Blue Book for Policy Debate

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- Digital copies of materials related to this print edition of *Blue Book*.
- Spotlight cases for each league (NSDA, NCFCA and Stoa) for the competitive season. The leagues release their topics in the spring, and we release the Spotlight Cases in August.
- New lessons and study guides for each league topic.
- [Optional] Subscription to *Blue Membership*, additional materials released throughout the competitive season to help prepare students for academic competitions and tournaments.

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Tournament season normally begins in the fall. Subscribing to *Blue Membership* is an optional benefit to competitive debaters who seek new briefs and materials for tournament participation. To start your membership, add *Blue Membership* to your cart. You will be automatically subscribed to weekly updates and downloads: http://www.monumentpublishing.com/blue-membership.

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Introduction

Welcome to *Blue Book!* You're in for an awesome journey of policy debate. Since 1998, *Blue Book* has been supporting policy debaters by providing them with the educational resources necessary to have them succeed at policy debating.

What Is Policy Debate?

Simply put, policy debate is the exciting educational opportunity where you and a partner get to develop a case to advocate some sort of change in how the United States government does things. You get to "change the status quo," debaters often say. You will also scrimmage against other teams who are doing the same, whereas you get to oppose their cases. Judges and teachers rank how well you debated and they declare a winner of your debate round.

Policy debate started in 1927. Today thousands of students participate in classrooms and competitions all over the country in this most invigorating activity. Several different debate leagues offer policy debate as an option for academic competition. While it may appear complicated to those not familiar with the activity, we believe there is a *structure* and *strategy* to policy debate that is actually quite simple.

Blue Book teaches you this structure and strategy to debating, plus gives you model cases from real resolutions to help you grow as a successful policy debater. There is also a digital addendum that releases in the summer that will bring you more up-to-date lessons for your learning. The print copy and the digital addendum together lead you through four units of study to fully prepare you for policy debate.

Units and Lesson Plans

Blue Book consists of four units, with three lessons for each unit, totaling twelve lessons in all. Depending on the size of the class and the time allowed for everyone to debate, these twelve lessons may fill up a semester or an entire year. The content of the units will bring you through a learning sequence of *understanding, learning, modeling,* and *debating.* More specifically, the four units will consist of:

UNDERSTANDING	LEARNING	MODELING	DEBATING
Unit I: Structure	**Unit II: Strategy**	**Unit III: Model Resolutions**	**Unit IV: Competition**
This unit helps you gain an understanding of the essentials for the policy debate round, as well as your responsibilities for the speeches in the round.	This unit walks you through case development and how to launch a debate round with a strong strategy to both affirm and negate the resolution.	This unit consists of three lessons, each exploring important domestic and world issues that constitute a strong debate. This is when you will conduct your first scrimmages with other debaters.	The majority of the content in this unit is part of your digital download. You will explore the resolutions unique to your league and prepare for your first competition.

Consider Units I and II your educational venture through the complexities of policy debate. Get ready to do a lot of studying through new vocabulary and ideas that may seem cumbersome at first, but they are necessary foundations for debating. You do the actual debating in Units III and IV.

We'd like to make an important note about Unit III. By the time you are studying *Blue Book* and depending on how old this edition is, the case material in Unit III may or may not still be valid. It is useful for practice debates or in-class exercises, but understand that websites may have been changed or been totally removed since this material was originally published in *Blue Book*. The world continues to change, too, so perhaps the case ideas that we suggest in this unit have been adopted. Do not rely on

any of the past year's material in a formal debate without first going online and verifying it for yourself.

The source material in Unit IV is digital, released in time for the current year's competition. This allows us to write cases and briefs that are much more current. But still, do not rely on the material too much. You will quickly learn that debaters must always be attentive to the latest developments in the news, especially developments concerning the topic the league is debating.

Scope and Sequence

The chart below helps give you an idea of the logical order of the learning material.

Lesson	Title	Objective
Unit I	**Structure of Policy Debate**	
Lesson 1	Basic Preparation for Policy Debate	*Learn the structure of policy debate.*
Lesson 2	Speaker Responsibilities	*Learn the responsibilities of each speech in the round, paying special attention to the speeches assigned to you.*
Lesson 3	Flowing	*Learn why flowing is so important and how to effectively flow and pre-flow constructive and rebuttal speeches.*
Unit II	**Strategy of Debate Cases**	
Lesson 4	Elements of an Affirmative Case	*Understand the elements of a strong affirmative case.*
Lesson 5	Stock Issues and Other Elements of Debate	*Learn the stock issues of topicality, significance, inherency, and solvency—as well as other elements to a debate.*
Lesson 6	Research	*Learn how to research qualified and persuasive evidence that supports the positions being advocated during a debate.*
Unit III	**Model Resolutions for Your Debates**	
Lesson 7	Domestic Surveillance	*"Resolved: The United States federal government should substantially curtail its domestic surveillance."*
Lesson 8	Federal Court Reform	*"Resolved: That the United States Federal Court system should be significantly reformed."*
Lesson 9	Trade With China	*"Resolved: The United States federal government should substantially reform its trade policy with China."*
Unit IV	**Ready for Competition**	
Lesson 10	Your Policy Debate League	*Learn about the opportunities offered by each league and how to initially prepare for your first tournament.*
Lesson 11	Understanding the Status Quo	*Study the Status Quo chapter provided in your league-specific download and master the current status of the topic.*
Lesson 12	Spotlight Cases	*Select one of three Spotlight Cases to your league's specific resolution, as well as prepare a more diverse negative strategy.*

We created each lesson to be completed within one week of study. This will vary with class sizes, the number of teachers or coaches available for scrimmages, and how much discussion will fill your activities. But, generally, each lesson comes with a suggested schedule that follows:

1. Day 1: A lesson reading plus a worksheet to test comprehension.

2. Days 2-3: Discussion or an activity that helps reinforce the lesson's objective.

3. Day 4-5: Units I and II will continue with discussion or activity, and Units III and IV will conduct scrimmage debates.

Adapting the Schedule

If you are either a more experienced debater or would rather dive headfirst into your league's debate resolution, you may do so with the digital addenda that releases before the competitive season. Unit III covers resolutions that have been run in previous years of competition, but Unit IV brings in the spotlight cases of the current year. Use the digital addendum that pertains to your league, and you'll have material for the current competitive season.

This is where the subscription to *Blue Membership* is extremely valuable. You will be able to further extend your units to include many more *Blue Membership* cases. This print copy of *Blue Book* comes with free access to three cases, but *Blue Membership* releases new material every Monday throughout your tournament season. We do this for several competitive events with what we call "Monument Mondays." If you subscribe, you will grow to have great expectations for the new releases, especially if you are preparing for an upcoming tournament.

This is also handy for yearlong classes, especially for club settings. You can either continue the Scope and Sequence throughout the year, or skip Unit III altogether to focus solely on your league's resolution. For yearlong classes, consider this extended Unit III with subscriptions to *Blue Membership:*

Lesson	Title	Objective
Unit III	**League-specific Topic Study**	
Lesson 7	Understanding the Status Quo (Taken from Unit III, Lesson 9)	To study the Status Quo chapter provided in your league-specific download and master the current status of the topic.
Lesson 8	Debate Cases #1-2	Master more of the topic and the model cases.
Lesson 9	Debate Cases #3-4	Master more of the topic and the model cases.
Lesson 10	Debate Cases #5-6	Master more of the topic and the model cases.
Lesson 11	Debate Cases #7-8	Master more of the topic and the model cases.
Lesson 12	Debate Cases #9-10	Master more of the topic and the model cases.
Lesson 13, etc.	Debate Cases #11-12	Master more of the topic and the model cases.

For noncompetitive classes, *Blue Book* provides an extensive amount of source text for you to plug into Unit III. The digital downloads in Unit IV cover three different leagues (NSDA, NCFCA, Stoa), allowing you an additional nine lessons. Filling up a year of content with deeper analysis of each resolution would be simple, not to mention a lot of fun debating. Following the educational lessons of Units I and II, consider this extension for Unit III:

Lesson	Title	Objective
Unit III	**Spotlight Cases**	
Lesson 7	NSDA Status Quo (Taken from the digital download in Unit IV)	Study the Status Quo chapter provided in the NSDA download and master the current status of the topic.
Lesson 8	Debate Case #1	Master more of the topic and the model cases.
Lesson 9	Debate Case #2	Master more of the topic and the model cases.
Lesson 10	Debate Case #3	Master more of the topic and the model cases.
Lesson 11	NCFCA Status Quo (Taken from the digital download in Unit IV)	Study the Status Quo chapter provided in the NCFCA download and master the current status of the topic.
Lesson 12	Debate Case #1	Master more of the topic and the model cases.
Lesson 13	Debate Case #2	Master more of the topic and the model cases.
Lesson 14	Debate Case #3	Master more of the topic and the model cases.
Lesson 15	Stoa Status Quo (Taken from the digital download in Unit IV)	Study the Status Quo chapter provided in the Stoa download and master the current status of the topic.
Lesson 16	Debate Case #1	Master more of the topic and the model cases.
Lesson 17	Debate Case #2	Master more of the topic and the model cases.
Lesson 18	Debate Case #3	Master more of the topic and the model cases.

Depending your school, club, or class size, your teacher or coach will most likely adapt this Scope and Sequence as he or she sees fit. For competitors, we strongly encourage *Blue Membership*. Additional study helps, as well as affirmative cases and negative briefs, will be released throughout the competitive season to help prepare you for tournaments.

Your Digital Addenda

The summer addendum releases in August. The content that we prepare for you comes from three different leagues that release their resolutions for the current year at different times. These leagues are:

1. National Speech and Debate Association (NSDA, formerly known as the National Forensic League). The NSDA releases their policy resolution by February of the previous year.

2. National Christian Forensics and Communication Association (NCFCA). The NCFCA releases their resolution at their national tournament in June.

3. Stoa (not an acronym, but the name of the league). Stoa releases their resolution at their National Invitational Tournament of Champions in May.

The August addendum will have material specific to your league's new resolution and some affirmative and negative briefing materials. These materials are stored in the cloud on Monument Publishing's web servers. You may download these materials by following the instructions at "Accessing Your Downloads" page at the beginning of this book.

What's Legal, What's Not

This is proprietary intellectual content, so please respect its copyright. **Simply put, if you do not own *Blue Book,* you may not use it or share its content.**

We allow some flexibility when debaters partner up for competition. If you own *Blue Book* and your partner does not, you will need to be the "owner" responsible for the use of the content. You may not share the book itself, but you can print the cases and briefs as if both of you own *Blue Book.* If you are a *Blue Membership* member and your partner isn't, you will have to be the one responsible to log in and print all the materials for the two of you. So, in the case of competitors in competition where you own *Blue Book* and your partner does not, you may share the cases and briefs with your partner.

IMPORTANT CHANGES TO THIS EDITION

If you're already a debater and a loyal owner of *Blue Book*, you are probably surprised at the changes in this edition. There are three significant changes to the new *Blue Book*.

1. Blue Book is releasing before the resolutions

If you're a previous user of *Blue Book,* you are used to receiving your book in the summer or fall, hot off the press. But we're changing that now with the release of *Blue Book* early in the school year, on March 1. The model cases in this book are from the previous year's resolutions, but they're only used as samples or models for how to write a case. This year's debaters won't miss anything, because the new material for the upcoming resolutions will be provided later.

In August, you will have access to three affirmative cases and negative briefs. We call these the "Spotlight Cases," and *Blue Book* owners have enjoyed these early releases in years past. Not only that, but you will have access to brand new lessons on the new resolution for your league as well. For competitors, this resolution-specific material is most helpful when debaters are so new to the topic of their league. You'll still have this, but it will now be part of the digital addendum that comes after the printing of *Blue Book*.

2. Blue Book is now written for both competitors and classrooms

An early release allows us to publish in all sorts of markets that we couldn't do in previous years. Most conventions are in the spring, and educational catalogues pull their content together to prepare for the upcoming school year. Most importantly, teachers typically purchase for their fall classes earlier in the spring, and now *Blue Book* is available for their preparation.

Blue Book has now been adapted for more effective use in classrooms. We took the educational content of our previous *Blue Books* and adapted them into specific units and a lesson plan strategy.

Teachers and coaches of new students—as well as self-study students—will find this easy-to-follow sourcebook extremely efficient for learning policy debate.

But competitors will not be disappointed with this last reason for change…

3. Blue Book now has a "Membership" edition specifically for competitors

Blue Book will prepare you for your first tournament. But throughout the competitive season, you will want *Blue Membership,* a subscription-based website that releases cases and briefs throughout the academic year. We will continue to pump out debate material for you, including new affirmative plans and new negative briefs as information about cases comes in to us from tournaments around the country.

As owner of *Blue Book,* you will have access to the new history and status quo chapters for your league's current resolution, plus the three Spotlight Cases referenced above. However, the materials will continue beyond for *Blue Membership* subscribers. This will include additional cases during the fall and winter, as debate cases unfold during the season.

For information on subscribing to *Blue Membership,* see the section at the end of this book.

Unit I

—

Structure of Policy Debate

There is little more exciting than being able to stand for your beliefs, communicate them with conviction, and advocate for a better world. This is what policy debate does for you.

But before you begin, you need to understand the basic structure to the game. Unit I gives you the essentials to help you become a great debater.

LESSON 1: BASIC PREPARATION FOR POLICY DEBATE

Objective of Lesson 1:

Learn the structure of policy debate.

Policy debate is an academic and competitive exercise that has a common framework and follows a specific format in every debate round. Not knowing the framework and format may give you some anxiety. Like any sport or classroom exercise, most anxiety has to do with a lack of understanding. Not knowing what to expect, the idea of standing in front of a judge or teacher, and debating an opponent is the most terrifying thing in the world. Relax. Every debater starts out wondering where to start. This unit walks you through the four things you should expect that will form the framework and structure of policy debate.

Expect the Topic

Debaters find the topic of discussion in the "resolution." The resolution is what all debate competitors will be debating. It is a policy statement that affirmative teams will affirm with plans advocating specific changes to current public policy. Debate teams (consisting of two students) will prepare an "affirmative" case to run, and the same teams will prepare "negative" briefs to debate against others. All teams must prepare to "affirm" and "negate" the resolution, since they can be assigned to either position right before a debate round starts. The entire stage is set around the resolution.

We have three sample resolutions to practice with, all three of which were adapted from previous years of competition:

1. Resolved: The United States federal government should substantially curtail its domestic surveillance.

2. Resolved: That the United States Federal Court system should be significantly reformed.

3. Resolved: The United States federal government should substantially reform its trade policy with China.

For each of the resolutions above, you will analyze and argue for and against the issue at hand. We have a model case for each of the resolutions, but we also have a *negative* brief for each of those cases.

This brings us to one of the most controversial yet exciting elements of policy debate: *understanding both sides.* We believe this is an educational element missing in much of modern education, but it is perhaps the most crucial in learning how to function in the real world. It isn't possible to find real solutions to world problems if we only listen to advocates for one side of important issues without ever considering opposing views.

The affirmative team tries to convince the judge that the status quo needs to change, and the negative team will try to stop them.

Expect Rules of Engagement

Envision four debaters—two on the affirmative and two on the negative—sitting at two tables, each on the side of a lectern. The lectern faces the judge, typically a teacher, an alumni graduate debater, or a community member who has been asked to participate. The judge has a ballot and a flowsheet to take notes during the debate. The round will last approximately 90 minutes, of which each speaker will speak only for 13 minutes, plus 6 minutes of cross-examination. Total speaking time:

19 minutes (8 minutes for constructive, 5 minutes for rebuttal, 3 minutes asking cross-examination, 3 minutes answering in cross-examination).

One encouraging feature of policy debate is that, unlike many other speech events, you can take to the lectern all the notes and briefing materials you need and you can read from them all you want. You never have to memorize anything in policy debate.

Here are the speeches and the time they are allotted. You and your partner must decide before you start debating who will be in the first or second position. For now, understand the four speaker positions: 1A, 2A, 1N and 2N (A=affirmative and N=negative).

1st Affirmative Constructive (1AC) – 8 minutes
Cross-examination: 2nd negative speaker asks questions of the 1st affirmative speaker – 3 minutes
1st Negative Constructive (1NC) – 8 minutes
Cross-examination: 1st affirmative speaker asks questions of the 1st negative speaker – 3 minutes
2nd Affirmative Constructive (2AC) – 8 minutes
Cross-examination: 1st negative speaker asks questions of the 2nd affirmative speaker – 3 minutes
2nd Negative Constructive (2NC) – 8 minutes
Cross-examination: 2nd affirmative speaker asks questions of the 2nd negative speaker – 3 minutes
1st Negative Rebuttal (1NR) – 5 minutes
1st Affirmative Rebuttal (1AR) – 5 minutes
2nd Negative Rebuttal (2NR) – 5 minutes
2nd Affirmative Rebuttal (2AR) – 5 minutes

There is also an allotment of five minutes for each team that is measured throughout the round that can be used in between speeches for preparation ("prep time"). Prep time begins when the previous speaker sits down and is charged against the team whose job it is to speak next. The five minutes can be budgeted in any fashion by each team—they can use a little bit of it before each speech, or they could use it all before one speech and none before any of the others.

Recognize a few things about this 74-minute format. First, each speaker is given the same amount of speaking time. Seems fair. However, the affirmative team is allowed the first and the last word. Doesn't seem fair. The first and last word are what sticks in the judge's mind. But when you think about it, the affirmative has to actually convince the judge that something must be done, and the negative can simply take pot shots at the affirmative team and not really convince the judge to do anything. So, in the real world, having the affirmative give the first and last word is fair.

This is a significant balance of responsibility in the round. The "burden of proof" rests with the affirmative team: they must prove that substantial change is justified. "Presumption" lies with the negative team: a decision-maker will usually presume that if the affirmative fails to meet its burden

of proof to justify a change, public policy should stick with the status quo (and the ballot will go to the negative).

Expect to Flow

Motivational writer Stephen Covey made a famous adaptation of a French proverb years ago when he wrote: "Seek first to understand, then to be understood." Before you can answer someone's arguments and get yours across, you must first have a full comprehension of the other side's arguments. "Flowing" a round is the note-taking process throughout the 74-minute debate. It is probably the most crucial initial skill for the beginning debater to learn. Flowing is where we seek first to understand and document the arguments being made by the other side before we begin answering them. We will have an entire lesson later in Unit I devoted to the subject of flowing.

A flowsheet tells you a lot about the round. There are strategies that make a lot of sense once you get your mind around the flow. Remember your job as a debater and a debate team: convince the one grading you. It's either your teacher in the classroom or the judge at a tournament. Some of the strategies you learn as you become good at flowing will help you convince the teacher/judge. You'll be a better persuader, a more strategic debater, and a more successful advocate for your position.

Flowing a debate round can be challenging, but it is absolutely essential and there is no substitute for it. One good way to get started is by seeing what a good completed flow should look like. Take a look at the following sample flowsheet. You see that the speeches flow from column to column, and debaters enter in the arguments as they are presented.

In this example, debaters are tasked with doing three things simultaneously:

1. Debaters need to listen to whoever is presenting. For example, when the 1AC is giving his or her speech, both negative debaters are busy listening to the key points of the outline of the 1AC.

2. Debaters need to record the arguments. Debaters are not only listening, but they are also writing the arguments down (flowing) in the 1AC column—the leftmost column in the flow shown above. This takes practice, but it becomes easier the more you do it. By the time the 1NC begins, every debaters' flow should have the 1AC column filled out; by the time the 1NC finishes, every debater should have the 1NC column filled out; and so on. Note: This does *not* mean trying to write down word for word everything the speaker is saying. It *does* mean writing a very short summary (3 or 4 words) of each major point in the speech.

3. Debaters need to prepare for their next speech. This means that, if you are the 1NC, you are not only *listening* and *recording* on the flow during the 1AC, you are also *"pre-flowing"* for the next speech. Each team is allowed 5 minutes of prep time to use as they wish to apply before one of the team speaks. As you get to know your speaking responsibilities, you'll try to use as little of this time as possible and save it for later in the round when you or your partner may need it. The 2AC will be "pre-flowing" during the 1NC, the cross-examination of the 1NC, and perhaps during prep time before the 2AC starts. Likewise, throughout the entire round, the next speaker is always pre-flowing his upcoming speech before it happens. The rest of the debaters and the judge are flowing it in real time as he or she delivers it.

When you begin learning debate, it is most important that you do #1 and #2 above first, before this #3 step. Get your opponents' arguments written down before you begin writing your responses. If not, you may well miss important points your opponent is making, and then find yourself in trouble later in the round when he points out that you didn't answer some key issues. Step #3 is always necessary, but you may need to do it during prep time and while your partner is conducting cross-examination rather than during your opponent's speech.

There are many skills you'll learn from debate, and flowing is one that will stick with you throughout college and life. Not much gets by a debater. This is because they are trained to listen, record, and prepare their thoughts—all simultaneously.

Expect to Learn

Debate teaches you four major things that go beyond the policy topic and even beyond the activity itself.

First, you will learn to communicate. At timed moments in your debate scrimmages, you will be expected to walk to the lectern and give reasoned, articulate arguments and responses to your

opponent's arguments. If you doubt yourself in your speaking ability, that doubt will go away with the practice that debate allows. You will be a more confident, more influential, and more disciplined communicator because of the activity of policy debate.

Second, you'll learn about cooperation. We don't believe competition and cooperation are mutually exclusive. Sure, you and your partner will go up against an opposing team, but you still need to cooperate with your partner. Cooperating with your partner is much more important than beating your opponent. In fact, you won't win many debate rounds if there is discord between the two of you. Cooperation precedes competition.

You'll also cooperate with other members of your class or club. As you work together to build winning debate strategies, you will find that dividing the labor among the group is an effective way to accomplish more than trying to do everything yourself.

Third, you'll learn to appreciate and adhere to moral and ethical behavior. Playing fair at any game makes sense, and it keeps the game healthy, fun, and rewarding.

