congress), or because they've already authorized the President's discretion in the second instance.

(This example isn't as clean as I'd like, but I hope you get the idea. It's also got a major practical flaw: most Executive Orders are based on ambiguity in the law as passed by Congress. Either the words need interpretation, or the law explicitly asks the Executive Branch to provide the specifics, or Congress hasn't provided funds to do everything specified by the law and the President is simply choosing what to do with the resources made available!)

The second is for Neg to show that the plan has so many specific disadvantages that the counterplan alone is superior. In theory, simply showing the plan is ineffective isn't enough. If it adds any benefit at all when joined with the counterplan, "both" wins. Neg must show the plan actually causes harms, which is harder to do. For the same reason, simply showing the counterplan is superior to the plan doesn't cut it either, so long as the plan adds something so that together they are superior.

Of course most judges aren't familiar with this sort of analysis, and you have to be very sure of yourself, on Affirmative or on Negative, to use it. I suspect most plan vs counterplan debates come down to just that: one side or the other persuade the judge that

their plan is better. Aff needs to be very confident it can convince a judge that doing both isn't simply agreeing to the counterplan and thus asking the judge to vote Neg.

In this final round, Aff tiptoes around the competitiveness argument, but doesn't quite get there. Aff points out several times that judicial review through the normal court system already exists, and that their plan does nothing to change that. That is very different from Aff saying that they agree that immediate Supreme Court review would be another useful addition, fully compatible with the proposed Congressional review. Close, but no cigar.