Aren't we all disappointed when a few (and it only takes a few) display poor behavior in any sport? In debate, some competitors knowingly choose to run fraudulent evidence, an offense that is clearly cheating but not easily identified. Other behavior—abusive tactics, derogatory style, sophist arguing—is more blatant. Such things are not fun, and they can ruin healthy debating.

But this doesn't invalidate the activity; in fact, it validates it even more. Debate sharpens you and your character. The choice to behave unethically is always available next to the choice to behave ethically. Great students and champion debaters consistently choose the latter, and they become the leaders that the activity trains them to be.

Fourth, you'll learn about competition. Whether you register for a tournament or not, debate is incredibly competitive. Even in a classroom setting, you will feel the adrenaline when you take the podium for the first time, and you'll want to *win.* We believe this is healthy. Ride that competitive urge and have fun!

Worksheet for Lesson 1

Name: _____ Date: _____

Read Lesson 1. Answer the following questions in the spaces provided.

1. List the four expectations of policy debaters:

Expect the _____.

Expect _____.

Expect to _____.

Expect to _____.

2. What topics do each of the resolutions in this *Blue Book* cover?

Topic #1: _____

Topic #2: _____

Topic #3: _____

3. Do you have any strong opinions on one of these topics? Pick one and write a sentence or two about your current opinion. "I believe that…" and briefly why:

Note: there is no wrong answer for #3. As a debater, you will be required to argue both sides of the resolution.

4. Mark "T" for true, and "F" for false on the following *Rules of Engagement* for policy debate.

_____ a) The affirmative gets the first word in the round, and the negative gets the last.

_____ b) Each debater gets a total of 19 minutes of speaking time during the 74-minute debate.

_____ c) Every speech in the round must be memorized in advance.

_____ d) Each debate team (not individual student) splits 5 minutes of prep time for the round.

_____ e) The affirmative has the responsibility of "presumption" when considering the resolution.

5. What three things do debaters need to do to properly flow a round?

Debaters need to _____.

Debaters need to _____.

Debaters need to _____.

6. What four things will you learn about as a policy debater?

First, you'll learn to _____.

Second, you'll learn about _____.

Third, you'll learn to appreciate and adhere to _____.

Fourth, you'll learn about _____.

Extension for Lesson 1

To help understand what goes on in a debate round, it helps to see one in action. Follow this link to watch a debate round in action: MonumentPublishing.com/bluebook-lesson1, or utilize *Blue Book Videos* from the Monument Publishing store. You should be able to identify the following from the video. Be prepared to discuss this in class or club with your peers.

1. The resolution being debated is:

2. In your own words, give a short explanation of your impression of each of the speeches.

1AC	1NC	2AC	2NC	1NR	1AR	2NR	2AR

3. Which side (affirmative or negative) do you believe won this round? Give a reason for your decision.

LESSON 2: SPEAKER RESPONSIBILITIES

Objective of Lesson 2:

Learn the responsibilities of each speech in the round, paying special attention to the speeches assigned to you.

Each of the four speakers has a different role to play in the team policy debate round. In this lesson, you will learn what is expected of each.

Long before any debate round starts, you and your partner will decide who will be the 1A and 2A, and who will be the 1N and 2N. The choices depend on how you and your partner work together, your strengths and weaknesses, your personalities, etc. Sometimes, after considering the responsibilities of

each speaker, you may discover that you and your partner are really not a good fit, or that perhaps someone else in your class would be a better fit. This is something you and your teacher should work out, and sometimes it's best for your teacher to make the assignment, and then wait to see how things work out.

Let's go through each of the responsibilities you and your partner will have in your speeches.

First Affirmative (1A)

The first affirmative speaker (1A) is typically the better of the two speakers. His or her responsibilities include:

1. Deliver the affirmative case, which includes the plan of action, in the first 8 minutes of the round. Unit II provides model cases for you, specifically designed to give you models to start the year. As you grow as a debate team, you and your partner will learn of new affirmative plans. Your 1AC is normally the only completely pre-written and scripted speech of the entire round. The rest of the round's speeches may range from very well-scripted to completely impromptu. But you have class and homework time to prepare your 1AC. Use it. Don't show up for your first round without first reading, studying, and *knowing* the case you'll be running.

2. Answer the 2N's cross-examination. When you are finished giving the 1AC, the 2N will stand to cross-examine you for 3 minutes. Your job is to answer honestly the questions without giving up admissions that could be harmful to your case.

3. Cross-examine the first negative Speaker (1NC). Since you wrote the case, you will probably have a good idea of how a sharp negative team will attack your case. The questions you ask will attempt to shoot some doubt into the arguments the 1N gave. Your partner may want a question or two asked, for he or she is getting ready to give the 2AC. So, do your partner a favor and fill up the entire three minutes of CX time. Every second of CX is another second of prep time for your partner.

4. Deliver the first affirmative rebuttal (1AR), arguably the toughest speech in the round. It follows the "negative block" of the round, the 13 minutes of speaking time in the center of the flow. In only 5 minutes, the 1AR must address all the arguments given in the two previous speeches by the negative speakers.

First Negative (1N)

The first negative speaker (1N) is the first to take a stab at the case that will define the round. Many debaters find the 1N position easier than the 2N, because the 1N only has to cover his own issues in his constructive (1NC) and his rebuttal (1NR). The 2N may be more difficult because he will have to cover only his own issues in his constructive (2NC) but cover all the issues in the round as he summarizes the entire negative position in his rebuttal (2NR).

The 1N will have to take very good notes of the 1AC. Make sure that first column on the flow is easy to read and understand. As the 1AC is delivered and during the cross-examination and prep time, the 1N will pull elements from the prepared negative brief to the case. He will also think up new arguments, as well as make arguments from things his partner was able to extract during the cross-examination. The 1N will "pre-flow" the second column of the flowsheet to best prepare for the first negative speech under the 1NC column, outlining arguments in writing before going to the lectern.

1. Deliver the first negative constructive (1NC). Consider the tight timing: the 1AC is 8 minutes, and the 2N will be cross-examining the 1A. You may take some additional prep time if needed, but don't take more than a couple of minutes. So, you have just 12-13 minutes to get your act together. Get that pre-flowed column ready, stack the briefs up in the order of your arguments, and approach the podium.

2. Answer the 1A's cross-examination. When 1NC is finished, the 1A will approach the podium and spend three minutes asking you questions. Answer honestly and try not to make admissions that would be harmful to the speech you just gave.

3. Cross-examine the 2AC. After the second affirmative constructive, you will stand to ask questions of the speaker who just responded to your first speech. The answers you get can be used as material for your rebuttal later (the 1NR).

4. Deliver the first negative rebuttal (1NR). You will give the second speech of what is commonly referred to as the "negative block." The negative team gets 13 minutes of speaking time against the affirmative case. One good division of this labor (suggested, not required) is to run "plan" arguments like disadvantages and solvency arguments in the 2NC (more on that in the 2N), while the 1NC/1NR focus on "case" arguments (like inherency and harms). Rebuttals are a time to respond to arguments made during the constructives, and no new arguments are allowed in the round from this point. The 1NR is expected to address line by line everything in the 2AC. Note that he is only expected to address the arguments he himself made in the 1NC. He has no responsibility to say anything about what his partner just said in the 2NC. After all, there was no affirmative speech after the 2NC, so 1NR has no need to address anything from 2NC. All of 1NR's efforts should be focused on responding to the affirmative's arguments in 2AC. Don't make the mistake of simply repeating things your partner just said in 2NC, since that will be a waste of time that will not add anything to the debate round.

Second Affirmative (2A)

It is easy to see the 2A as "supporter" to the 1A, but the 2A comes through in the end to wrap up the debate round on a positive note.

1. Deliver the second affirmative constructive (2AC). The 2A will be listening carefully to the 1NC, flowing it, and then pre-flowing his responses before he steps up for the 2AC. To prepare, the 2A's job

will be to foresee the arguments the 1NC will give. He needs to have a large brief of supplemental affirmative evidence prepared that can be used to answer all anticipated negative arguments. Then, using the 2A evidence in the model cases provided in Units II-V, prepare for the 2AC.[1] Become as familiar with the opposing arguments to you and your partner's case as possible. The outline of the 2AC is easy: Just respond line by line to everything the 1NC said. If you've done that, you've done your job. If you have time left over (unlikely, but it can happen), you can add additional reasons why your affirmative plan should be adopted that were not mentioned in the 1AC.

2. Answer the 1N's cross-examination. The very person your speech addressed will cross-examine you. Defend your position and explain the evidence and arguments you just presented.

3. Cross-examine the 2NC. The last constructive speech will likely deliver disadvantages and solvency arguments. In cross-examination you begin to challenge these attacks. The 1AR depends on you getting some admissions that can be used as responses in rebuttal, because he needs short and fast arguments he can use when he is pressed for time in the 1AR.

4. Deliver the second affirmative rebuttal (2AR). This is the last word in the entire round. 2AR must summarize all the key issues of the round and show why the affirmative won. An advanced skill of the 2AR will be to "crystallize" or give "voting issues" for the judge. These voters will be a bulleted list of 3-5 reasons the judge should award you with an affirmative ballot. These points should cross-apply to the arguments given in previous speeches, particularly the 2NR and any points the 2NR dropped.

Second Negative (2N)

The 2N gives the first word (cross-examination of the 1AC) and the last word (the 2NR) from the negative team.

1. Cross-examine the 1AC. You will be 8 minutes into the round when you approach the lectern. Your partner will be getting ready to follow you, so be sure to take all three minutes of CX.[2] Ask questions with authority, as if you know more about this case than the affirmative team.

2. Deliver the second negative constructive (2NC). As soon as you sit down from CX and your partner approaches the lectern, you get to work, possibly on plan-side arguments (or other arguments

[1] Note: We use '2A' as a convenient label, but the 2A evidence in your digital files can be used at any point in the round. Some of it could be swapped into the 1AC if you think it fits better. And the 1AR can (and should) use it whenever needed.

[2] When you debate in Unit III you won't be surprised about what your classmates are running. Everyone will be modeling one affirmative case. When you debate in Unit IV, the digital downloads will give you three cases, of which you need to prepare responses for all three. In competition, anything at all can be run, so you will really have to prepare! A good negative team will rarely be surprised at a topical affirmative case, but even if they are, they should have materials prepared that can give them something to say.

based on the division of labor you and your 1N partner have worked out). "Plan-side" arguments are disadvantages and solvency arguments against the 1AC's plan. Your briefs should be full of structured arguments against the case: the affirmative plan won't work the way it is supposed to (no solvency) and instead produces harmful side effects (disadvantages).

3. Answer the 2A's cross-examination. This will be the best shot the affirmative will have to create a crack in the negative block. Make sure he or she fails at this. Answer the questions honestly, but be an advocate for the speech you just gave. Summary: the affirmative case won't work, and it will on balance cause more harm than good.

4. Deliver the second negative rebuttal (2NR). This 5-minute speech is the last word of the negative team. It is common practice to deliver a list of voting issues for the judge, a few good reasons why the judge should warrant a negative ballot. It will attempt to address everything the 1AR addressed, as well as point out everything the 1AR dropped and failed to address. Unlike the 1NR, who only has to cover his or her own arguments and respond to 2AC's response to them, the 2NR has to cover all of the 1N and the 2N arguments that came out in the round. The 2NR must, therefore, be able to flow well and be able to possibly talk a little faster than the 1NR speaker.

All the speeches are strategically placed to give everyone equal time to make their arguments and conduct a robust debate. The table below summarizes the responsibilities of the speakers.

1st affirmative speaker	1st negative speaker	2nd affirmative speaker	2nd negative speaker
1. Deliver the 1AC	1. Deliver the 1NC	1. Deliver the 2AC	1. Cross-examine the 1AC
2. Answer the 2N's cross-examination	2. Answer the 1A's cross-examination	2. Answer the 1N's cross-examination	2. Deliver the 2NC
3. Cross-examine the 1NC	3. Cross-examine the 2AC	3. Cross-examine the 2NC	3. Answer the 2A's cross-examination
4. Deliver the 1AR	4. Deliver the 1NR	4. Deliver the 2AR	4. Deliver the 2NR

Worksheet for Lesson 2

Name: _____ Date: _____

Read Lesson 2. Answer the following questions in the spaces provided.

1. Which speaker did you think you would be (both Aff and Neg)?

2. Match the following duties with one of the following speakers: 1A, 2A, 1N, 2N.

a) The _____ delivers the affirmative case

b) The _____ answers the 1A's cross-examination.

c) The _____ cross-examines the 2NC.

d) The _____ cross-examines the 2AC.

e) The _____ delivers the 2nd affirmative constructive.

f) The _____ answers the first CX from the negative team

g) The _____ delivers the 1st negative constructive.

h) The _____ delivers the 2nd negative rebuttal.

i) The _____ answers cross-examination from the 2AC.

j) The _____ delivers the 1st affirmative rebuttal.

k) The _____ delivers the 2nd negative constructive.

l) The _____ delivers the 2nd affirmative rebuttal.

m) The _____ delivers the 1st negative rebuttal.

n) The _____ cross-examines the 1AC.

o) The _____ prepares CX questions for the first negative speaker.

p) The _____ answers the second cross-examination from the affirmative team.

3. Why does the affirmative team get the first and last word in the debate round?

4. What is the “negative block”? How are negative teams supposed to divide the labor between the 2NC and 1NR?

5. Circle the speaker position and, in the space following, explain why this position is best for you.

1A or 2A:

1N or 2N:

Extension for Lesson 2

You now have a deeper understanding of what you will need to prepare for in your upcoming debates. Come up with a simple policy resolution that you and your friends could debate (or your teacher may provide one for you). Make sure the resolution calls for a significant change to the status quo. For example, *"Resolved: Our school's lunch hour should be significantly longer."*

Fill out a brief explanation of what *you* would be doing if you were any of the four speakers. The first has been done for you, but feel free to add to what has been entered.

Speaker	Constructive	Rebuttal
1A	*1AC: I would approach the lecture with a copy of my affirmative case. My flowsheet would be pre-flowed with the 1AC column already filled out. After reading my entire case, I would be cross-examined by the 2N.*	
1N		
2A		
2N		

LESSON 3: FLOWING

Objective of Lesson 3:

Learn why flowing is so important and how to effectively flow and pre-flow constructive and rebuttal speeches.

We've observed already that "good flowing" is essential to winning a debate. Unfortunately, there is no magic set of instructions about flowing that can make someone good at it. We can explain what it is, but success at it requires lots of practice, so you will have to be willing to put in the effort if you want to become good at flowing. Rest assured it will pay off: It is not a coincidence that winning debaters are always good at flowing.

Flowing is the process of writing down a well-organized, legible summary of all the arguments made by all the debaters in the constructives and rebuttals, including your own. It is essential to effective

debating and you should not bother competing in debate nor taking a debate class if you are not willing to do it. Improved flowing is the single biggest thing most beginning debaters can do to improve their chances of winning debate rounds.

Why Flowing Is So Important

Why is flowing so important? Because, *if you don't flow it, you don't know it.* This is why we have a saying at our camps and in our classes:

You have to flow every time. That, my friends, is the bottom line.

You will not be able to remember all the arguments the 1AC made five minutes after he made them. You will then not be able to remember all the arguments the 1NC made, and the problem keeps snowballing as the debate progresses. When the 2A gets up and says, "Remember what my partner's card said in 1A about economic harms?" you will have no idea what he is talking about if you didn't flow it.

When I'm judging, I can tell when debaters aren't flowing well. I will hear a statement like this: "Now in the last speech, he said something about the economy." This tells me that the current speaker is trying to recall something off the top of his head, but he really doesn't have an accurate summary of it written down and he probably doesn't know what he's talking about. "Something about the economy"—that could be anything.

If his flow had been complete, he would have said it more like this: "Now in the last speech, his third disadvantage was that it would cause a recession and loss of a million jobs." See how much better that is? Notice how much more persuasive this guy sounds already? He's on the right track because he's flowing better.

In the last two lessons, you observed debate rounds and understand the eight columns of the flowsheet. Now let's dig deeper into how to utilize that flowsheet in order to make you an excellent debater.

Flowing the Constructives

We provided you some templates for a flowsheet, but the idea could be just as easily mapped out on an 11x14-inch legal pad. Turn it sideways and divide it into eight columns, labeling each column with the eight speeches of the round (1AC, 1NC, 2AC, 2NC, 1NR, 1AR, 2NR, 2AR). Cross-examination does not have to be flowed because issues raised in CX are questions, not arguments, and they don't become arguments until someone says them in a subsequent speech. You should have something that looks like this:

1AC	1NC	2AC	2NC	1NR	1AR	2NR	2AR

Once we know where all the speeches will go, we then focus on writing brief summaries of each argument, plus any additional information that might be needed to help us respond intelligently to the points made in the round. The 1AC is the first speech in the round, so let's consider an example of how it would be flowed. Below is a greatly simplified sample of a made-up 1AC, followed by a sample flow that a negative debater would make while listening to this speech. The 1AC below is not offered as a perfect model for a 1AC, and it is incomplete in some ways. It is offered only for the purpose of illustrating flowing.

> *"Good morning. My name is John Smith and I will be telling you today about an urgent problem facing the world today in which aid money intended for the poor in Africa ends up in the hands of corrupt elites and fuels civil wars and even terrorism. These problems compel my partner and me to affirm: That the United States should significantly change its foreign aid policies.*
>
> *Observation 1: We offer the following definitions, all from Woobster's 9th edition dictionary in 2015: Significant: having great meaning. Aid: assistance given to one in need. Foreign: pertaining to a country outside of one's own.*
>
> *Observation 2: Inherency: the US donates billions of dollars to African governments. Prof. Alf Landon, UCLA Policy Review, December 2015: "The US government donates around $10 billion per year for assistance programs in Africa. Most of this money goes to the governments in the region."*
>
> *Observation 3: Harms.*
>
> *Harm 1: Aid given to governments fuels civil wars. Hank Haggerty, BOSTON GLOBE, 7 July 2012: "Civil wars in Ubanga and Obongo have been prolonged and worsened by the influx of cash from US government aid programs to the governments in the region."*
>
> *Harm 2: Corrupt elites steal money intended for the poor. Wes Woozy, NEW YORK TIMES, 8 June 2011: "US aid officials estimate that around 50% of the poverty relief aid money donated to African governments last year was stolen by corrupt elites."*
>
> *Harm 3: African aid fuels terrorism. R.U. Sirius, NEWS QUARTERLY, Summer 2015: "Several terrorist groups, including Al-Qaeda, receive payoffs from corrupt government officials in Africa, and a lot of that money comes from cash siphoned away from US aid programs."*
>
> *Observation 4: We offer the following plan:*
> *1: Agency. Congress and the US State Department.*

2: Mandates. All foreign aid to Africa shall be donated to Non-Governmental Organizations from now on.
3: Funding. Current budget for foreign aid shall be continued from current sources.
4: Enforcement shall be through the US State Department.
5: This plan takes effect immediately upon an affirmative ballot.
6: The affirmative team reserves the right to clarify the plan in later speeches.

Observation 5: Advantages

Advantage 1: Reduced risk of civil wars. Frank Jones, NEW REVIEW, 2015: "If Western governments would stop giving aid money directly to African governments, civil wars would often dry up and evaporate due to lack of cash for weapons and troops."

Advantage 2: The poor receive aid, not corrupt elites. Barney Rubble, STONEHENGE TIMES, 2016: "Directing US relief programs in Africa to relief organizations rather than the African governments would bypass the corrupt elites and significantly reduce the theft of aid that robs the world's poorest people of the help they desperately need."

Advantage 3: Stop funding terrorism. Wes Woozy, FOREIGN REVIEW, 2016: "If the US government redirected its aid to non-governmental organizations and away from corrupt regimes, many terrorist groups in Africa would find themselves seriously starved of revenues."

What should appear on the four flowsheets (five, if you count the judge) in the room now? Remember that the affirmative team must flow its own arguments too, and a smart 1A will pre-flow the outline of his 1AC onto his flow before he even gets to the tournament. Everyone should have a flow that looks something like the one below:

1AC	1NC	2AC	2NC	1NR	1AR	2NR	2AR
I. DEF Signif, aid, foreign II. INH US=$10B/yr to Afr govts III. HARMS 1. civil war 2. elites steal $ 3. terrorism – payoffs from govt officials IV. PLAN All Afr aid thru NGO's V. ADV 1. ↓civil wars 2. poor get $ 3. ↓$ to terror							

Before continuing, let's look at what is flowed, how it's flowed, and what isn't flowed. First, notice the widespread use of abbreviations: "DEF" for definitions; "INH" for inherency; "$" for money or funding; "Afr" for Africa or African; and the "down arrow" indicating reduction or less of something. You and your partner will develop a consistent set of abbreviations that the two of you can both

understand, and you will use these over and over again to save space on the flow. Everything that can be abbreviated should be.

Next, notice what's NOT on the flow. The definitions usually don't need flowing unless you hear something crazy. If you're listening as the negative and you don't hear anything crazy in the definition, then you probably won't challenge it anyway. What's the use of writing this down if you're not going to make anything out of it? Just write down the words that the 1A defined, in case they left one out. You can always get the exact definitions from the copy of the 1AC that the 2NC will ask for in cross-examination anyway, if you do suddenly think up a topicality argument based on word definitions.

Something else not on the flow: all the planks of the plan. Only the mandates are flowed. The mandates are what the plan actually does, everything else being details that are in most plans. Again, unless you hear something crazy in one of them, it usually isn't worth the space to write down facts like their "agency" is "Congress and the State Department." A big part of skillful flowing is knowing what to write and what to leave out. Write the important stuff and leave out the things that aren't going to matter.

Notice what *is* on the flow: The entire outline of the 1AC. Anyone looking at this column can quickly figure out that they had three harms, one inherency argument, a plan to stop giving money to African governments and redirect it only to NGO's, and three advantages. And you should have a short summary of what those arguments are. If your flow doesn't give you the essential facts described in this paragraph, your flow isn't good enough and you need more practice flowing.

What happens next? Many would say, "Well, the 1NC gets up and speaks and everyone flows what she says." Not quite. The next thing that happens is that the 1N "pre-flows" her upcoming speech. "Pre-flowing" is a technique used by winning debaters that often separates them from the novices. It means that the 1N is going to write down short summaries of what her arguments will be in the 1NC during the 1AC, during the prep time between 1AC and 1NC, and while her partner is conducting the cross-examination of the 1AC.

Pre-flowing accomplishes two goals: First, it gives the 1N an outline of what she is going to say so that she can remember all the arguments she wants to make and can give an accurate summary at the start of the speech. Second, it means she has her own speech on the flow for the rest of the round. Since you cannot flow and speak at the same time, this is the best and sometimes only way to have a flow of your own speeches. This is essential because in rebuttal you will need to refer back to what you said in constructives, and if you haven't flowed your own speech, you will not be able to do that.

Never, ever go to the lectern in a policy debate with an empty column under your name on the flow. If you are the 1N, your 1NC flow should be filled out before you get up there. If it isn't, go back and sit down, because you are not ready to give your speech. The same goes for all the other speeches.

The pre-flow done by the 1N will be similar to the real-time flow taken by the other debaters: a list of summarized and abbreviated references to the 1NC arguments, similar to the 1AC flow. Let's suppose that the 1N plans to make the following arguments (summarized here for brevity; in real life she would have to completely explain them and read all the evidence for them):

Harms:
1) Civil wars in Africa are under control and reducing today.
2) 97% of aid reaches the poor today.
3) Terrorists aren't getting US aid money.

Inherency:
1) US State Department has announced new tighter controls on foreign aid.
2) African governments are behaving more responsibly.

The diagram below shows how the flow will appear after the 1NC:

1AC	1NC	2AC	2NC	1NR	1AR	2NR	2AR
I. DEF Signif, aid, foreign II. INH US=$10B/yr to Afr govts III. HARMS 1. civil war → 2. elites steal $ → 3. terrorism – payoffs from govt officials → IV. PLAN All Afr aid thru NGO's V. ADV 1. ↓civil wars 2. poor get $ 3. ↓$ to terror	INH 1. Tighter ctrls on aid 9/06 2. Afr govts behavior↑2/07 HARMS 1. civil wars↓ 2. 97% aid gets to poor 3. terr not getting aid $						

Notice a few additional features of the 1NC flow. First, we can draw arrows that connect related material across from the 1AC. We did that under the harms arguments above, and the need for these arrows will become more apparent as the flow progresses. We didn't do it with the inherency arguments because the negative's inherency evidence does not directly relate to the 1AC's inherency observation. Negative is raising new issues about controls and behavior changes, but they are not disputing 1AC's claim that the US gives $10 billion/year in aid to African governments. These get flowed as inherency arguments, but they can't be linked with an arrow back to a 1AC argument.

Second, note again the abbreviations that appear in the 1NC column. These are similar to the abbreviations we used to represent the 1AC material. But we added one additional feature: notice the 9/06 and 2/07 next to the inherency arguments. These are the dates of those cards, and we notate them because the dates on these cards could become important issues in the round.

You might be wondering why we left the bottom half of the 1NC column blank. It seems like a lot of wasted space that could have been used to write out more complete information about the 1N's arguments. But there's a good reason for leaving it blank: The 2NC is probably going to make solvency arguments and/or disadvantages. These will be flowed against the plan and its advantages at the bottom of the flow. We are leaving the bottom of the flow open so that 2N's arguments can be written on the same flow with everything else and we will not be writing arguments on top of each other or in the margins after 2NC.

The cross-examination of the 1N by the 1A will follow, and the 2A will begin pre-flowing his next speech. Here we need to illustrate another flowing feature that can be extremely useful: flowing material generated during cross-examination. Cross-examination does not need to be flowed, which is why there are no columns on the flow for it. So, how, why, and when do we make notes about something that occurs in cross-ex?

The first indication on the flow of something that occurred in cross-examination will be a pre-flow notation made by the examiner's partner about something that the examiner was able to squeeze from her opponent that can be used to support her argument in the upcoming speech. In the current example, let's suppose the cross-examination of the 1N went like this:

> *Q. Now on your first harm card about 97% of the aid gets to the poor. Is that talking about US foreign aid in general or specifically aid to Africa?*
>
> *A. I think that card's talking about US foreign aid in general.*
>
> *Q. OK, thanks.*

The 2A, as soon as he hears this, will pre-flow the letters "cx" and "not specifically Africa" in his 2AC column as a reminder to give this as a response to the 1N harms argument. He puts the "cx" notation to remind himself to say that this was something the other team admitted under cross-examination.

The 2A will pre-flow the rest of his 2AC in similar manner as that used by the 1N (using evidence and full explanations, not the quick summaries below), so let's summarize his arguments and see how they would appear on the flow:

> Inherency:
> 1) Controls on US aid are not effective 12/15, updating Neg 9/06 card.
> 2) African governments wasting aid money despite reforms.

Harms:
1) Civil wars killed 3 million in Africa over the last 3 years.
2) 1N admitted in CX that his card is about US aid programs in general, not specifically Africa.
3) 1N's card wasn't talking about African-based terrorist groups and didn't mention the groups our 1A card mentioned.

For reasons of space, we've again greatly simplified this constructive by putting only the outline of what would appear in it above. These would appear on the flow as illustrated in the diagram below:

1AC	1NC	2AC	2NC	1NR	1AR	2NR	2AR
I. DEF Signif, aid, foreign II. INH US=$10B/yr to Afr govts III. HARMS 1. civil war → 2. elites steal $ → 3. terrorism – payoffs from govt officials IV. PLAN All Afr aid thru NGO's V. ADV 1. ↓civil wars 2. poor get $ 3. ↓$ to terror	INH 1. Tighter ctrls on aid 9/06 → 2. Afr govts behavior ↑2/07 → HARMS 1. civil wars ↓ → 2. 97% aid gets to poor → 3. terr not getting aid $ →	INH 1. Ctrls not working 12/06 2. Afr govts wasting $ despite reform HARMS 1. 3m died 2. cx Not specif Afr 3. ≠ same terr groups in 1A					

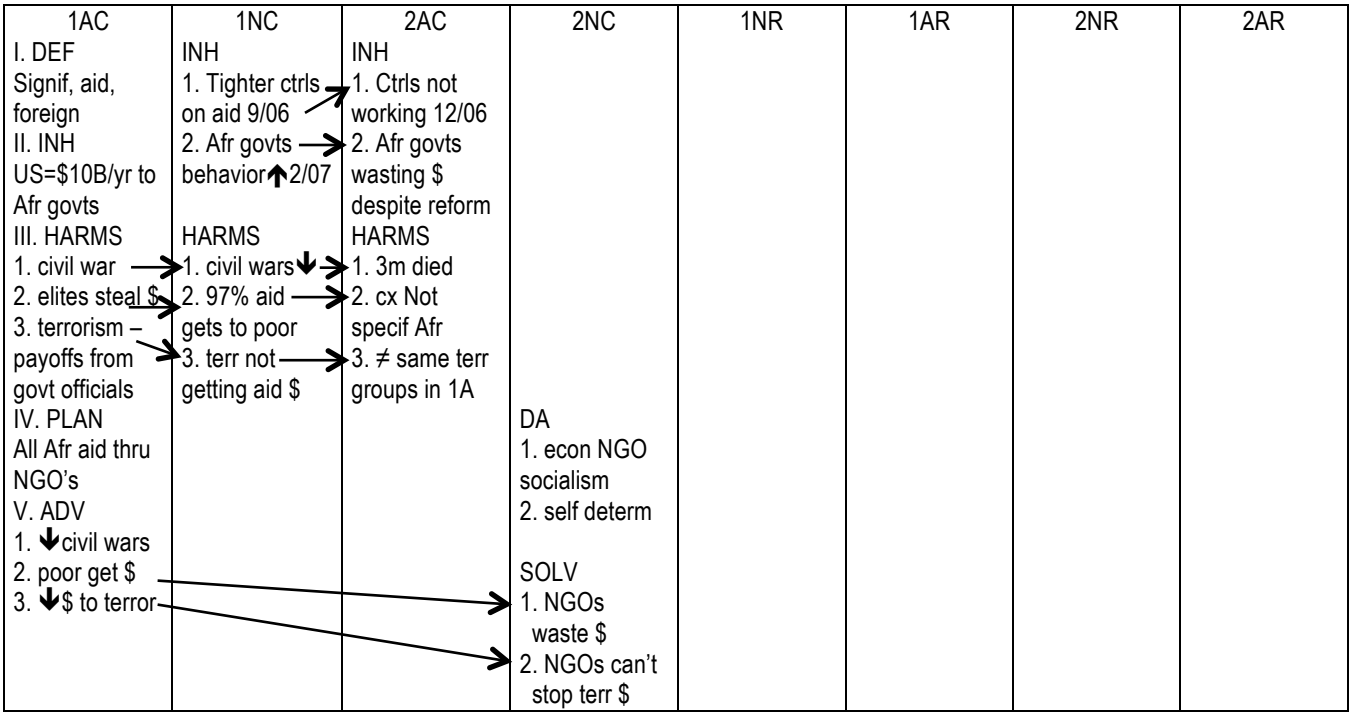
(Note the equal sign with the line through it, indicating "not equal" or "isn't" in the third harm argument in 2AC—another cute space-saving device.)

As promised, the 2N will bring up solvency arguments and disadvantages in the next speech. Here's a quick summary of her arguments along with the flow after 2NC is finished. Keep in mind that the process for developing and delivering the 2NC is the same as the other two non-scripted constructives we have seen already: pre-flow during prep time and cross-examination, and use the pre-flow as the outline for the speech up at the podium.

Disadvantages:
1) Economic decline caused by socialist ideology promoted by NGOs in Africa.
2) Cultural violations and loss of self-determination when outside agencies tell native peoples how to improve their lives.

Solvency:
1) NGOs waste as much money as African governments.
2) NGOs cannot prevent money from getting to terrorists.

Let's see how these would be flowed in the 2NC's column:



Flowing the Rebuttals

With the 1NR, rebuttals begin and arguments get shorter and simpler because no new arguments are being introduced—the debaters are only responding in a short period of time to material already in the round. The 1N, because she has carefully studied *Blue Book* Lesson 3, will give a line-by-line response to the 2AC and will not waste any time repeating what her partner said in 2NC:

> Inherency:
> 1) Look back at our 1NC card—it says the US State Department is already imposing tighter controls!
> 2) Even if African governments are still wasting money, they are wasting less than they used to and it will be even less in the future as the reforms have more time to take effect.
>
> Harms:
> 1) The evidence didn't say those 3 million that died were in civil wars caused by US foreign aid, nor did their solvency evidence say how many of those 3 million would have been saved by this plan.
> 2) The 97% card shows that the status quo has adequate controls in place, since the controls are working on a general basis. There's nothing stopping those controls from working in Africa like they do everywhere else.
> 3) Our card was referring to all terrorist groups in Africa not getting US money. It doesn't have to specifically list each one.

1AC	1NC	2AC	2NC	1NR	1AR	2NR	2AR
I. DEF Signif, aid, foreign II. INH US=$10B/yr to Afr govts III. HARMS 1. civil war 2. elites steal $ 3. terrorism – payoffs from govt officials IV. PLAN All Afr aid thru NGO's V. ADV 1. ↓civil wars 2. poor get $ 3. ↓$ to terror	INH 1. Tighter ctrls on aid 9/06 2. Afr govts behavior↑2/07 HARMS 1. civil wars↓ 2. 97% aid gets to poor 3. terr not getting aid $	INH 1. Ctrls not working 12/06 2. Afr govts wasting $ despite reform HARMS 1. 3m died 2. cx Not specif Afr 3. ≠ same terr groups in 1A	DA 1. econ NGO socialism 2. self determ SOLV 1. NGOs waste $ 2. NGOs can't stop terr $	INH 1. LWIS 2. Trend ↑ reform will work HARMS 1. ①≠caused by aid ②no specif solv ev 2. shows ctrls work 3. all terr groups			

Notice two new markings in the 1NR flow. The first inherency response was abbreviated on this flow (not by the 1N himself!) as "LWIS." Unfortunately, the 1N made the beginner's mistake of merely repeating what she said earlier rather than responding to the 2AC's evidence. Rather than trying to re-write or summarize a worthless blurb like that, a clever affirmative (and perhaps the judge) will abbreviate it as LWIS, which stands for "look what I said (LWIS) back in the earlier speech." It means she gave no real response and just repeated what she or her partner said earlier. All it takes is four letters to remind the affirmative of that on a flow.

Notice also the circled "1" and "2" on the first harm argument. These are sub-points to the first harm argument indicating she gave two separate responses to the 2AC's argument. It is important to label these separately because if 1AR does not notice that he gave two responses, and only replies to one of them, the 2NR will pounce on that mistake, tell the judge about the other response, and claim victory on that argument.

We now expect the 1AR to cover, however briefly, all the issues in the round. As noted in Lesson 2, the 1AR is the most difficult speech in the round. He has only five minutes to cover 13 minutes of negative speaking. But thankfully, a good 1A has a clear flowsheet to keep him on track! He should be able to see exactly what was run in the negative block—both in the 2NC and the 1NR—and address every single argument. It won't be easy, but let's see what the 1AR says in the summary below:

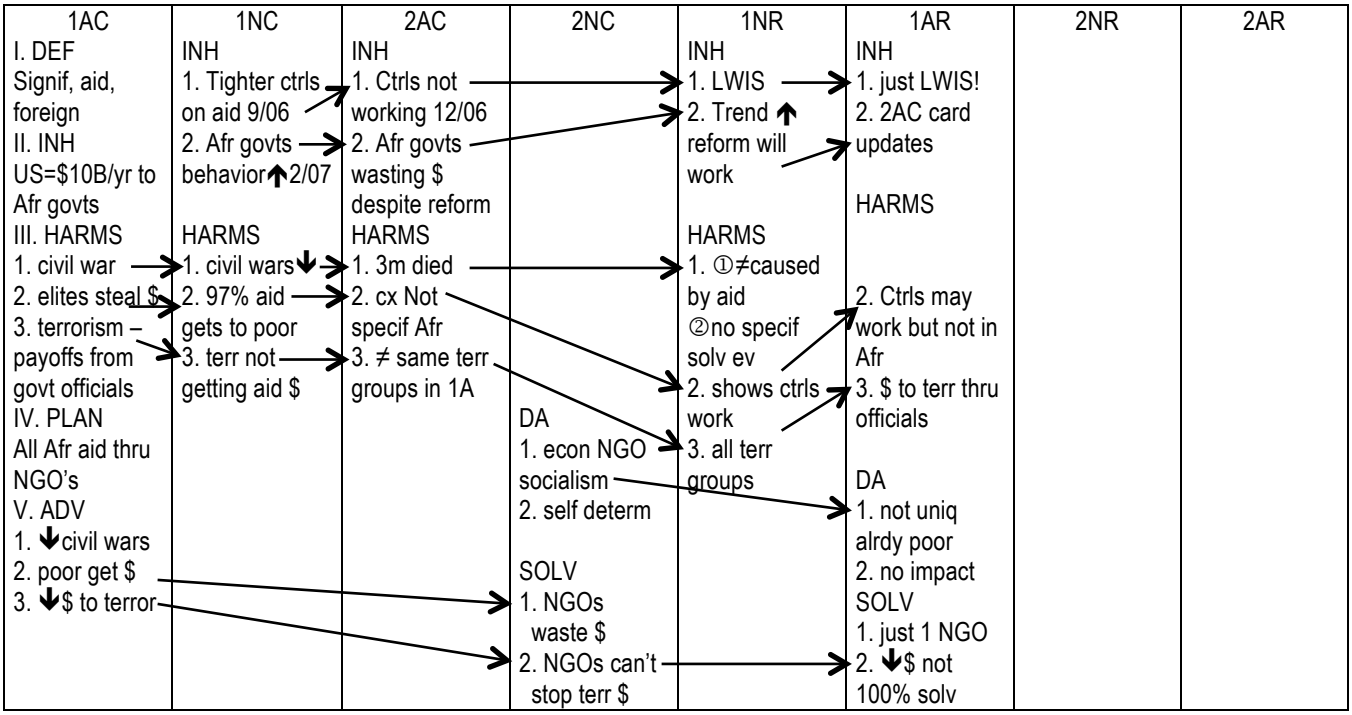
> Disadvantages:
> 1) Socialism corrupting poor nations' economies is not unique because most of these countries already have messed-up economies anyway. They can't get much poorer than they already are.
> 2) Loss of self-determination through outside intervention should not be a voting issue in the round because the

Negative team gave no impact to it. So what if they lose some self-determination? If we save lives, they can live long enough to worry about it later.

Solvency:
1) The Negative's card about NGOs wasting money was about one bad organization, not about NGOs in general.
2) Our expert said NGO money was less likely to get into terrorists' hands than it would be if it were going to governments. We're only claiming a reduction, not 100% guarantee that terrorists never get money.

Inherency:
1) No clear response to 2AC, just repeated 1NC argument.
2) Our card that status quo reforms aren't working updates their card about the trend of improvement today.

Harms:
2) The evidence may show that controls are working in some places, but it doesn't prove anything about what's happening in Africa, like our evidence does.
3) Here's more evidence from Prof. Joe Balladucci, Big University, 2012: "US government aid to African governments often finds its way into the hands of terrorists due to widespread official corruption."



By now you know what to expect on the flow, based on the arguments the 1AR made. Notice one thing in particular here: that ugly empty space under the heading "HARMS." The 1A forgot or ran out of time to respond to the first harms argument that the negative team made. You can see how all the other arguments from earlier in the debate are being carried across the flow with arrows into the 1AR, and we expect those arrows to continue "flowing" across the page until the end of the 2AR.

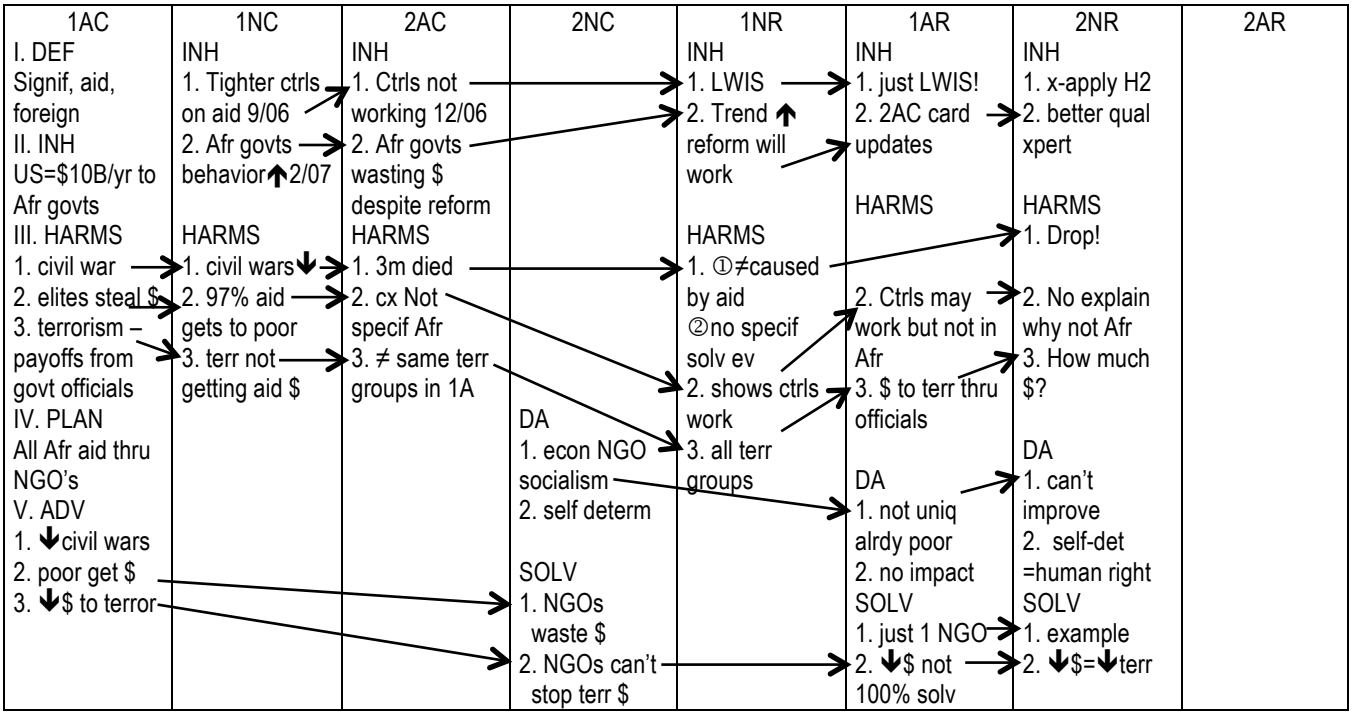
Let's see what the 2NR does next. Here's a quick summary of what the 2NR will say:

Inherency
1) Cross-apply our second harm response where we gave evidence that controls are working and 97% of the aid gets to the poor. I'll have more to say on that under Harms.
2) Even if their evidence was more recent, our source was better qualified and had more experience with aid projects in Africa.

Harms
1) They dropped our two responses to the first harm about civil wars. This harm is now out of the round.
2) Affirmative never proved what's different about Africa to show why the controls wouldn't work there as well as in the rest of the world.
3) The 1AR evidence didn't quantify how much money was going to terrorist groups in Africa. It could be a very insignificant amount.

Disadvantages
1) The uniqueness is that even if they are poor now, they will either get into worse poverty or else get policies that guarantee they stay poor even as other countries that don't adopt socialism get richer through trade and economic integration.
2) Self-determination is the right of every ethnic and national group of people. Denying self-determination has the impact of denying basic human rights.

Solvency
1) Our evidence shows one example of an NGO that wastes money. It doesn't prove that this is the only NGO that has this problem. It proves that NGOs are not necessarily more efficient than government aid programs.
2) Affirmative never shows that whatever small percentage reduction they might achieve in funding to terrorism would reduce actual terrorist incidents. In other words, there's really no proven impact even if they do achieve some percentage reduction in funding.



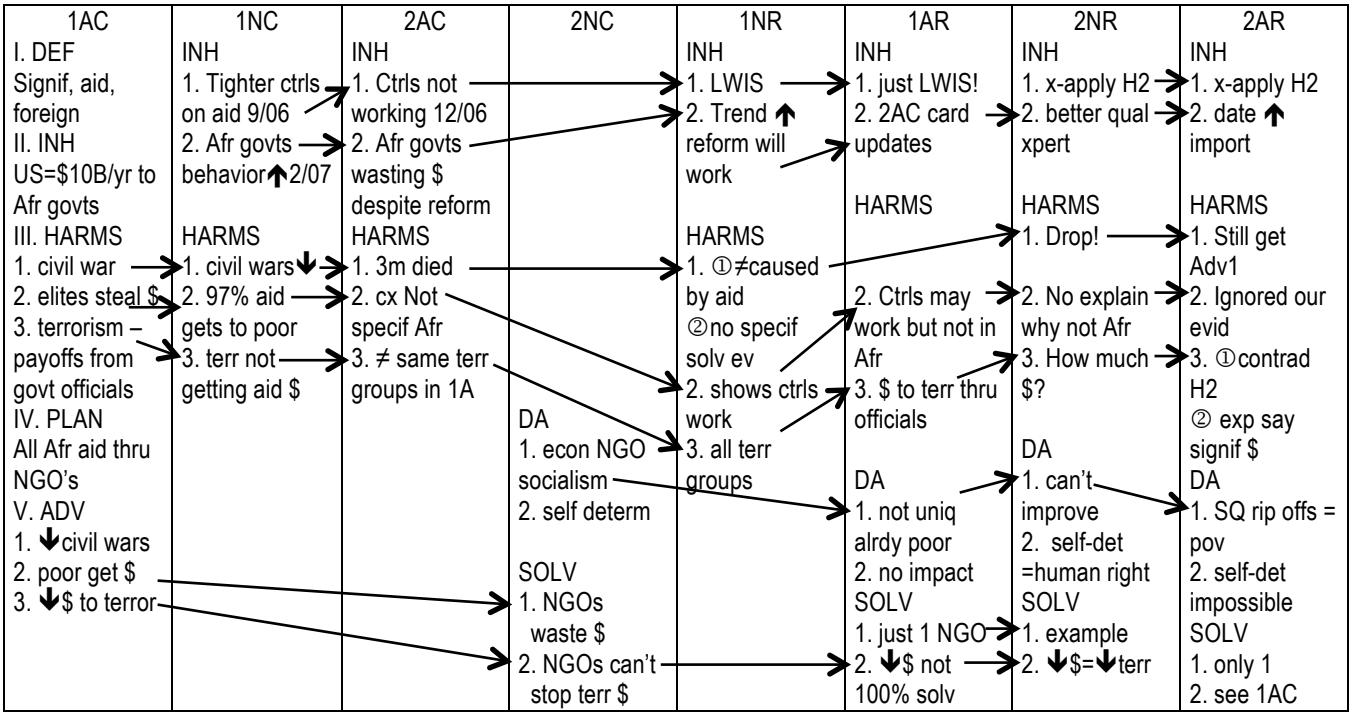
Notice a few things about the 2NR flow. First, 2NR used the term "cross-apply" to give a better response to the first inherency argument instead of LWIS again. "Cross-apply" (abbreviated "x-apply" on the flow) means to use the same response for two different arguments because the same evidence or logical reply will equally apply to both. Here, the 2N believes that her response to the second harm argument (abbreviated "H2" in the inherency part of the flow) will also be adequate to answer the first inherency argument. So, she simply tells the judge to cross-apply her second harm argument as also being the response to the first inherency argument. This neatly saves her some time in rebuttal by using one response to accomplish two things.

Notice also at the first harms argument that the 2N simply points out (correctly) that the affirmative dropped this argument and then moves on. She does not waste time belaboring this point excessively. There's no need: If everyone is flowing accurately, they can easily see that 1AR dropped it and that the issue is now pretty much going to flow negative.

Now we come to the 2AR's responses to the 2NR. Here's a quick summary, but first notice that the speaker may choose to address the issues in a different order from that of the previous speaker, based on what he thinks is most important:

> Disadvantages
> 1) The poverty disadvantage is still not unique because people are stuck in poverty no matter what happens. If NGO socialism keeps them poor then they'll stay poor, but if the status quo rip-offs of aid continue, they'll continue to be poor too. Poverty is simply not a reason to vote Negative in this round.
> 2) Self-determination is impossible to achieve: Mashy Niblock, BANFF REVIEW, 2007: "African countries have little hope of self-determination no matter what the West does. For the foreseeable future, they will be wards of the developed world and continue to depend on aid for basic survival."
>
> Solvency
> 1) The card did not say it was giving one example among many NGOs that waste money. It was simply citing one NGO that had a problem. It doesn't say that lots of others have the same problem.
> 2) Our 1AC evidence said it was beneficial to reduce dollars going to terrorists; we don't need to read anymore cards on that.
>
> Harms
> 1) Regardless of how you vote on the harm card on civil wars, they dropped our 1AC solvency evidence that says civil wars would go down if you vote for our plan. That's enough to justify an Affirmative ballot.
> 2) On controls not working, they said we didn't explain why they don't work in Africa. We don't have to; our evidence did it for us. They keep ignoring the stacks of evidence we read and just keep asking "why?" Ultimately it doesn't matter why, as long as we solve for it.
> 3) How much money is going to terrorists from corrupt officials? First of all, the fact he now admits that this is happening at least some of the time contradicts his response on Harm 2 about not knowing whether controls are working—now we agree that they don't. Second, our 1AC evidence said it was a significant problem. If the experts who have looked at this say it's a significant problem, then not knowing the exact dollar value has no impact on the round.
>
> Inherency
> 1) He cross-applies Harm 2, so cross-apply my responses to Harm 2 here.
> 2) We update them but they claim their expert is better qualified. There was nothing wrong with our expert on this, and more importantly, on this issue, timing is the important factor. This is about inherency, regarding what the status quo is doing, and our more recent evidence showed that the status quo is failing to solve. Their expert may have been great, but things have changed since he said what he did.

Down below, you can see how the flow will look after the 2AR:



The flow is now complete. It was a useful tool during the round, but its usefulness does not end at that point. Some debaters fail to flow the 2AR because they don't realize that a flow's benefits are not confined to the immediate round. In the competitive season when you're going from tournament to tournament, you will use these flows to prepare for the next tournament.

If it was a negative round, take the outline of the affirmative case and prepare a negative brief from it. Use the evidence summaries as a starting point to do research on the claims the affirmative made and develop more evidence to defeat this case if you encounter it again. Remember that there may be other teams using the same case, so don't assume that it only applies to the one team you heard in this one round.

If it was an affirmative round, look at the negative arguments that gave you trouble. Go do more research and either improve your 1AC or save the evidence for use in the 2AC or 1AR to refute the things negatives are bringing up against you.

In debate club, you may share your negative flows with your friends. They, too, can start preparing for those tough affirmative cases you came up against in competition. Clubs that review negative flows together can often think of powerful arguments that didn't come up during the round. Everyone can be better prepared next time they go negative against the same plan.

Worksheet for Lesson 3A

Name: _____ Date: _____

Read Lesson 3 through the constructive speeches. Answer the following questions in the spaces provided.

1. Fill out and take note of the following, taken from the introduction of Lesson 3:

Flowing is the process of _____ _____ a well-organized, legible

_____ of all the _____ made by all the debaters in the

_____ and _____, including _____

_____.

2. In the first two lessons, do you feel you have grasped the importance of flowing? Explain.

3. When the 1AC is finished with his speech, who in the room should have the first column filled out?

Circle all that apply: 1A 2A 1N 2N The judge

4. Explain why debaters typically do not write down the definitions other than just the words that are being defined. Include in your answer when it would be appropriate to write down the full definition.

5. Why aren't most of the specifics of the plan written down? What one specific is always written down?

6. Explain the concept of pre-flowing. Is it ever appropriate to approach the lectern without your speech pre-flowed?

7. The cross-examinations do not need to be flowed on a debater's flowsheet. Why is this the case?

8. In the example above, what two major classifications of arguments did the 2NC bring up that are new arguments on the flow?

a)

b)

9. Which of the following does *not* need to pre-flow their upcoming speech?

Circle: 1A 2A 1N 2N The judge

Worksheet for Lesson 3B

Name: _____ Date: _____

Read Lesson 3 through the rebuttal speeches. Answer the following questions in the spaces provided.

1. Fill out and take note of the following, taken from the introduction of the rebuttal speeches from Lesson 3:

With the 1NR, rebuttals begin and arguments get _____ and

_____ because no _____ _____ are being

introduced—the debaters are only _____ in a short period of time to material

already in the round.

2. Explain what the abbreviation LWIS stands for and why it is a useful strategy on your flowsheet.

3. Why should a debater signify sub-points with circled numbers on their flowsheet?

4. Why is the 1AR the most difficult speech in the round? How does flowing help make this speech effective?

5. What does it mean to "cross-apply" an argument? What is the abbreviation that debaters use to show this on the flow?

6. How much time should a debater take showing a dropped argument?

7. Explain why a flow should be completed to the very end and why debaters should hold onto their flowsheets after the round.

Extension for Lesson 3

Once again, return to the video debate at MonumentPublishing.com/bluebook-lesson1, or if your teacher provides another video, return to that. Watch the video and flow the debate round using a flowsheet. Be sure to follow the format provided in this chapter.

Unit II

—

Strategy of Debate Cases

The affirmative case kicks off the debate round. You will need to understand how to develop a strong 1AC as well as negate other 1ACs. Unit II helps you put the fundamentals of case construction together for you and your partner's success.

LESSON 4: ELEMENTS OF AN AFFIRMATIVE CASE

Objective of Lesson 4:

Understand the elements of a strong affirmative case.

Though speaking in front of a teacher or a tournament judge is where the debate is won, the months of preparation beforehand—in your schoolwork—is the preparation that makes the speaking effective. Great debaters will be so well-prepared and researched that they will be ready for anything in the round. You do this by creating strong cases.

Let's spend a while on the first speech: the First Affirmative Constructive, or 1AC. The debate round will kick off with 8 minutes of the 1AC, read from beginning to end.

There are several types of debate cases, and you will eventually become familiar with many of them. The first to get to know well is the "harms-solvency" case. This most traditional case format follows a popular plan structure used in academic debate. We'll start with this model, though there are others commonly used and equally valid as well, to introduce you to affirmative debate. The five parts are *definitions, inherency, harms, plan,* and *solvency.*

Definitions

"Definitions" explain key terms in the resolution, and sometimes additional words that are used in your plan. Do not make the mistake of using too much of your time with definitions. This section of your speech should simply define the resolution in a way that clearly includes your plan. No more than a minute should be spent on definitions.

This is more important than debaters sometimes think. Sharp negative debaters can hijack the round by asserting their own definitions of key words in the resolution and run the debate round off the road and into the negative ditch by showing the affirmative didn't meet their definition of the resolution. Don't make the mistake of failing to define key words in the 1AC.

Inherency

Inherency is the part of the affirmative case that explains what law or policy the status quo is doing that is different from what their plan does. Inherency can be evidence showing current laws, court decisions, policies, attitudes, or other things that establish the structure of the status quo.

Here are two examples of good inherency claims from a 1AC:

> *Supreme Court decision Oliphant v. Suquamish restricts Indian tribal sovereignty*
>
> *Current law imposes barriers to exports of natural gas*

These inherency claims are not harms, because no one is being harmed yet. For example, we don't know yet why it's bad that we can't export natural gas or why it's bad that Indian tribal sovereignty is restricted. That will be covered next in the harms. Inherency asks us merely "what policy is the status quo doing?"

Harms

Harms are reasons for change that are based on bad things happening in the status quo. These are the problems the affirmative says exist because the resolution is not being presently adopted. You will eventually get to how to solve these problems, but the harms contention is your opportunity to thoroughly explain how bad things really are.

Keep in mind that a harm is a harm only if someone is harmed. That sounds like a tautology, but there is a difference between something that sounds bad and something that is actually harmful. The difference is that when a valid affirmative harm is presented, no one will be able to say "So what?" to it. Listen to the difference between these two claims:

> *HARM 1: Federal deficit increased. Current policies add $500 billion to the federal deficit over the next 3 years.*

Analysis: So what? Who is hurt if the federal deficit goes up? This claim isn't stating that anyone was hurt, so it's not really a harm yet. Remember, it isn't a harm until someone gets harmed.

> *HARM 1: Higher deficits kill jobs. $500 billion increase in the federal deficit over the next 3 years will eliminate 30,000 jobs in the US economy.*

Analysis: Now we have a harm, because 30,000 people will suffer.

"Significance" is a term we will explore more in the next lesson but, for now, understand that it refers to the magnitude either of the harms being solved or the advantages being gained. A significant harm affects a large number of people, a big quantity of money, etc. In the example above, the affirmative team will argue that 30,000 people losing their jobs is a significant problem.

Plan

Next, we provide a plan to fix the harms. There is no need to put evidence inside the plan text. Simply state your plan in the following outline:

> **Agency:** This is the government body you will be using or creating to carry out the implementation of your plan.
> **Mandates:** The "law" you would pass to implement the plan. State this in your own words.
> **Funding:** Where is the money coming from? "No new funding is necessary under my plan" may be your line here. Or, you might cut some useless federal program and divert the money to your brilliant plan, or raise a tax.
> **Enforcement:** When people break the rules, who will carry out the punishment?
> **Timing:** When does the plan take effect?
> **Clarification:** The affirmative team reserves the right to clarify the plan in future speeches.

The main plank of your plan is the "mandates." This will be the actual law you plan to implement. Pay most attention to the mandates when you are flowing rounds. When writing your case, make sure the mandates are easy to follow and clear enough for your judge or teacher to understand.

Solvency

As you will learn in the next lesson, "solvency" is a stock issue that judges frequently vote on. This model case we are illustrating here is named "harms-solvency" for this reason: *your plan "solves" the "harms."* Therefore, the ending of your 1AC will be evidence showing the ways your plan is "solving."

This could be as simple as reflecting each and every harm with a solvency point. If Harm 1 stated that the economy is suffering, Advantage 1 or Solvency 1 would show how the plan improves the economy. Just like with harms, the solvency will have evidence showing this to be true.

Competitors spend a great deal of time developing their debate case, often going through several revisions throughout the year. Like artists who are never really "finished" with the art piece, they are never really "finished" with their debate case. As evidence is brought up, read in the news, or brought out by an opponent unexpectedly in a debate tournament, they return time and again to cut, revise, and research some more. Their debate case will change with time, and it should get stronger throughout the season, with the hope that it could become nearly unbeatable by the later tournaments.[3]

There is no single magic format that wins more often than other formats. There are other case formats that may be written and used successfully but, for now, master the harms-solvency case format.

[3] Assuming, that is, that you remain with the same case throughout the year. You are under no obligation to do so. In fact, unless some tournament rule says otherwise, you can use different affirmative cases in different debate rounds even in the same tournament. Some debaters change plans frequently in order to maintain an element of surprise throughout the debate season, so that negative teams never know what to expect.

Worksheet for Lesson 4

Name: _____ Date: _____

Read Lesson 4. Answer the following questions in the spaces provided.

1. The most traditional case format is the harms-solvency case. Explain why it is called this.

2. Briefly explain each of the five sections of the harms-solvency case.

   a) Definitions

   b) Inherency

   c) Harms

   d) Plan

   e) Solvency

Extension for Lesson 4

Watch again the 1A from the previous debate, or with another debate your teacher provides. As you did with the worksheet, explain each section of the harms-solvency case in the space provided.

a) Definitions

b) Harms

c) Inherency

d) Plan

e) Solvency

If time allows, re-watch the rest of the constructive speeches. Notice how the different sections of the harms-solvency case are addressed. In what ways were these helpful to making individual sides of the debates persuasive?

LESSON 5: STOCK ISSUES AND OTHER ELEMENTS OF DEBATE

Objective of Lesson 5:

Learn the stock issues of topicality, significance, inherency and solvency—as well as other elements to a debate.

"Stock issues" are fundamental elements of persuasion, sometimes referred to as the elements that the affirmative team needs to uphold in the debate. Some of the stock issues have already been discussed, but let's focus on them a little deeper.

Topicality

Every case must be "topical," meaning it must actually do what the resolution states. It has to do the resolution, the whole resolution, and nothing but the resolution. Sometimes a case will veer into non-topical areas that don't have to do with the topic of debate. If, for example, the resolution calls for changing US trade policy toward China, and a team tries to change US trade policy toward Iran, a

negative team would make a "topicality" argument, claiming the plan was not within the boundaries of the resolution.

Affirmatives should be bulletproof on topicality, and negatives should challenge topicality only when there is a reasonable question on whether or not a case is topical. Cases written merely to surprise the negative team into panic debating are just as annoying as negative teams who run topicality arguments on a whim. While it is okay to use a case that the negative team isn't familiar with, it is *not* okay to use one that is so weird that no one can figure out what it has to do with the resolution.

Significance

Every 1AC must offer a case that is "significant" in nature. The affirmative team has the burden to take on problems that have significant impacts to our society. A plan that doesn't accomplish something "significant" is not worth the hour and a half the debate round takes.

Keep in mind that the significance may derive from the importance or magnitude of the harms, or it may be measured by the importance of the advantages. The opposite of significance is an affirmative case that, even if it worked, would only produce a tiny benefit or solve a tiny problem. We shouldn't waste everyone's time on a policy that would bring a $1 benefit (or solve a $1 harm) to the US economy, for example. Even if it succeeds, it's not worth our time to debate it. If the negative can convince the judge that the affirmative team does not solve a problem that bears a significant impact, a judge could be persuaded into casting a negative ballot.

Inherency

Inherency is the most difficult stock issue to understand, but once debaters finally understand it, the lights go on and they debate inherency quite well. Inherency is the claim that the problems with the status quo will not go away without the proposed plan and/or that the status quo is not already doing what the affirmative team is proposing in their mandates. The affirmative will claim that the harms in their case will stay and get worse without adopting their plan, and that their plan is not already enacted in the status quo.

Blue Membership members who are getting ready for competition in a league may notice some of the cases with this disclaimer at the top: "Warning: This bill is currently being debated in the US Congress. Watch the news closely for inherency." If Congress were to vote for a bill during the year that puts one of the *Blue Membership* cases into law, that team would have to change their case. The case would have lost inherency because the status quo would already be solving the problem.

Solvency

The last stock issue an affirmative needs to prove is "solvency"—that is, does the plan solve the problems it sets out to achieve? The affirmative team will, of course, present evidence showing in the 1AC that their plan solves.

This is often the most vulnerable stock issue for the affirmative. Very often, judges will vote for a negative team because the negative team convinced them that the affirmative would not solve the problems cited. Good negative teams will spend a good deal of their time on solvency.

Other Issues in Policy Debate

"Stock" issues are technically elements of persuasion, and there are many logicians who vary in their depth of stock issue theory. For debating policy debate, there are a handful of other issues that may or may not carry the weight of the four stock issues listed above, but they are worth mentioning. They often become reasons judges vote for one side or another in a debate round.

Disadvantages

An extension to defending the status quo is showing how the affirmative plan will bring about unforeseen side effects. The negative can claim that *even if* the affirmative solves its harms, greater harms will come about as a result. These are called *disadvantages*. All policy plans will risk disadvantages, and a good negative team will train themselves to run organized and effective "disads."

A disadvantage needs to meet four criteria to win. While they may not be spelled out in every disadvantage you argue, these criteria will be debated when your disadvantage is entered into the round: *uniqueness*, *link, brink,* and *impact.* Uniqueness means the disadvantage isn't happening already and isn't going to happen unless the plan is enacted. The negative will *link* the specific part of the affirmative plan that causes the harm to the disad presented; the link is the "cause and effect" from plan to consequence. Next, a prediction—called *brink*—will be made as to when this disad will come about, or the negative team will claim that this plan not only will move us in the direction of something bad but will actually trigger the bad consequences. Lastly, the negative will show the *impact* of the disad—the harmful consequences of people getting hurt.

Minor Repair

The negative may choose to fix the current system a little without adopting the significant change the affirmative proposes. This is called a *minor repair*. If the negative team shows that this minor repair (which will be contrasted with the affirmative's "significant change") solves the problems the affirmative team is claiming, the judge will see no reason to vote affirmative. Presumption will be on the negative side, and the negative can win with this alternative, somewhat advanced, strategy.

However, the negative team must be careful not to grant all the affirmative harms. If too many minor repairs are called for, the judge may agree that the status quo is so messed up that major structural change *is* needed. Only introduce minor repairs if 1) the affirmative case is so outlandish that something much less radical would do just fine; or 2) as a strategy for taking out one or two of the harms (solving them with the minor repair) while defeating the rest of the harms in more traditional ways.

Fiat

The idea of fiat is sometimes confusing. Debaters need to debate the merits of the case presented, and just because the current political climate would never go for the affirmative case isn't a reason to avoid the debate. An affirmative team has "fiat power" to argue to the judge: "Look, it may be that the President will veto this bill, but you have fiat power to make it law."

It may be tempting for a negative team to refer to the political scene and claim "that'd never get passed today." Fiat means that everyone in the room should operate on the belief that the plan would be enacted "by fiat" when the judge signs the ballot. The resolution only requires us to debate that we "should" adopt a new policy, not that Congress or the President "would" adopt it.

One caveat to that: Fiat power only means you can "fiat" that your case will be adopted by Congress or any other appropriate decision-maker. That's it. You can't fiat solvency or advantages. You have to prove with evidence that your plan works, you just don't have to prove that Congress would adopt it.

Counterplan

The negative team has the option to agree with everything the affirmative says *except* the adoption of their specific plan. They do this with the use of a "counterplan." A counterplan is an alternative plan that still negates the resolution, but it solves it with a plan that "counters" it.

There are many ways to beat the affirmative team. When adopting a counterplan, many of those avenues are cut off. First of all, the negative sacrifices *presumption;* once a counterplan is offered, presumption cannot be claimed unless the negative can somehow show that their counterplan is a smaller change than the affirmative's plan. Furthermore, the negative needs to agree that the harms exist, that they are significant, that they are inherent to the status quo, and that a change in the status quo is necessary.

This isn't to say that counterplans are always a bad strategy, but there are some specific recommendations to keep in mind when running one. First, we strongly recommend that the plan is *non-topical*, meaning the plan denies the wording of the resolution. If a negative runs a counterplan that is also upholding the resolution, the affirmative can argue that there are now two teams affirming the resolution, so no matter who wins, the judge should check "affirmative" on the ballot. We

recognize there are coaches and judges that are more open to "topical" counterplans, and we don't disrespect them. We advise that it's better debating strategy to run a counterplan that denies the resolution, given the possibility of having a judge who does not like topical counterplans, and considering the amount of time you would have to spend in the round, possibly boring or confusing the judge, while debating counterplan theory to justify your topical counterplan.

Second, the counterplan must have mandates, agency, funding, and enforcement just like an affirmative plan. This requires extensive preparation and briefing before the tournament.

And third, the counterplan must show how the advantages from the counterplan are greater than the advantages of the affirmative plan, or how it avoids disadvantages to the affirmative plan. This can change the strategy of the 1NC to run disadvantages, which might normally have been reserved for the 2NC.

In addition, a counterplan must be "exclusive" to the affirmative plan. That is to say, it should be either impossible or not beneficial to adopt both the affirmative plan and the counterplan at the same time. If both plans are good and are not exclusive, then the affirmative can simply say, "Judge, do both. Vote affirmative for our plan and then do the counterplan later." The negative can avoid this problem by either making the counterplan something that is physically impossible to do at the same time as the affirmative plan, or else by showing that the disadvantages of the affirmative plan are so great that it would be beneficial to do "only" the counterplan.

Worksheet for Lesson 5

Name: _____ Date: _____

Read Lesson 5. Answer the following in the spaces provided.

1. Define “topicality” =

2. Define “significance” =

3. Define “inherency” =

4. Define “solvency” =

5. Define “disadvantage” =

6. Define “minor repair” =

7. Define “fiat” =

8. Define “counterplan” =

Extension for Lesson 5

Refer back to the debates you watched in Lesson 1 and Lesson 2. In the boxes below, explain at least one argument that was raised concerning each of the stock issues.

Debate #1	Debate #2
Topicality:	Topicality:
Significance:	Significance:
Inherency:	Inherency:
Solvency:	Solvency:

In your estimation, do you think the affirmative debaters adequately defended each of the stock issues? If they failed at one of them, do you think they would deserve the ballot? Be prepared to explain your answer.

LESSON 6: RESEARCH

Objective of Lesson 6:

Learn how to research qualified and persuasive evidence that supports the positions being advocated during a debate.

Debaters soon realize that gathering evidence is crucial to winning. The best policy debaters are able to scour the news, pull data into briefs, and organize the briefs in a way that dramatically increases their chances in the next tournament. Don't underestimate it: evidence is key to successful debating. Many debate rounds are won during the weeks before the tournament at the library or on the internet doing research.

Some debate formats don't rely as much on evidence. They may allow the debater to merely assert things that he has heard or believes, or things he thinks everyone knows, or to merely summarize things he has learned about the subject. Not so in policy debate. Here, pretty much every fact introduced into the round should be demonstrated from a piece of evidence quoted word for word in the round.

Evidence is essential in policy debate because it is the foundation of your credibility. High school students don't know nearly as much as experts do, and neither do old debate coaches or teachers. We may claim with all sincerity that the status quo should be reformed, but unless we show that we have some credible backing to our claims, judges won't believe us.

In addition, research is a skill that will empower you throughout life. You'll know how to scour the Internet before making a career choice, forming a political view, or searching for advice on a big decision. You will not be a disagreeable person when challenged, nor will you be a gullible person when not. Careful research gives you factual basis for your beliefs, rather than merely acting on emotional impulse, offering a greater likelihood of better outcomes.

Elements of Evidence

Evidence consists of direct quotations from a properly cited published source (book, magazine, newspaper, or website). Evidence is what you cite to back up the factual claims you make in your speeches, both affirmative and negative. Elements that each piece of evidence traditionally must have to be considered valid in a policy debate round are:

1. *Source.* A piece of evidence has to have something indicating who said the quote that is being offered. This should be obvious to the casual observer. Along with the source, evidence quotes often (and should whenever possible) provide qualifications for the source. If the author is a professor, journalist, economist, well-known political writer, etc., it is helpful to know that. Quotes that lack a qualification for the source can still be used in many cases, but the judge will have to weigh that against whatever the other team brings up in their evidence. If the other team's evidence is better qualified, then they will have a strong argument to make that they deserve to win on that basis.

2. *Publication.* You need more than just "Joe Schmoe says…" You need the publication where he said it and the name of the article.

3. *Date.* Except for citations from timeless reference sources like ancient philosophers, the Constitution or dictionaries (and even then, quoting from a really old dictionary might be a problem due to changes in word usage over time), dates are a critical element in evaluating the quality and evidential value of any quote introduced in a debate round. Evidence quotes need to show at least the year in which they were published, and if more precise dates are available (month, day), then those should be provided too.

Here is a citation from a piece of evidence taken from a previous *Blue Membership* brief. Notice the Source, Publication, and Date all laid out for the debaters:

FACT 2. Big delays. Slow approval process blocks US LNG exports

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE 2014 (Prepared By the Energy and Commerce Committee, Majority Staff) Prosperity at Home and Strengthened Allies Abroad – A Global Perspective on Natural Gas Exports 4 Feb 2014 http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20140204LNGexports.pdf

However, time is of the essence and DOE's slow approval process for LNG exports is squandering the chance to maximize our energy advantage. DOE has only made five decisions since the first non-FTA application was submitted over three years ago, and more than 20 applications still await action. America's window of opportunity will not remain open for long. In the face of continued delays, nations with near-term energy needs will be forced to look elsewhere for supplies, LNG facilities will have difficulty securing financing in an uncertain regulatory environment, and America will see greater competition from other LNG exporters. To avert these risks to our global LNG export leadership potential, the committee urges DOE to approve all pending LNG export applications by the end of 2014.

Notice the "tag" line (the bolded summary of the evidence at the top) is written to set up the judge to hear the evidence. It tells the judge what we expect this evidence to prove by summarizing key words and concepts from the card into a short line. The tag is not evidence and should not be read as a substitute for the evidence. The citation (the italicized paragraph) has a simple underlined introduction; this is what is read in the debate round, but it also has available all the information needed to validate that this is a direct quote from a qualified source. Same with the quoted section of the evidence. The underlined part is what is read, but the rest is kept in the evidence to make sure the context of the evidence is intact or to provide more details should they be needed later in the debate round.

Credibility

There are several factors that contribute to the credibility (believability, persuasive value) of evidence introduced into a debate round. The first is the source. The best evidence comes from the best-qualified sources. Good sources include:

- Professors, doctors, or other researchers writing papers or studies about their area of expertise.
- Experts at "think tanks," like Heritage Foundation, Brookings Institution, Cato Institute, Brennan Center for Justice, Center for American Progress, etc. Always be sure to cite the name and credentials of the specific expert, not just the name of his organization.
- Politicians describing the state of the law or the state of political conditions they are trying to change. Quoting a politician's opinion that a new law would solve some problem is less persuasive, though it can be useful to show that it is not just the affirmative debater advocating the plan but actual officials who know something about the situation.
- Journalists reporting on facts in existence in the world. Sometimes journalists venture into opinion (e.g., the editorial columns of newspapers like *The New York Times*); these are not so credible, since journalists have no more qualifications than anyone else to express opinions about the way things "should be."

- Journalists reporting the statements and opinions of experts. In this case, the credibility derives from the expert being quoted.

- Judges' statements in court decisions.

- Law Review articles.

- Subject matter experts, even if they are not professors or PhDs, when writing about subjects they have worked with extensively. For example, the leader of a food aid program who has spent years working among the poor in Africa: he may not have a PhD in foreign policy, but I would find him credible if he makes statements about hunger in Africa.

- Encyclopedias and dictionaries.

On the other hand, there are also sources that are less than credible:

- Blogs written by anonymous individuals or random members of the public. However, there are blogs written by some high-powered experts, so this is not a rejection of all blogs, just those for whom we do not know the qualifications of the author or if the author appears to have no actual expertise.

- Websites with no author's name listed. There are various articles posted on the web that do not list who wrote them or where they came from. Stay away from these.

- Wikipedia. You should not quote Wikipedia for any reason because anyone can add things to it. People have added joke entries to it just to see if they could. Wikipedia is useful for background reading and for its references to other websites. Go check out those other sites and, if they are credible, use them.

- Emails. If you get an email from a subject matter expert, that does not qualify as a published source. If you are emailing someone with expert opinions, you should ask him for citations to some of his published works or websites you could go to for the information you need.

- Many debaters, and some coaches, mistakenly believe that evidence must be "unbiased" to be credible. Other than basic facts about the universe, there is likely no such thing as "unbiased" evidence. And why should there be? Remember that policy debate is a debate about what we "should" do to create a better world. The current state of facts certainly plays in to that calculus, but you should expect to hear lots of clash between various credible sources who each claim that they know what we "should" (or "should not") do.

You will hear one well-qualified expert state that the US can raise more money by modifying some existing policy. You will then hear another well-qualified source say that idea will lead to economic ruin. The quotes from these experts are the necessary foundation for the debate. If one debater or the other merely asserted one of those positions, the debate would be essentially over for lack of evidence. But with the evidential foundation laid, both debaters can now build on the foundation laid by their expert quotes and can now persuade the judge why their expert's position should be accepted.

Evidence Integrity Is Your Integrity

The evidence in *Blue Book*—and several times more evidence in a *Blue Membership*—is only the start, not the end, of your research. It is designed to give you a model and an example to show you the way. This is what you do and how you do it. Now go forth and do much more!

I hope that all debaters try their hardest to win. But don't let the will to win become a temptation to compromise basic standards of integrity. Since the academic demands are great, there is often a temptation to "fudge" evidence: change a date here, tamper with a quote there, add a few words to make the evidence say what you need it to say, or just make up quotations. What seems so easy and innocent can lead to an ethics charge that can ruin your debate experience.

Evidence tampering degrades the activity of debate and, when exposed, strips a student of honor. Worse yet is that there is an opponent on the other side who has been personally violated by the cheater's actions. One student taking an award from another—knowing full well of the fraudulent evidence that helped put them there—is completely dishonorable.

Evidence fraud is also similar to steroids in professional sports. A runner will pump himself with artificial steroid drugs to give him a competitive edge, and a debater could tamper with his or her evidence to make it more persuasive in a debate round. Allowing steroid use in sports would turn the participants into drugged-up monsters, essentially making the sport into something of an *All-star Wrestling* show, a mockery of the real thing rather than a test of skill. We want the best debater to win, not "the one who can tamper their evidence best."

Debaters who play by the rules—those who avoid the temptation to fudge the evidence in their favor and instead build arguments based on valid research—should never have to compete against another who is falling to the temptation. When it happens, it should be identified and the offenders should be immediately sanctioned.

Worksheet for Lesson 6

Name: _____ Date: _____

Read Lesson 6. Answer the following in the spaces provided.

1. Of the following scenarios, list as (A) fraudulent, (B) legitimate, or (C) questionable.

_____ a) You find a piece of evidence that is rather old (1998), but you are certain a piece of evidence exists somewhere that is more recent that says the same thing. You read it when searching last week, but now you are not able to find it. Rather than waste any more time, you simply change the card you have from 1998 to 2016.

_____ b) You write a case with the criterion of "Financial Viability." A case that is financially viable is a case worth passing, you argue. You have a piece of solvency evidence that comes very close to making this conclusion. Inserting the prepositional phrase "with financial viability" would make it perfect, but you know that would be fraudulent. Instead, you place the phrase with brackets around it: [with financial viability].

_____ c) You pull together a piece of evidence from a chapter of a book. The parts you would like to read in a round are from the beginning of the chapter and the end, with a lot of needless data in between. Rather than type out the entire chapter and underline the beginning and the end, you merge the two parts with an ellipses (...).

_____ d) You find a piece of evidence from a website that has no date affixed to it. You place the day you accessed it on the citation of the card.

_____ e) You need a card that shows the US is behind the times when compared to Europe. You find a website that shows this in a chart that compares US policies with other countries, and on the same site (different page) shows the cost of the policy is, in fact, higher than most other countries. You combine the data from the two charts with a tag line, "US policies cost more than most other countries." Everything is fully cited and links to both web pages are in the citation.

_____ f) You use a card from a brief that you received online from another debater. The opposing team makes the claim that it is a fraudulent piece of evidence and turns it in to tournament adjudication. It turns out the evidence is fraudulent. Are you going to be in trouble, considering that you did not write it?

2. Is it possible to *unintentionally* run fraudulent evidence? Can you be penalized in a tournament even though my fraudulent evidence was not intentional? Whose responsibility is it to make sure your evidence is legitimate?

Extension for Lesson 6

The following is an article used to write the negative brief in a case in Unit II. Read the article. Without looking ahead to the affirmative case in Lesson 6, cut three pieces from the evidence in the space provided below.

We did one of them below and put a square box to highlight where we got if from within the article. Notice the elements of the cutting and how it makes the point with a credible piece of evidence. Come up with two more, then compare to the case to see how close you came to the model brief.

HARM 1. Injustice. It's unjust for debtors to choose far-away courts for their bankruptcy case in order to get different legal results

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue (brackets added to fix a typographical error in the original) http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

Often, law-shopping motivates venue-shopping. To facilitate venue-shopping, law firms representing debtors often maintain elaborate charts detailing what courts have ruled on what issues that their clients are concerned about. This is unjust. A legal system in which there are in the normal course conflicts in judicial decisions ought not allow one party in litigation to choose which of those courts has more favorable decisions and then go there to file its case. There is no sound reason why, for example, a debtor headquartered in New York should be permitted to have its right to reject a collective bargaining agreement with its union in New York subject to Ninth Circuit case law just because it is incorporated in Alaska or has a subsidiary in Idaho. Such was surely not within the reasonable expectation of the parties to the agreement when they executed it. The law applicable to a debtor's bankruptcy case ought to be the law applicable in the state of its principle place of business, without an opportunity to cho[o]se other law.

STATEMENT

of

HON STEVEN RHODES
United States Bankruptcy Judge
Eastern District of Michigan

to the

ABI COMMISSION
TO STUDY THE REFORM OF CHAPTER 11

on

CHAPTER 11 VENUE

November 22, 2013
Austin, Texas

I. Introduction

My 28 years on the bankruptcy bench have persuaded me that the current bankruptcy venue law, 28 U.S.C. § 1408, is the single most significant cause of injustice in chapter 11 bankruptcy cases.

Accordingly, I support the amendment to this law in H.R 2533 (2011). This bill would provide for chapter 11 venue in the district of the debtor's principal place of business or principal assets and in the district where an affiliate has filed when the affiliate owns more than 50% of the debtor's voting shares.

I submit this statement in support of that view, but only partly so.

The question of changing chapter 11 venue is at once complex from a policy perspective, highly charged from a political perspective, and deeply personal from the perspective of many chapter 11 professionals (including judges). Accordingly, it deserves careful, thorough, and impartial study and deliberation, and the process of that study must give that appearance. The goal of broad support for any recommendation on venue that the Commission might be unattainable, but the process must be above criticism.[4]

Accordingly, this statement will first lay out in Part II below the many considerations that I believe the Commission should take into account in order to accomplish a comprehensive and fair study of chapter 11 venue.

The list of considerations is long—seventeen in all. If the Commission agrees that these, or even many of these, are legitimate considerations, it may well decide that it simply does not have the resources, or, at this point, the time, to complete the kind of study that the subject requires. In that event, the Commission may decide that it is appropriate to recommend to the ABI that it establish another commission—a Chapter 11 Venue Commission—just to study and make a recommendation on this important and controversial issue. To me, that result would be entirely understandable and acceptable.

In Part III of the statement, I will address only four of the seventeen considerations that I identify in Part II. I choose only four because of my own lack of time, and because in my view these four considerations have not received adequate attention elsewhere in the debate over chapter 11 venue. These four considerations are:

(1) The purpose of venue in our jurisprudence;
(2) The impact of venue-shopping on judicial legitimacy;
(3) The injustice of law-shopping; and
(4) The potential inadequacy of the transfer of venue process to fix the law-shopping problem.

Finally, for the record, I fully support and agree with the testimony provided on September 8, 2011, to the Subcommittee on Courts, Commercial and Administrative Law of the House Judiciary Committee by Bankruptcy Judge Frank Bailey, Professor Melissa Jacoby and Peter Califano of the Commercial Law League of America. I commend to the Commission the testimony and the statements that those

[4] In this regard, I recall to the Commission's attention the process criticisms leveled at the National Bankruptcy Review Commission when it was preparing its recommendations on chapter 11 venue. Fair or not, it is arguable that those criticisms doomed the NBRC's recommendations on chapter 11 venue.

witnesses provided. I also fully support the testimony and statement to be given to the Commission by Doug Rosner of the CLLA.

II. Considerations That May Impact a Recommendation Regarding Chapter 11 Venue

This list was compiled by reviewing the available literature on the chapter 11 venue debate. I do not, of course, warrant its completeness; others may well identify additional important considerations. The list is in no particular order.

1. Motivations for Venue Shopping

a. What are the motivations for venue selection under the current venue law?
b. Are those motivations legitimate as a matter of public policy?

2. Difference with Other Federal Venue Laws

a. How are the bankruptcy venue laws different from other federal venue laws?
b. What about chapter 11 bankruptcy justifies any such differences

3. Costs

a. To what extent does venue-shopping result in increased costs for professional fees or other expenses?

4. Access

a. What impact does venue-shopping have on access by interested parties?
b. By the public?
c. By the media?

5. Impact on Local Economies

a. What impact does venue-shopping have on local economies?
b. Is the impact on local economies a legitimate consideration?

6. Purpose of Venue Laws

a. What are the purposes of a venue law in our judicial system?
b. Are those purposes well-served by the present chapter 11 venue law?

7. Law-Shopping

a. To what extent is law-shopping a motivation for venue-shopping?
b. Should the law allow the filing party to law-shop, i.e., choose the substantive law applicable to the case?

8. Judge-Shopping

a. To what extent is judge-shopping a motivation for venue shopping?
b. Should the law permit judge-shopping?
c. To what extent does judicial experience motivate venue shopping?
d. Is this a legitimate concern?
e. Is judicial inexperience a real, as opposed to a perceived, concern?
f. If real and legitimate, can this concern be accommodated in other ways?
g. What other concerns motivate judge-shopping?

9. Predictability

a. To what extent does predictability of process or result motivate venue-shopping?
b. Is predictability a legitimate concern?
c. Is predictability a real, as opposed to a perceived, concern?
d. If real and legitimate, can this concern be accommodated in other ways?

10. Change of Venue

a. Is the opportunity for transfer of venue, either on motion or *sua sponte*, a viable and efficient means to address venue-shopping abuse, however that is defined?
b. What are the expenses in attorney fees and other costs that result from such motions?
c. What is the cost to the judiciary of this process?
d. What is the impact on chapter 11 cases upon a change of venue?
e. How often is venue change attempted?
f. How often is it successful?
g. What are the characteristics of the cases in which it is successful?
h. Does transfer of venue impact the substantive law applicable to the case?

11. Legitimacy

a. Does venue shopping undermine the legitimacy of the chapter 11 bankruptcy process?

12. The Principal Place of Business Standard

a. If the "principal place of business" standard is adopted for chapter 11 venue, how much litigation might result from applying that standard?
b. Would the Supreme Court's decision in *Hertz Corp. v. Friend*, 559 U.S. 77, 130 S. Ct. 1181 (2010), defining "principal place of business" in federal civil litigation, apply in the bankruptcy context and thereby result in reduced litigation?

13. Involuntary Bankruptcy

a. To what extent is involuntary bankruptcy used as a tool to combat venue-shopping?
b. Is combating venue-shopping an appropriate and legitimate use of involuntary bankruptcy?

14. Outcomes

A. Does venue-shopping impact chapter 11 outcomes?
B. If so, how does that impact occur?
C. If so, how much weight should this consideration be given?

15. Technology

1. To what extent does the use of technology lessen the concerns about venue shopping, especially the concern about access?
2. To what extent can enhanced use of technology further enhance access?
3. Does the use of technology for this purpose undermine the judicial process in any significant way?
4. What are the financial costs of using technology to address venue-shopping concerns?

16. Court Competition

1. To what extent does the current venue law result in competition among bankruptcy courts for chapter 11 cases?

2. To what extent is such competition advantageous or disadvantageous for the chapter 11 process?

17. Multi-District Litigation Experience

1. What are the procedures that the Panel on Multidistrict Litigation uses when determining venue and selecting a judge?
2. Is that body of experience pertinent to the chapter 11 venue debate?

III. Addressing Four Specific Considerations

As noted in the introduction, the considerations addressed to be here were chosen not only for their importance, but also because they have not been adequately addressed elsewhere in the literature on the issue. These are: (1) the purpose of venue in our jurisprudence; (2) the impact of venue-shopping on judicial legitimacy; (3) the injustice of law-shopping; and (4) the potential inadequacy of the transfer of venue process to fix the law-shopping problem.

(1) The Purpose Of Venue In Our Jurisprudence

The analogy of a defendant in a civil action to a creditor in a bankruptcy proceeding is imprecise but it rings true enough in the venue context. In civil litigation, there is a consensus that the primary purpose of statutory venue restrictions is to protect the defendant against the plaintiff's unfair or inconvenient venue choice.

The Supreme Court has observed, "In most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-184 (1979). Many other cases echo this view.[5]

The treatises also reflect this view.[6]

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[5] *See also Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168, 60 S. Ct. 153 (1939) (purpose of venue "is to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found") (citing *General Inv. Co. v. Lake Shore Ry.*, 260 U.S. 261, 275 (1922)); *Bockman v. First American Marketing Corp.*, 459 F. App'x 157, 161 (3d Cir. 2012) ("Purpose of venue provision is to protect defendant from risk that the plaintiff may select an unfair or inconvenient forum.") ; *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 760 F.2d 312, 316 (D.C. Cir. 1985) (limitations on venue "generally are added by Congress to ensure a defendant a fair location for trial and to protect him from inconvenient litigation"); *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989, 991 (4th Cir. 1984) ("[D]efendant must look primarily to federal venue requirements for protection from onerous litigation"); *Adams v. Bell*, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983) (finding venue serves role of "protecting defendants from the inconvenience and harassment of participating in trial far from home").

[6] "A primary purpose of venue requirements is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." 17-110 MOORE'S FEDERAL PRACTICE - CIVIL § 110.01.
"The federal venue principles, which are statutory and judicially created, not constitutional, have been designed to insure that litigation is lodged in a convenient forum and to protect the defendant against the possibility that the plaintiff will select an arbitrary place in which to bring suit. The Late Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, Adam N. Steinman, FEDERAL PRACTICE & PROCEDURE § 1063

Likewise, the purpose of restricting venue in bankruptcy ought to be to protect creditors against the debtor's venue choice. The current law, however, does not accomplish that purpose.

Under current law, a chapter 11 debtor may file in the state where its only connection is its incorporation or in any state where a subsidiary is incorporated. 11 U.S.C. § 1408. Indeed, it is not too farfetched to observe that under present law, many large corporations can find a way to file for chapter 11 bankruptcy in *any* judicial district. Simply stated, this venue "restriction" does nothing to protect creditors against the debtor's selection of an unfair or inconvenient forum.

On the other hand, requiring a debtor to file where its principal place of business is located, although arguably imperfect, is more likely to fulfill this purpose. The Supreme Court has defined a corporation's "principal place of business" as follows:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Hertz Corp. v. Friend, 559 U.S. 77, 92-93, 130 S. Ct. 1181, 1192 (2010).[7]

Significantly, the Court also observed, "The public often (though not always) considers it the corporation's main place of business." *Id*.

"As many courts have observed, the key to venue is that it is 'primarily a matter of choosing a convenient forum.' The primary focus of a venue inquiry is the 'convenience of litigants and witnesses,' although it is more concerned with the litigant who has not chosen the forum than with the litigant who has. In most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." 15 C. Wright, A. Miller and E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3801.

[7] The Court cautioned, however:

> We recognize that there may be no perfect test that satisfies all administrative and purposive criteria. We recognize as well that, under the "nerve center" test we adopt today, there will be hard cases. For example, in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet. That said, our test nonetheless points courts in a single direction, towards the center of overall direction, control, and coordination. Courts do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other.

Hertz Corp., 559 U.S. 95-96, 130 S. Ct. at 1194.

Similarly, creditors (and the public) can reasonably expect that a debtor should be required to file its reorganization proceeding in the district of its principal place of business—its nerve center, where the debtor's officers "direct, control, and coordinate the corporation's activities." Only with that restriction can the historical purpose of venue restrictions be fulfilled.

(2) The Impact of Venue-Shopping on Judicial Legitimacy

Legitimacy is essential to the proper functioning of the judiciary. "As Americans of each succeeding generation are rightly told, the [Supreme] Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy." *Planned Parenthood v Casey*, 505 US 833, 865 (1992). Alexander Hamilton famously stated, "The judiciary has the power of neither the purse nor the sword." Federalist 78 (Hamilton), in The Federalist Papers 521, 523 (Wesleyan 1961) (Jacob E. Cooke, ed).

This commentator concisely argues the case for judicial legitimacy:

> Positive public perception of the judiciary's role in American political life is indispensable to the effectiveness of the judicial branch. Indeed, this collective perception is the very source of judicial legitimacy, the *sine qua non* of our common law system.
>
> The concept of judicial legitimacy resides at the center of the constitutional doctrine of an independent judiciary and is the primary reason why people respect and obey the law. Thus, when the public views the judiciary as legitimate, the legitimacy of the entire legal system is nourished and strengthened. In short, if judicial independence is the lifeblood of the legal body politic, then judicial legitimacy is the immune system.
>
> ***
>
> Thus the concern here is not simply whether people generally believe in the legitimacy of judges, but for what reasons and with what reservations.

Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry Into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1102 -1103 (2007).[8]

There are many elements necessary to establish and maintain judicial legitimacy. As the following commentators argue, chief among those elements is the opportunity for parties to participate in the judicial process:

> [T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation

[8] See also Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 998-1010 (1999); Alain A. Levasseur, *Legitimacy of Judges*, 50 AM. J. COMP. L. 43, 45-50 (2002).

> lifts adjudication toward its optimum expression. *Whatever destroys the meaning of that participation destroys the integrity of adjudication itself*.

Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (December 1978) (emphasis added).

> That legitimacy is a tenuous commodity, particularly for unelected judges. Recent studies suggest that the public has serious doubts about the legitimacy of the courts. Of course, those doubts have many causes, and indeed the entire notion of judicial "legitimacy" embraces a number of distinct concepts. But at least some of the public's misgivings can be traced to the problems identified above, *particularly the lack of meaningful participation by those who are affected by the court's decision*.
>
> ***
>
> *[W]hen a court sets a precedent that binds third parties who never had an opportunity to shape the governing rule, it risks losing legitimacy in the eyes of the broader public.*

Michael Abramowicz and Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 983-84 (Summer 2009) (footnotes omitted) (emphasis added).

> Stepping back from the parties' views of any single case to an aggregate social perspective, the procedures that a legal system employs and the judgments that it produces, when taken all together, have to be fair enough, both on average and in the most significant cases, to encourage members of the society to keep reverting to the courts as the principal mechanism for resolving disputes. *Courts' legitimacy depends, in other words, not just on individual losing parties' walking away with the conviction that a courtroom was the proper venue to resolve grievances* (however upset the parties might have been about the final verdict), but on the public's having faith that the legal process will afford a fair hearing and generally fair treatment to those who invoke it—and that the courts will give careful, respectful consideration even to nonparties' interests when they are implicated in lawsuits.

Richard B. Katskee, *Science, Intersubjective Validity, and Judicial Legitimacy*, 73 BROOK. L. REV. 857, 862 (Spring 2008) (emphasis added).

Venue-shopping in chapter 11 cases undermines judicial legitimacy when it prevents or even impairs the meaningful participation of any of the parties. It also underlines the integrity of the adjudication process itself. Because the fulfillment of the judiciary's mission depends so fundamentally on its legitimacy in the eyes of the public, a chapter 11 venue should be carefully restricted to maximize the participation of the parties. Although there is likely no single venue in a large chapter 11 case that will perfectly facilitate this goal, venue in the district of the debtor's principal place of business appears to offer the best opportunity.

(3) The Injustice of Law-Shopping

Often, law-shopping motivates venue-shopping. To facilitate venue-shopping, law firms representing debtors often maintain elaborate charts detailing what courts have ruled on what issues that their clients are concerned about.[9]

This is unjust. A legal system in which there are in the normal course conflicts in judicial decisions ought not allow one party in litigation to choose which of those courts has more favorable decisions and then go there to file its case. There is no sound reason why, for example, a debtor headquartered in New York should be permitted to have its right to reject a collective bargaining agreement with its union in New York subject to Ninth Circuit case law just because it is incorporated in Alaska or has a subsidiary in Idaho. Such was surely not within the reasonable expectation of the parties to the agreement when they executed it. The law applicable to a debtor's bankruptcy case ought to be the law applicable in the state of its principle place of business, without an opportunity to choose other law.

As the Supreme Court stated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S. Ct. 839 (1947), "In cases which touch the affairs of many persons, there is reason for holding the trial in their venue and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in local controversies decided at home."

(4) The Potential Inadequacy of Transferring Venue to Fix the Law-Shopping Problem

To the extent that law-shopping is determined to be an inappropriate grounds to permit venue-shopping, the problem can only be addressed by restricting venue as proposed. While one might think that upon a change of venue, the applicable law of the transferee circuit would apply, two Supreme Court cases suggest that instead the law of the transferor circuit applies.[10]

In *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805 (1964), the Court held that, following a transfer under 28 U.C.C. § 1404(a) initiated by a defendant, the transferee court must follow the choice-of-law rules that prevailed in the transferor court. In *Ferens v. John Deere Co.*, 494 U.S. 516, 527, 110 S. Ct. 1274, 1282 (1990), the Court held that the same rule applies even when a plaintiff initiates the transfer.[11]

Although there does not appear to be any case law addressing this issue in the bankruptcy context, these two Supreme Court cases raise a substantial issue about whether changing venue solves the law-shopping problem that is inherent in 28 U.S.C. § 1408.

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[9] In making this observation, I intend no criticism of this practice. Indeed, under our current venue law, this practice is in the best interest of any debtor client. Without intending to single out this particular firm, an example of such a chart is available at: www.sbli-inc.org/archive/2004/documents/17000000.pdf.

[10] *See also* Michael P. Cooley, *Will Hertz Hurt? The Impact of Hertz Corp. v. Friend on Bankruptcy Venue Selection*, XXIX ABI JOURNAL 4, 28, 84-96, May 2010.

[11] *See also In re Coudert Bros. LLP*, 673 F.3d 180, 186 (2d Cir. 2012) ("[I]t is also clear that when a case is transferred, the choice of law rules of the state in which the case was initially filed transfer with it."); *DSQ Property Co., Ltd. v. DeLorean*, 891 F.2d 128, 129 (6th Cir.1989).

IV. Conclusion

It is worth restating that the few points made here are not the only points in support of limiting chapter 11 venue as proposed in H.R. 2533 (2011). The subject of chapter 11 venue demands a careful, impartial, and thorough study. I sincerely hope that the Commission can harness the resources and find the time necessary for that study, and that at its conclusion, the Commission will endorse an amendment to 28 U.S.C. § 1408 that will end the pervasive injustice that currently results from it.

Unit III

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Model Resolutions for Your Debates

Now you know what it takes to advocate for and against a political position. Do you feel ready to give debating a try? The following lessons in Unit III lead you through three cases for three specific resolutions, each case a strong model for policy debate. You're in for a great time debating domestic surveillance, judicial reform, and far-Eastern trade.

LESSON 7: DOMESTIC SURVEILLANCE

The Debate of Lesson 7:

"Resolved: The United States federal government should substantially curtail its domestic surveillance."

United States citizens do not contest the need for its government to serve and protect its people. This sometimes takes proactive domestic surveillance programs. But how do we balance between monitoring to protect citizens' security and violating the privacy rights of those very citizens? This is what debaters argue when debating, "Resolved: The United States federal government should substantially curtail its domestic surveillance."

Notice one odd thing about this resolution: The word "privacy" is not in it (nor is it mentioned in the Constitution). But that word will likely come up when you debate the resolution on domestic

surveillance. There's no way to debate this resolution without debating some aspects of this vital concept.

Human beings have always had some belief in the essential nature of privacy for some elements of their personal lives. All cultures throughout the world believe some human behaviors should only occur in seclusion, where the door should be shut and individuals should be left alone. Privacy is a basic human right that laws, in general, protect. We will make sure of this when we affirm the resolution with "The Case for ECPA Secrecy Reform."

Privacy in the US Constitution

Before we dive into the case, it will help to understand the idea of privacy, especially as it originates from the US Constitution. The part of the Constitution most often cited in reference to domestic surveillance is the Fourth Amendment:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

The 4th Amendment originally applied only to the federal government, but was applied to the states (by application of the 14th Amendment) by the Supreme Court in the case of *Mapp v. Ohio* in 1961[12]. Parse the words of this amendment carefully and notice some words and concepts that are (or are not) there:

1. "Unreasonable searches."

Does this Amendment say that all government searches require a warrant? If you think so, read it again. The 4th Amendment limits "unreasonable" searches, not "all" searches. If a search is reasonable, it doesn't require a warrant. A huge amount of court litigation (and policy debate) centers around what is "reasonable" and what is so unreasonable that it would require a warrant.

Legal scholars sometimes refer to this debate in part as the "expectation of privacy." Would a reasonable person expect that some activity is private? If so, it should arguably require a warrant. If not, it might be reasonable to expect that if anyone else can see it, the government can too. Too, exceptional circumstances can turn unreasonable searches into reasonable ones. Courts have ruled that opening luggage and doing body searches at airports is "reasonable" because of the risk of terrorism.

2. "Persons, houses, papers, and effects."

Where do bytes, sound waves, and web pages fit in to this? The founders of our country could not have imagined that someday people would communicate by sending electronic messages through wires or

[12] http://supreme.justia.com/cases/federal/us/367/643/case.html

airwaves. How does this apply in the wired communication age (1844-1995) or the internet/cell-phone age (1995-present)?

3. "Their."

This little word "their" makes a big difference in actual practice. What is the difference between a letter you write on a piece of paper and mail in an envelope to your friend and an email you write on your computer and send electronically to your friend? In many cases, the difference is that your email letter sits on a server (a big computer) somewhere. If a copy of your letter is sitting on Google's server machine, that copy of the letter might arguably be "theirs" and not "yours." Your letters are secure from search, but the one sitting at Google isn't yours and you have no claim to privacy over it.

That's how the Constitution has been interpreted in respect to electronic surveillance. This leads to the case you will be debating in Lesson 7.

The Specific Problem of the Electronic Communications Privacy Act (ECPA, 1986)

Rising crime rates in the 1960s and public revelations of widespread warrantless government wiretapping led Congress to enact the Omnibus Crime Control and Safe Streets Act in 1968. The law contained a number of gun control regulations and other provisions that would ostensibly "get tough on crime." It contained a section called "Title III," written to reverse the trend toward increasing government surveillance.

Title III prohibited unauthorized interception of wire or oral communications by private parties or by government agents, and set standards for obtaining search warrants. "Electronic" communications were added later by the ECPA in 1986. Title III pre-empts state law to the extent that states may require higher, but not lower, standards for authorizing wiretapping. For example, federal law requires one party to a conversation to be aware that the conversation is being recorded, but some states require all parties to be aware of the recording, or else the recording is illegal. Title III also contains exceptions to the warrant requirement in case of life-threatening emergency.

ECPA was intended to update Title III and meet a balance between expectations of privacy and law enforcement capabilities. ECPA has a sub-section called the Stored Communications Act (SCA) that created a set of standards for government access to electronic communications, as outlined below:

Type of Communication	Required for Law Enforcement Access	Statute
Email in Transit	Warrant	18 U.S.C. § 2516
Email in Storage on Home Computer	Warrant	4th Amendment, US Constitution
Email in Remote Storage, Opened	Subpoena	18 U.S.C. § 2703
Email in Remote Storage, Unopened, Stored for 180 days or less	Warrant	18 U.S.C. § 2703
Email in Remote Storage, Unopened, Stored for more than 180 days	Subpoena	18 U.S.C. § 2703

Source: Electronic Privacy Information Center http://epic.org/privacy/ecpa

To understand this chart (and terms that will be used in your debates) you need to understand two important terms:

A. "Subpoena" – an order that demands someone to hand over something because it has relevance to an investigation.

B. "Warrant" – an order asserting that there is probable cause to believe evidence of a crime will be found.

As you might guess, the government can allege that anything could be relevant to an investigation, so a subpoena is a pretty low standard. A warrant requires a lot more investigation and justification and is harder to get. What's baffling to many people is why an email 180 days old can be obtained only with a warrant, but waiting one more day lowers the standard to a subpoena.

The root cause of confusion and lack of protections in ECPA is that it was written in 1986. Think how much communications have changed since then. Nobody was texting or emailing in 1986 and cell phones were very large expensive bricks owned by a few rich people.

These questions call for a change to the status quo, don't you think? In fact, there are bills pending in Congress to do just that, and that change is what you will be debating in this lesson.

The Proposed Solution of Reforming the ECPA

The model case is called "The Case for the ECPA Amendments Act." As already mentioned, the current laws regulating federal government access to the content of email date to 1986, when almost nobody had email. The Electronic Communications Privacy Act may have had good intentions in a world that had never heard email. What few existed were not stored on machines at any central

location but were sent immediately to their recipients. Any emails left on servers unread were assumed to be abandoned, and so no one saw any privacy violation in allowing the government to read emails on outside servers (i.e., not on your own computer) over six months old.

How times have changed. Today many email systems routinely store all emails on big servers. The government would need a warrant to come into your home and get onto your computer to look at an email or a file on your laptop. But if you have the same file or email stored on an Internet service or email provider's system, they can simply get it from them. Contrast this open viewing of your private messages with the level of protection the same message would have if it were on paper and stored in your home. Our "papers" are protected by the 4th Amendment from unreasonable search without warrants. But now that our "papers" are digital and online, it's time to update the law so that 21st century "papers" get the 4th Amendment protections they deserve.

One federal appeals court (the 6th Circuit Court of Appeals) has already ruled exactly that: that the government needs a search warrant to look at emails on a third-party server. But that ruling doesn't apply throughout the United States (it only applies within the region of the country under the 6th Circuit's jurisdiction) and has never been tested at the Supreme Court. Many experts say we need to pass the Email Privacy Act, a bill pending in Congress as of 2015, which would extend the same requirement for a search warrant to email as we currently have with our paper letters and mail.

Negating the Case

Negatives will argue that requiring warrants for emails and online data unnecessarily slows down investigations of terrorism and crime. The public should know that emails stored on other people's computers are not private, and they shouldn't have any expectation of privacy in them.

Worksheet for Lesson 7

Name: _____ Date: _____

Read Lesson 7. Answer the following in the spaces provided.

1. Write out the 4th Amendment to the US Constitution as referenced in Lesson 7. Underline the three phrases that are expanded upon.

2. A _____ is an order that demands someone to hand over something because it has relevance to an investigation. A _____ is an order asserting that there is probable cause to believe evidence of a crime will be found. Which is more difficult for an agency to make?

3. Why is it a significant problem that the ECPA law was amended in 1986?

4. What is the negative stance against this case? Do you think it is a good position or a bad one?

Extension for Lesson 7

You know the structure of a debate round, you know about the first topic you'll be debating, and your teacher has you scheduled for your first round. Now is the time to debate!

The following extensions consist of:

1. A Case. This is one of many cases that could be run that affirm the resolution, "Resolved: The United States federal government should substantially curtail its domestic surveillance." You or your partner, depending on who is the 1A, will read this case against a negative team in one of the two rounds you will be running.

2. 2A Evidence. For every section in you harms-solvency case, you have more evidence to back up your arguments. This will be used by both debaters throughout the debate round; much of it will be used in the 2AC, but it could be used also in the 1AR and 2AR.

3. Negative Brief. You will also run as the negative team against the same case. This brief quotes experts who oppose the affirmative's idea for bankruptcy court reform.

You also have another flowsheet. If you are on the affirmative team, pre-flow the 1AC before the debate begins. Everyone in the round should take proper notes throughout the debate in order to convince the judge that their side is the winning side.

Good luck debating! And may the best team win.

THE CASE FOR THE ECPA AMENDMENTS ACT

Wisconsin Representative James Sensenbrenner said it best in 2013 QUOTE: "The Electronic Communications Privacy Act of 1986, or ECPA, is complicated, outdated, and largely unconstitutional. ECPA made sense when it was drafted, but the role of the Internet and electronic communications in our daily lives is vastly different now than it was during the Reagan administration. Needed reforms can better protect privacy and allow the growth of electronic communications in the economy without compromising the needs of law enforcement. ECPA was drafted in 1986, the same year Fox News was launched. That year, President Reagan ordered a strike against Muammar Qaddafi. Arnold Schwarzenegger married Maria Shriver, and at this time in 1986, Mark Zuckerberg was 1 year old. The world is a different place. I think we all can agree on that. The 1986 law governing the Internet is like having a national highway policy drafted in the 19th century." [13] UNQUOTE. Please join my partner and me as we affirm that: The United States federal government should substantially curtail its domestic surveillance.

OBSERVATION 1. Our DEFINITIONS

Curtail: "to reduce or limit (something)" (*Merriam-Webster Online Dictionary copyright 2015* http://www.merriam-webster.com/dictionary/curtail)

Substantial: "considerable in quantity: significantly great " (*Merriam-Webster Online Dictionary copyright 2015* http://www.merriam-webster.com/dictionary/substantially*)*

Domestic: "of, relating to, or made in your own country" (*Merriam-Webster Online Dictionary copyright 2015* http://www.merriam-webster.com/dictionary/domestic*)*

Surveillance: "the act of carefully watching someone or something especially in order to prevent or detect a crime" (*Merriam-Webster Online Dictionary copyright 2015 http://www.merriam-webster.com/dictionary/surveillance)*

ECPA: The Electronic Communications Privacy Act of 1986
SCA: The Stored Communications Act – it's part of the ECPA.

[13] *Rep. James Sensenbrenner, Chairman of the House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://sensenbrenner.house.gov/uploadedfiles/ecpa_opening_statement.pdfm*

OBSERVATION 2. INHERENCY

FACT 1. No warrants required. The government reads your email and cloud data without a search warrant.

This happens because the data isn't physically in your possession, it's on servers owned by your email provider. Instead of getting a warrant to search your home for your data, they get it from your online provider, like Google.

Teri Robinson 2015 (associate editor) SC MAGAZINE 5 Feb 2015 "Bicameral, bipartisan seeks to modernize electronic privacy law" (brackets added) http://www.scmagazine.com/amendments-to-1986-ecpa-would-require-warrants-court-order/article/396493/

"In the nearly three decades since ECPA became law, technology has advanced rapidly and beyond the imagination of anyone living in 1986," [Utah Sen. Mike] Lee said. "The prevalence of email and the low cost of electronic data storage have made what were once robust protections insufficient to ensure that citizens' Fourth Amendment rights are adequately protected." David LeDuc, senior director of public policy at the Software & Information Industry Association (SIIA), noted in a blog post that current law "is failing to provide a legal framework for the 21st Century." The privacy protection standards differ for digital communications stored at a target's house versus in a provider's servers. "If government entities want to access your email and communications on your computer in your house, they need to get a warrant," he wrote, "but if they want to access the same information stored remotely 'in the cloud,' by a company like Google, Facebook or others, the standard is much lower."

FACT 2. Thousands of searches. The federal government makes thousands of warrantless searches every month.

Dominic Rushe 2013. (journalist) 24 Jan 2013 « Google's ECPA report reveals the extent of the FBI's warrantless email snooping » THE GUARDIAN (British newspaper) http://www.theguardian.com/commentisfree/2013/jan/24/google-ecpa-fbi-warrantless-email-snooping

This week, Google revealed that the US government made 8,438 requests for user data between July and December, up 136% from the last half of 2009 when the search firm started compiling data. More worryingly still, Google's Transparency Report revealed for the first time just how the US authorities go about collecting this information. In 68% of cases, the requests for information are made using ECPA subpoenas, which do not need a court order. As anyone who has watched *Law and Order* will know, getting a wiretap for a phone line is a piece of work. The same goes for the letters in your mailbox, or the chance to rifle through your office draws. But the vast majority of ECPA investigations go ahead without a court hearing.

OBSERVATION 3. The HARM. Fourth Amendment violation. We see this in 3 sub-points:

A. The stakes are high. Email is a vital part of our private lives.

Judge Danny Boggs 2010. (U.S. federal appeals court judge on the 6th Circuit Court of Appeals) decision of the court in U.S. v. Warshak, 14 Dec 2010 http://www.wileyrein.com/resources/documents/Warshak.pdf (brackets added)

Since the advent of email, the telephone call and the letter have waned in importance, and an explosion of Internet-based communication has taken place. People are now able to send sensitive and intimate information, instantaneously, to friends, family, and colleagues half a world away. Lovers exchange sweet nothings, and businessmen swap ambitious plans, all with the click of a mouse button. Commerce has also taken hold in email. Online purchases are often documented in email accounts, and email is frequently used to remind patients and clients of imminent appointments. In short, "account" is an apt word for the conglomeration of stored messages that comprises an email account, as it provides an account of its owner's life. By obtaining access to someone's email, government agents gain the ability to peer deeply into his activities. Much hinges, therefore, on whether the government is permitted to request that a commercial ISP [Internet Service Provider] turn over the contents of a subscriber's emails without triggering the machinery of the Fourth Amendment.

B. 4th Amendment protections denied. Warrantless email searches violate the 4th Amendment.

Achal Oza 2008. (J.D. candidate, Boston Univ. School of Law) AMEND THE ECPA: FOURTH AMENDMENT PROTECTION ERODES AS E-MAILS GET DUSTY, BOSTON UNIVERSITY LAW REVIEW, Vol 88 (the "§" symbol means "section") http://128.197.26.34/law/central/jd/organizations/journals/bulr/volume88n4/documents/OZA.pdf

As this note has explained, portions of § 2703 of the ECPA are unconstitutional. An e-mail user has a reasonable expectation of privacy in the e-mails she has stored on her e-mail service provider's server, assuming the service provider does not monitor or audit her e-mails. While § 2703 applies full Fourth Amendment protection at a probable cause standard to e-mails in storage on a third-party server for 180 days or less, it denies them this protection once they age over 180 days.

C. The Impact: Basic human rights are lost.

Supreme Court Justice Louis Brandeis in his famous dissent in the 1928 case of Olmstead versus U.S. explained the impact when he said:

Supreme Court Justice Louis Brandeis 1928. Dissenting opinion in the case of Olmstead v. United States - 277 U.S. 438, 4 June 1928 https://supreme.justia.com/cases/federal/us/277/438/case.html

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

OBSERVATION 4. We offer the following PLAN

1. Congress passes the ECPA Amendments Act of 2015. All private communications and data stored online get the same 4th Amendment privacy protections as papers and physical documents, with the same requirement for search warrants. Bill also contains exceptions for civil investigations and no change to the rules for foreign intelligence surveillance.
2. Enforcement through the federal courts. Evidence collected without a warrant will be excluded from trial.
3. Funding through existing budgets of existing agencies.
4. Plan takes effect the day after an affirmative ballot.
5. All affirmative speeches may clarify.

OBSERVATION 5. The Plan SOLVES by restoring online privacy. We see this in 3 sub-points:

1. Privacy protections restored. Referring in context to the ECPA Amendments Act of 2015…

Teri Robinson 2015 (associate editor) SC MAGAZINE 5 Feb 2015 "Bicameral, bipartisan seeks to modernize electronic privacy law" (brackets added) http://www.scmagazine.com/amendments-to-1986-ecpa-would-require-warrants-court-order/article/396493/

The amended act, "would level the playing field for cloud computing by establishing a warrant requirement" for law enforcement to obtain content from service providers that hold "private electronic messages, photos and other personal records, like Gmail or Facebook," [senior director of public policy at the Software & Information Industry Association David] LeDuc said. If passed into law, the legislation would indeed protect the confidentiality of electronic communications described by section 2703(a) of the act and prohibit government from seeking or forcing disclosure of digital communication content without a warrant issued by "a court of competent jurisdiction directing the disclosure." In other words, law enforcement and government would have to "show the court there is probable cause to believe that the sought-after records may reveal evidence of wronging," wrote LeDuc.

2. Government intrusion blocked.

Rep Tom Graves 2013 (R-Ga.; quoted by Office of Rep. Kevin Yoder (R-Kansas) "Representatives Yoder, Graves Introduce Email Privacy Act" 8 May 2013 http://yoder.house.gov/media-center/press-releases/representatives-yoder-graves-introduce-email-privacy-act

"Government agencies should never be able to read our private emails without a warrant," said Congressman Graves. "It is ridiculous for the IRS or any other federal agency to believe it is above our fundamental right to privacy, but it's important that we update the law to keep up with modern communication and protect against government intrusion."

3. Experts agree. Bipartisan and widespread advocacy as over 80 organizations favor requiring warrants for ECPA searches.

Richard Salgado 2013. (Director, Law Enforcement and Information Security at Google Inc.) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80065/html/CHRG-113hhrg80065.htm

And Google is not alone in taking this view. More than 80 companies and organizations that span the political spectrum are now members of the Digital Due Process Coalition which supports updating ECPA. And these include Americans for Tax Reform, the American Civil Liberties Union, the Center for Democracy & Technology, the Competitive Enterprise Institute, and the U.S. Chamber of Commerce. Notably, these organizations do not always agree on other privacy issues, but they are united in the effort to support updated provisions in ECPA for the requirement of a warrant for the production of content.

2A EVIDENCE: ECPA AMENDMENTS ACT

OPENING QUOTES/AFF PHILOSOPHY

We need to question the limits of the modern surveillance state

Judge Stephen W. Smith 2012. (United States Magistrate Judge, Southern District of Texas) Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket, HARVARD LAW & POLICY REVIEW, http://harvardlpr.com/wp-content/uploads/2013/06/Gagged-Sealed-and-Delivered.pdf

Ordinary citizens are inclined to give the benefit of the doubt to our zealous and well-meaning officers of the law. But 30,000 secret surveillance orders a year generate a ton of doubt. Keep in mind that this number covers only federal law enforcement; it is unlikely that state and local law enforcement are less active than their federal counterparts. At some point it becomes legitimate to question the proper limits of the modern surveillance state. When so much is done out of public view, how can we know when it has gone too far?

Electronic surveillance is among the most intrusive government activity

Judge Stephen W. Smith 2012. (United States Magistrate Judge, Southern District of Texas) Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket, HARVARD LAW & POLICY REVIEW, http://harvardlpr.com/wp-content/uploads/2013/06/Gagged-Sealed-and-Delivered.pdf

"The public has no way to evaluate, much less have confidence in, sealed court orders. From the standpoint of the ordinary citizen, electronic surveillance is among the most intrusive governmental activities a court can authorize, yet it is also the most likely to be hidden from public view."

BACKGROUND

ECPA is based on 1986 technology. It doesn't account for modern email users leaving messages on servers

Achal Oza 2008. (J.D. candidate, Boston Univ. School of Law) AMEND THE ECPA: FOURTH AMENDMENT PROTECTION ERODES AS E-MAILS GET DUSTY, BOSTON UNIVERSITY LAW REVIEW, Vol 88 http://128.197.26.34/law/central/jd/organizations/journals/bulr/volume88n4/documents/OZA.pdf

Congress passed the ECPA in 1986 to draw clear lines as to where Fourth Amendment protection extends with emerging technologies. In 1986, e-mail technology was still very new. Most e-mail users dialed-up to their e-mail servers using a modem and downloaded their communications to a home computer, with the server acting only as a medium for temporary storage. Using this rationale, the ECPA draws a distinction between e-mails in electronic storage on third-party servers for 180 days or less and those in electronic storage longer than 180 days. E-mails in storage for 180 days or less are afforded full Fourth Amendment protection at a probable cause standard while those in storage for longer than 180 days may be compelled for disclosure at a mere subpoena standard. This distinction reflects how twenty years ago, if a user did not download an e-mail communication to her home computer within 180 days, she had essentially abandoned it to the service provider and no longer had a reasonable expectation of privacy within its contents.

DEFINITIONS / TOPICALITY

Link to full text of the Senate bill for the ECPA Amendments Act of 2015

http://www.leahy.senate.gov/imo/media/doc/HEN15170.pdf

INHERENCY

ECPA doesn't require warrants for emails and social network messages – no 4th Amendment protection

Lee Tien 2012. (Senior Staff Attorney with the Electronic Frontier Foundation) 19 Sept 2012 "ECPA Reform May Require Warrants for Email, But Hurts Video Privacy" https://www.eff.org/deeplinks/2012/09/ecpa-reform-may-require-warrants-email-hurt-video-privacy

Right now, ECPA doesn't always require a probable cause warrant to force service providers to turn over the contents of users' private emails, instant messages, and social networking messages. The government can compel the handover of email stored at a "remote computing service" with a so-called "D order" without showing probable cause. Nor does the government need a warrant if an email message is older than 180 days. This low threshold to electronic messages is in stark contrast to the fourth amendment protections for physical letters. Most troubling, the Justice Department has maintained that opened, read mail left in your mailbox (e.g., Gmail) falls completely outside of the privacy protections of the Stored Communications Act.

ECPA allows government to get emails without warrants. Even Dept of Justice admits it violates users' expectations of privacy

Richard Salgado 2013. (Director, Law Enforcement and Information Security at Google Inc.) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80065/html/CHRG-113hhrg80065.htm

ECPA was passed in 1986 when electronic communications services were in their infancy. With the dramatic changes that we have seen since then, the statute no longer provides the privacy protection that user of these services reasonably expect. And one example that the Committee may already be familiar with is from the ECPA rules around compelled disclosure of e-mail. As a general rule, law enforcement under the statute needs to obtain a warrant to compel an electronic communications service provider to disclose content that is held in electronic storage, as that term is defined in the statute, for 180 days or less. Once that message becomes 181 days old, it loses that level of statutory protection and a government entity can compel its disclosure with a mere subpoena which, of course, is issued on a much lower standard than a search warrant and without any judicial review. I will also note that the Department of Justice has taken the position that government can use a subpoena to compel the production of e-mail that has been opened even if it is younger than 181 days. It is a position that has been rejected by one court of appeals in the Federal system. If one could discern a policy rationale for this 180-day rule in 1986, it is not evident any longer and contravenes users' reasonable expectations of privacy. We are encouraged to hear that the Department of Justice seems to acknowledge this as well.

No clear court ruling. While email and cloud storage should be protected by the 4th Amendment, federal courts have not yet ruled clearly on it.

Prof. Orin S. Kerr 2013. (George Washington Univ. Law School) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80065/html/CHRG-113hhrg80065.htm

The lower court case law is, as of yet, not fully developed. We have one significant decision from the Sixth Circuit Court of Appeals. We do not yet have a decision from the United States Supreme Court, and also we are still in the beginning stages of getting case law on fact patterns beyond e-mail. So, for example, in addition to storing contents, remotely stored contents by e-mail, individuals may have stored Facebook messages, Google documents stored in the cloud, lots of information that is available on remote servers that does not fit the specific category of e-mail. The lower court cases so far suggest that they are also fully protected by the Fourth Amendment's warrant requirement, but as of yet, we do not have a lot of case law in the lower courts to indicate whether that is the case. I think it is correct, though. I think it is difficult to distinguish between e-mail, for example, and Facebook messages and documents in the cloud. In my view, they are all protected under the Fourth Amendment under the reasonable expectation of privacy test.

HARMS / SIGNIFICANCE

ECPA blocks constitutional protection of privacy.

Analysis: Even if ECPA is unconstitutional, federal agents will say they were relying on it when they searched emails without a warrant, and the "good faith exception" rule will allow them to get away with it. This means relying on courts to protect us from ECPA problems is not sufficient, we need to actually fix ECPA itself.

Prof. Orin S. Kerr 2013. (George Washington Univ. Law School) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80065/html/CHRG-113hhrg80065.htm

The difficulty then with the existing statute is not only that it is below the constitutional threshold, but that because it is below the constitutional threshold, it actually becomes significantly harder for the constitutional protections to be recognized, thanks to the good faith exception under the Fourth Amendment when the government relies on a statute that allows a search or seizure. The key case here is another 1986 decision, Illinois v. Krull, which held that when the government reasonably relies on a statute that might be considered constitutional, the exclusionary rule does not apply under the good faith exception. What that means as a practical matter is that the existence of ECPA actually makes it harder to recognize constitutional rights. It actually cuts constitutional protection rather than adds privacy protection because the government under current law can rely on the good faith exception to rely on the statute to obtain contents with less process than a warrant. As the case law becomes more established, it will be harder for the government to do that. But ironically, the existing statute actually makes it harder for Americans to recognize their constitutional rights and to get those constitutional rights recognized in cases than there would be if there were no statute at all.

Email searches without warrants are unconstitutional

Note: This is a federal appeals court decision, so you might wonder why the law hasn't already been changed and why we still need the AFF plan. The answer is that rulings of the 6th Circuit Court of Appeals only apply in the region of the country under the 6th CCA's jurisdiction. (See card below: Michigan, Ohio, Kentucky and Tennessee) Until the Supreme Court rules on it, or the ECPA/SCA are changed, the rest of the country goes on with the rule that they don't need search warrants for emails. There's also a risk that the Supreme Court could overturn the Warshak decision at some future date, without legislation establishing the rule once and for all.

Judge Danny Boggs 2010. (U.S. federal appeals court judge on the 6th Circuit Court of Appeals) decision of the court in U.S. v. Warshak, 14 Dec 2010 http://www.wileyrein.com/resources/documents/Warshak.pdf (brackets in original)

Accordingly, we hold that a subscriber enjoys a reasonable expectation of privacy in the contents of emails "that are stored with, or sent or received through, a commercial ISP." Warshak I, 490 F.3d at 473;see Forrester, 512 F.3d at 511 (suggesting that "[t]he contents [of email messages] may deserve Fourth Amendment protection"). The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. Therefore, because they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of Warshak's emails. Moreover, to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional.

"Warshak" decision only applies in Michigan, Ohio, Kentucky and Tennessee

Amy Worlton and Megan Brown 2010. (both are attorneys; partners with Wiley Rein LLP law firm.) 17 Dec 2010 "Law enforcement may require a warrant to access stored emails in the Sixth Circuit, and ECPA reform needed now more than ever" http://www.lexology.com/library/detail.aspx?g=ddadab97-4ba4-489c-bed0-290b7a337e2a

In agreeing with the defendant that a subpoena was inadequate, the court wrote "a subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial Internet Service Providers (ISPs).' The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. Therefore, because they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of Warshak's emails. Moreover, to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional." Service providers, particularly those with operations in the Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee), should take note of this decision, as it may impact compliance protocols.

SOLVENCY / ADVOCACY

We need to update ECPA with warrant requirement to promote economic growth [Also: Warshak decision by itself isn't enough, we need to amend ECPA directly]

Richard Salgado 2013. (Director, Law Enforcement and Information Security at Google Inc.) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT
http://judiciary.house.gov/_files/hearings/113th/03192013_2/Salgado%2003192013.pdf

In 2010, the Sixth Circuit held in United States v. Warshak that ECPA violates the Fourth Amendment to the extent that it does not require law enforcement to obtain a warrant for email content. Google believes the Sixth Circuit's interpretation in Warshak is correct, and we require a search warrant when law enforcement requests the contents of Gmail accounts and other services. Warshak lays bare the constitutional infirmities with the statute and underscores the importance of updating ECPA to ensure that a warrant is uniformly required when government entities seek to compel production of the content of electronic communications. The inconsistent, confusing, and uncertain standards that currently exist under ECPA illustrate how the law fails to preserve the reasonable privacy expectations of Americans today. Moreover, providers, judges, and law enforcement alike have difficulty understanding and applying the law to today's technology and business practices. By creating inconsistent privacy protection for users of cloud services and inefficient, confusing compliance hurdles for service providers, ECPA has created an unnecessary disincentive to move to a more efficient, more productive method of computing. ECPA must be updated to help encourage the continued growth of the cloud and our economy.

ECPA should be updated to require warrants for emails

Richard Salgado 2013. (Director, Law Enforcement and Information Security at Google Inc.) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80065/html/CHRG-113hhrg80065.htm

The 180-day rule reveals the gap between where the statute is and where users' reasonable expectations of privacy lie. The privacy protection afforded to e-mail content from law enforcement should not vary based on a communication's age or its opened state. ECPA should be updated to require a warrant to compel the production of any content. Updating ECPA should be a top privacy priority for the 113th Congress.

Even law enforcement agrees: Current policy is outdated. Emails should get privacy protection

Elana Tyrangiel 2013. (Acting Assistant Attorney General, Office of Legal Policy, US Dept of Justice; she's involved in prosecuting federal crime) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 http://judiciary.house.gov/_files/hearings/113th/03192013_2/Tyrangiel%2003192013.pdf

Although ECPA has been updated several times since its enactment, the statute—and specifically the portion of the SCA addressing law enforcement's ability to compel disclosure of the stored contents of communications from a service provider—has been criticized for making outdated distinctions and failing to keep up with changes in technology and the way people use it today. Many have noted—and we agree—that some of the lines drawn by the SCA that may have made sense in the past have failed to keep up with the development of technology, and the ways in which individuals and companies use, and increasingly rely on, electronic and stored communications. We agree, for example, that there is no principled basis to treat email less than 180 days old differently than email more than 180 days old. Similarly, it makes sense that the statute not accord lesser protection to opened emails than it gives to emails that are unopened.

4th Amendment protections should be extended to all email

Achal Oza 2008. (J.D. candidate, Boston Univ. School of Law) AMEND THE ECPA: FOURTH AMENDMENT PROTECTION ERODES AS E-MAILS GET DUSTY, BOSTON UNIVERSITY LAW REVIEW, Vol 88 http://128.197.26.34/law/central/jd/organizations/journals/bulr/volume88n4/documents/OZA.pdf

The Sixth Circuit was the first circuit court to properly address this issue, and its panel decision held that e-mail users have a reasonable expectation of privacy with their e-mails stored on third-party servers so long as the service provider does not maintain a policy that they would actively audit the users' communications. The Sixth Circuit vacated the panel opinion en banc for lack of ripeness and did not reach the underlying constitutional issues. This Note recommends that Congress amend the ECPA to bring it in line with current e-mail communication technology. Congress should update the ECPA by eliminating the 180-day distinction of § 2703(a). By doing so, Congress will statutorily extend Fourth Amendment protection to communications that e-mail users today reasonably expect to have protected.

Email privacy should not depend on where the mail is physically stored

Richard Salgado 2013. (Director, Law Enforcement and Information Security at Google Inc.) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80065/html/CHRG-113hhrg80065.htm

Mr. Chairman, I do not think people necessarily know where their e-mail is stored. Part of the reason for that, of course, is the, if you will, magic of the cloud as it is, which is by having data spread throughout lots of data centers in different locations, even the existence of a single e-mail may itself have been scattered among different data centers to provide for security, for robust services, to reduce latency. The rules around disclosure of the data should not have anything to do with the location of it, which is, in some sense, driven by the physics and architecture of the Internet and not by choice of users or companies.

No good reason to deny the same level of privacy protection to emails as given to paper documents

Richard Salgado 2013. (Director, Law Enforcement and Information Security at Google Inc.) testimony before House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 19 Mar 2013 Subcommittee hearing: ECPA (PART I): LAWFUL ACCESS TO STORED CONTENT http://judiciary.house.gov/_files/hearings/113th/03192013_2/Salgado%2003192013.pdf

The distinctions that ECPA made in 1986 were foresighted in light of technology at the time. But in 2013, ECPA frustrates users' reasonable expectations of privacy. Users expect, as they should, that the documents they store online have the same Fourth Amendment protections as they do when the government wants to enter the home to seize documents stored in a desk drawer. There is no compelling policy or legal rationale for this dichotomy.

DISADVANTAGE RESPONSES

"Need email for civil (non-criminal) investigations" – Response: ECPA Amendments Act allows it

Text of the proposed ECPA Amendments Act of 2015. *http://www.leahy.senate.gov/imo/media/doc/HEN15170.pdf*

''(h) RULE OF CONSTRUCTION.—Nothing in this section or in section 2702 shall be construed to limit the authority of a governmental entity to use an administrative subpoena authorized under a Federal or State statute or to use a Federal or State grand jury, trial, or civil discovery subpoena to— ''(1) require an originator, addressee, or intended recipient of an electronic communication to disclose the contents of the electronic communication to the governmental entity;

"National Security" – Response: Freedom from privacy invasion is a form of security

*Laura W. Murphy 2014. (*director of the *American Civil Liberties Union*'s Washington legislative office*.) 13 June 2014 WASHINGTON TIMES "Privacy: The Debate We Need" http://www.washingtontimes.com/news/2014/jun/13/privacy-the-debate-we-needed/#ixzz34vD2x68H*

Americans, as well as their representatives, are beginning to realize once again that security is a multidimensional concept and that privacy is one of its components. After 9/11, security for most Americans meant protection from external threats. But because of the Snowden revelations, Americans are remembering once again the other kind of security we sought by ratifying the Bill of Rights, and its Fourth Amendment in particular. It also didn't help the government that the phone records program failed to detect even one terrorist plot against the United States, according to the president's own review panels who investigated the program. This proved we didn't have to give up liberty for security. It was a false choice all along.

"Hurts Law Enforcement" – Response: Even the Attorney General supports ECPA warrants for email
[The Attorney General is the head of the Dept. of Justice; he's in charge of all federal law enforcement.]

David Kravets 2013. (journalist) Cops Should Get Warrants to Read Your E-Mail, Attorney General Says, 16 May 2013 WIRED http://www.wired.com/2013/05/holder-email-warrants/

Attorney General Eric Holder became the White House's highest ranking official to support sweeping privacy protections requiring the government, for the first time, to get a probable-cause warrant to obtain e-mail and other content stored in the cloud. "It is something that I think the Department will support," Holder testified before the House Judiciary Committee, when questioned about the Justice Department's position.

Nothing in ECPA Amendments Act changes anything about FISA

Text of the proposed ECPA Amendments Act of 2015. *http://www.leahy.senate.gov/imo/media/doc/HEN15170.pdf*

Nothing in this Act or an amendment made by this Act shall be construed to preclude the acquisition by the United States Government of— (1) the contents of a wire or electronic communication pursuant to other lawful authorities, including the authorities under chapter 119 of title 18 (commonly known as the ''Wiretap Act''), the Foreign Intelligence Surveillance Act of 1978 (50 22 U.S.C. 1801 et seq.), or any other provision of Federal law not specifically amended by this Act;

PRIVACY / SECURITY TRADE-OFF: PRIVACY SHOULD WIN

The Founders knew about security risks – but they wrote the Bill of Rights anyway to uphold privacy over security

Bob Barr 2008. (former federal prosecutor; former congressman from Georgia) "Privacy and Security. This house believes security in the modern age cannot be established without some erosion of individual privacy. " 5 Feb 2008 THE ECONOMIST http://www.economist.com/node/10600829

Acts of terrorism in recent years have resulted in significant casualties—the September 11th 2001 hijackings, the Madrid train bombing of 2004 and the British transport bombing in 2005, for example—and steps must be taken to prevent their recurrence. However, to make the rhetorical jump from that reasonable proposition to the position that modern-day terrorists present such a novel and not heretofore contemplated threat to our way of life that the structure that our governments designed to protect privacy as a foundation of freedom must give way, makes no sense and is unsupported by history. For example, when the privacy-based provisions in the Bill of Rights were crafted, debated, and adopted by the US in the years immediately after the fledgling country won its independence, the country faced security threats far more dire than those posed our countries nowadays by practitioners of terrorism. Yet in the face of very real threats to the survival of this new country by the world's then most powerful nation, the drafters of the Bill of Rights incorporated therein very explicit and real limitations on the power of government to invade individuals' privacy.

Using security to justify electronic privacy invasion logically justifies allowing open searches of everyone's house

New York Times 2013. (journalist Michael Powell) 10 June 2013 Using a Would-Be Subway Bomber to Justify Sweeping Surveillance http://www.nytimes.com/2013/06/11/nyregion/using-a-would-be-subway-bomber-to-justify-sweeping-surveillance.html?_r=0

Government has an ever-growing ability to peer into what we once thought of as our intimate lives. Harvest enough phone records, study enough e-mail patterns, eavesdrop on enough conversations, and eventually its net will dredge up nasty fellows who wish us only ill. But what becomes of the society that allows its fishermen to cast such nets? "There's no question, at least in the criminal context, that we'd solve a lot of crime if we allowed government to search everyone's house," noted Mark Rumold, a staff lawyer with the Electronic Frontier Foundation, which has opposed such intrusions.

Protection of privacy is a cornerstone of civilization itself

Bob Barr 2008. (former federal prosecutor; former congressman from Georgia) "Privacy and Security. This house believes security in the modern age cannot be established without some erosion of individual privacy. " 5 Feb 2008 THE ECONOMIST http://www.economist.com/node/10600829

The centrality of the right to privacy as a cornerstone not only of modern-day Western societies, but of civilization itself, is precisely why the ongoing erosion of this fundamental right—a process that has accelerated greatly since the events of September 11th 2001—is so disturbing and should be resisted strongly.

Privacy protection is a moral value required to preserve human dignity

Dr. Ann Cavoukian 1999. (PhD; Information & Privacy Commissioner for the province of Ontario, Canada) Privacy as a Fundamental Human Right vs. an Economic Right: An Attempt at Conciliation, Sept 1999 http://www.ipc.on.ca/images/Resources/up-1pr_right.pdf

What has been compelling about the human rights approach is that it acknowledges privacy as a moral and social value. Privacy possesses moral value since, it has been argued, privacy supports the development of individual dignity and autonomy. As stated by the Standing Committee on Human Rights and the Status of Persons with Disabilities: " Privacy is a core human value that goes to the very heart of preserving human dignity and autonomy."

NEGATIVE BRIEF: ECPA AMENDMENTS ACT OF 2015

The AFF case passes the ECPA Amendments Act of 2015, which requires warrants for emails and privately stored content online.

NEGATIVE PHILOSOPHY

We must balance both security and privacy – can't just focus on privacy alone

Lanny Davis 2013. (attorney; principal in the Washington, D.C., law firm of Lanny J. Davis & Associates; served as President Clinton's Special Counsel) 7 June 2013 We Need Protection From Terrorism AND Intrusion on Privacy Rights http://www.newsmax.com/LannyDavis/Government-Terror-Privacy-NSA/2013/06/07/id/508683#ixzz34v8QPlzt

But on the other hand—and there is another hand, despite the absolutist, sanctimonious voices I heard last night on television, speaking as if there is only one value, privacy rights, to be considered here—we also need protection from the murderers and sociopaths who celebrate death rather than life and were responsible for 9/11 and the Boston Marathon murders. The solution is not, and will never be, perfect. But as Abraham Lincoln noted when he suspended habeas corpus briefly during the Civil War, "the Constitution is not a suicide pact." We need—we can have—a government that protects our civil liberties and privacy rights and protects our families from evil terrorists. We must have both.

ECPA (Electronic Communications Privacy Act) reform must maintain BOTH goals: Public safety and privacy

Elana Tyrangiel 2013. (Acting Assistant Attorney General, Office of Legal Policy, US Dept of Justice; she's involved in prosecuting federal crime) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80065/html/CHRG-113hhrg80065.htm

Since its inception, ECPA has sought to ensure public safety and other law enforcement imperatives, while at the same time ensuring individual privacy. It is important that efforts to amend ECPA remain focused on maintaining both of these goals

INHERENCY

Google already requires warrants, regardless of what ECPA allows

David Kravets 2013 (journalist) WIRED 23 Jan 2013 "Google Tells Cops to Get Warrants for User E-Mail, Cloud Data" http://www.wired.com/2013/01/google-says-get-a-warrant/

A Google spokesman told *Wired* that the media giant demands that government agencies—from the locals to the feds—get a probable-cause warrant for content on its e-mail, Google Drive cloud storage and other platforms—despite the Electronic Communications Privacy Act allowing the government to access such customer data without a warrant if it's stored on Google's servers for more than 180 days. Google requires an ECPA search warrant for contents of Gmail and other services based on the Fourth Amendment to the Constitution, which prevents unreasonable search and seizure," Chris Gaither, a Google spokesman, said.

Court decisions, though conflicting, allow Google to demand warrants, and authorities are complying

David Kravets 2013 (journalist) WIRED 23 Jan 2013 "Google Tells Cops to Get Warrants for User E-Mail, Cloud Data" http://www.wired.com/2013/01/google-says-get-a-warrant/

But Google can seemingly grant more privacy than the four corners of the law allows because there's been a string of conflicting court opinions on whether warrants are required for data stored on third-party servers longer than 180 days. The Supreme Court has never weighed in on the topic—and the authorities are seemingly abiding by Google's rules to avoid a high court showdown.

HARMS / SIGNIFICANCE

Google admits: There is no expectation of privacy in email stored on servers

Dominic Rushe 2013. (journalist) THE GUARDIAN (British newspaper) 15 Aug 2013 "Google: don't expect privacy when sending to Gmail" http://www.theguardian.com/technology/2013/aug/14/google-gmail-users-privacy-email-lawsuit (brackets in original)

According to Google: "Just as a sender of a letter to a business colleague cannot be surprised that the recipient's assistant opens the letter, people who use web-based email today cannot be surprised if their communications are processed by the recipient's ECS [electronic communications service] provider in the course of delivery."

No reasonable expectation of privacy when records are turned over to 3rd parties

Prof. Nathan A. Sales 2011. (assistant professor of law, George Mason Univ. School of Law; former Deputy Assistant Secretary in the Office of Policy at the U.S. Dept. of Homeland Security.) 9 Mar 2011 testimony before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary United States House of Representatives "The Reauthorization of the PATRIOT Act" http://www.fas.org/irp/congress/2011_hr/030911sales.pdf

The constitutional principles concerning government access to third party records have been settled for decades, and these precedents strongly support the PATRIOT Act's business records authority. A long line of Supreme Court case law confirms that there is no "reasonable expectation of privacy" in the information a person conveys to businesses and other third parties. As a result, the government's efforts to acquire such data—as with grand jury subpoenas, for example—do not amount to "searches" within the meaning of the Fourth Amendment. Investigators therefore need not secure a warrant or demonstrate probable cause. For instance, in the 1979 case Smith v. Maryland, the Supreme Court ruled that police officers' use of a pen register—which records the numbers dialed by a particular telephone, but not the content of the resulting conversations—did not require a warrant or probable cause. "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." A few years earlier, in United States v. Miller, the Court similarly ruled that police could obtain a person's financial records from a bank without a warrant or probable cause.

Microscopic impact: Law enforcement requested information about 31,000 email accounts out of 425 million at Google. That's 0.007%

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

I applaud Google for this transparency initiative, but I believe some context is appropriate for the subcommittee's understanding. In June of 2012, Google claimed 425 million individual account holders for its Gmail product alone. In 2012, it reported receiving over 40,000 government requests for communications records worldwide, affecting about 68,000 users or accounts globally. In the U.S., Google reported a total of just over 16,000 government requests affecting just over 31,000 accounts. That means just a tiny fraction of one percent of Google's accounts were affected by government demands.

Microscopic impact: Law enforcement agencies average 1 request per year for Google records. 16,000 requests per year (previous card above), and there are 17,000 enforcement agencies in the US

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

Consider that in the context of more than 17,000 law enforcement agencies in the United States. This means that on average, there was less than one request for information per law enforcement agency per year for Google records. Contrast that with crime reporting statistics, which reflect that in 2011, more that 14,000 Americans were murdered, more than 83,000 were forcibly raped, and there were over 350,000 robberies. It is hard to conclude from these numbers that law enforcement demands for records are excessive.

Nobody's "snooping": Requests for email information are legitimate and key to fighting crime

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013
http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

My fellow professionals and I deal with cases like that every day, and stored communications are a critical part of the constellation of evidence that allows us to identify the guilty and keep the public safe. I encourage the committee to keep these numbers in mind when some parties claim that law enforcement is "snooping" without regard to privacy. When we request these records, it is for a reason – we believe that the records constitute evidence that will lead to identification of sexual predators, the recovery of kidnapping victims, or the successful prosecution of a murderer. Any consideration of changes to ECPA that will make obtaining communications records more time-consuming and laborious should reflect an understanding of how those changes will impact our ability to do our job, and whether or not the public would truly be upset about the balance as it is currently struck.

No evidence law enforcement is abusing electronic communication access: They only care about information that is part of a criminal investigation

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013
http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

As we consider various law enforcement concerns, we must keep in mind a simple fact that is nevertheless often overlooked in the public discourse on this topic: we are talking about law enforcement's ability to gather evidence. Not "information" or "content" or "communications records," but evidence. All hammers are tools; a hammer only becomes evidence if it is relevant to a criminal investigation. Similarly, law enforcement has no interest in communications records unless they advance a criminal investigation, whether to prove guilt or exonerate the innocent. The complete lack of a demonstrated pattern of misuse or abuse by law enforcement to access electronic communications records bears out this truth.

Growth in legal demands for electronic communications isn't a problem – it's quite normal

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013
http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

Concerns about the volume of law enforcement legal demands. As I address the issue of volume of legal process and its effect on timeliness of service provider response, I must also address a common talking point used by those who would further restrict law enforcement access to stored content: namely, that the number of law enforcement requests for this information is growing. Our response is simple: of course it is. That is because in the digital age, a growing percentage of the available evidence in any criminal case is going to exist in the digital crime scene. Communications records have taken their place alongside physical evidence, biological evidence, testimonial evidence, and the other traditional categories. Laws and policy should reflect this reality and ensure law enforcement access to evidence that by its nature can't make a mistaken identification in a lineup or testify untruthfully.

DISADVANTAGES

Terrorism & crime

Link: Terrorism threat justifies law enforcement access to business records.

Prof. Nathan A. Sales 2011. (assistant professor of law, George Mason Univ. School of Law; former Deputy Assistant Secretary in the Office of Policy at the U.S. Dept. of Homeland Security.) 9 Mar 2011 testimony before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary United States House of Representatives "The Reauthorization of the PATRIOT Act" http://www.fas.org/irp/congress/2011_hr/030911sales.pdf

The terrorist threat isn't going away anytime soon. Al Qaeda and its followers are still mortal dangers to Americans at home and abroad, and Congress should make sure that our counterterrorism agents have the tools they need to detect and disrupt our enemies' bloody plots. This is no time to dismantle the USA PATRIOT Act. The three provisions that are on the verge of expiring—roving wiretaps, business records, and lone wolf—have been on the statute books for years without compromising vital privacy interests or civil liberties. Not only does the PATRIOT Act let counterterrorism agents use some of the same investigative techniques that regular cops and prosecutors have had in their arsenal for years. The act's safeguards and protections are at least as robust as – and in some cases are even more robust than – their law enforcement counterparts. Congress should promptly reauthorize these authorities before they sunset later this year. Al Qaeda hasn't given up. We can't afford to either.

Link: Requiring court orders will divert critical law enforcement resources

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

Notification provisions may put a greater burden on law enforcement than an increased proof requirement. Several ECPA reform proposals have borrowed language from wiretap law requiring notification of customers of legal demands, or securing a series of separate court orders delaying notification. These provisions risk diverting critical law enforcement resources from investigations simply to comply with burdensome notification provisions or delay orders that do not offer any additional constitutional protections, and may actually threaten ongoing investigations. We urge the committee to carefully balance the need for notification and reporting against the resources it will drain away from a range of investigative priorities.

Link: Delays in access to stored content will slow down investigations and reduce our ability to fight crime

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

If governing law is changed to require probable cause for any type of location information, there will be a negative impact on the time required for law enforcement to conduct certain types of investigations. Some of this impact can be balanced by changes in the law with respect to records retention and quality of service in response to law enforcement legal demands. Any effort to modify the standard of proof for access to stored content that does not address the concerns outlined above will lengthen law enforcement's investigative timeline, and therefore reduce our effectiveness and negatively impact our ability to bring criminals to justice.

Brink: Quick access to electronic communication is key to protecting the public from crime

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

The crime scene of the 21st century is filled with electronic records and other digital evidence. The contents of this digital crime scene, including electronic communications records, often hold the key to solving the case. They also hold the key to ruling out suspects and exonerating the innocent. Law enforcement's ability to access those records quickly and reliably under the law is fundamental to our ability to carry out our sworn duties to protect the public and ensure justice for victims of crime.

Link & Brink: Email content is key to investigating lots of serious crimes

Elana Tyrangiel 2013. (Acting Assistant Attorney General, Office of Legal Policy, US Dept of Justice; she's involved in prosecuting federal crime) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013 (SCA=Stored Communications Act; it's part of ECPA)
http://judiciary.house.gov/_files/hearings/113th/03192013_2/Tyrangiel%2003192013.pdf

And, indeed, the SCA is critical to all sorts of criminal investigations into murder, kidnapping, organized crime, sexual abuse or exploitation of children, identity theft, and more. As technology has advanced, appropriate governmental access to certain electronic communications, including both content and non-content information, has become even more important to upholding our law enforcement and national security responsibilities. Even within these criminal investigations, it is important to understand the kind of information that the government obtains under the SCA as well as how that information is used. Under the SCA, the government may compel service providers to produce both content and non-content information related to electronic communications. It is clear that the contents of a communication—for example, a text message related to a drug deal, an email used in a fraud scheme, or an image of child pornography—can be important evidence in a criminal case.

Impact: Security tradeoff. Legal barriers to information increase risk to our most vulnerable citizens. Abducted children, escaping fugitives, terrorist attacks…

Richard Littlehale 2013. (Assistant Special Agent in Charge, Technical Services Unit , Tennessee Bureau of Investigation) statement to the COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS UNITED STATES HOUSE OF REPRESENTATIVES 19 Mar 2013
http://judiciary.house.gov/_files/hearings/113th/03192013_2/Littlehale%2003192013.pdf

A robust debate about balancing personal privacy and security is beneficial to all Americans, but the people and their representatives must be able to make an educated judgment about what they are giving up and what they are getting. There is no question that a growing number of personal details about all Americans are moving around the digital world, and some of those details make their way into digital crime scenes. Just as there is no question that people have an interest in preserving the privacy of that information, there can be no question that some of that information holds the keys to finding an abducted child, apprehending a dangerous fugitive, or preventing a terrorist attack. Whenever we move forward with the privacy/safety debate, we should be mindful that any restriction of law enforcement's access to that information, whether by redefining legal barriers or allowing service providers to erect new technological barriers, may well come at a price, and some of that price could be paid by our most vulnerable citizens. We should be sure we are willing to require them to pay it.

PRIVACY / SECURITY TRADEOFF: SECURITY BENEFITS JUSTIFY SOME PRIVACY LOSS

Rights cannot be the sole consideration: We have an ethical duty to balance rights with the cost to the community

Manuel Velasquez, Claire Andre, Thomas Shanks, and Michael J. Meyer, written in 1990 and revised in 2014. (Markkula Center for Applied Ethics at Santa Clara University) "Rights"
http://www.scu.edu/ethics/practicing/decision/rights.html

But rights should not be the sole consideration in ethical decision-making. In some instances, the social costs or the injustice that would result from respecting a right are too great, and accordingly, that right may need to be limited. Moreover, an emphasis on rights tends to limit our vision of what the "moral life" entails. Morality, it's often argued, is not just a matter of not interfering with the rights of others. Relying exclusively on a rights approach to ethics tends to emphasize the individual at the expense of the community. And, while morality does call on us to respect the uniqueness, dignity, and autonomy of each individual, it also invites us to recognize our relatedness—that sense of community, shared values, and the common good which lends itself to an ethics of care, compassion, and concern for others.

If information is used properly, the public is compensated for diminished privacy by increased security

Judge Richard Posner 2008. (Judge on the U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, Univ. of Chicago) Privacy, Surveillance, and Law, CHICAGO UNBOUND, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2808&context=journal_articles

I have said both that people value their informational privacy and that they surrender it at the drop of a hat. The paradox is resolved by noting that as long as people do not expect that the details of their health, love life, finances, and so forth, will be used to harm them in their interactions with other people, they are content to reveal those details to strangers when they derive benefits from the revelation. As long as intelligence personnel can be trusted to use their knowledge of such details only for the defense of the nation, the public will be compensated for the costs of diminished privacy in increased security from terrorist attacks.

Civil liberties are impacted by terrorism risk: If we want to protect liberties, we have to protect against terrorism

Prof. Geoffrey Stone 2013. (law professor, Univ. of Chicago) "Is Edward Snowden a hero? A debate with journalist Chris Hedges & law scholar Geoffrey Stone" 12 June 2013 http://www.democracynow.org/2013/6/12/is_edward_snowden_a_hero_a

Let me make another point about civil liberties here, by the way, that it's extremely important to understand that if you want to protect civil liberties in this country, you not only have to protect civil liberties, you also have to protect against terrorism, because what will destroy civil liberties in this country more effectively than anything else is another 9/11 attack. And if the government is not careful about that, and if we have more attacks like that, you can be sure that the kind of things the government is doing now are going to be regarded as small potatoes compared to what would happen in the future. So it's very complicated, asking what's the best way to protect civil liberties in the United States.

No impact: The fact that someone sees what you are doing isn't a violation of privacy unless there are some bad consequences

Paul Rosenzweig 2012. (former Deputy Assistant Secretary for Policy in the Department of Homeland Security; Principal and founder of a small consulting company, Red Branch Consulting, PLLC, which specializes in cybersecurity policy and legal advice; Professorial Lecturer in Law at George Washington University ; Visiting Fellow with a joint appointment in the Center for Legal & Judicial Studies and the Douglas and Sarah Allison Center for Foreign Policy Studies at The Heritage Foundation..) Statement before the Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia Committee on Homeland Security and Governmental Affairs, United States Senate July 31, 2012 http://www.heritage.org/research/testimony/2012/08/the-state-of-privacy-and-security-our-antique-privacy-rules

Other routine examinations are by governmental authorities—the policeman in the car who watches the street or the security camera at the bank or airport, for example. As we drive down the road, any number of people might observe us. So what we really must mean by anonymity is not a pure form of privacy akin to secrecy. Rather, what we mean is that even though one's conduct is examined, routinely and regularly, both with and without one's knowledge, *nothing adverse should happen to you without good cause*. In other words, the veil of anonymity previously protected by our "practical obscurity" that is now so readily pierced by technology must be protected by rules that limit when the piercing may happen as a means of protecting privacy and preventing governmental abuse. To put it more precisely, the key to this conception of privacy is that privacy's principal virtue is a *limitation on consequence*. If there are no unjustified consequences, i.e., consequences that are the product of abuse or error or the application of an unwise policy then, under this vision, there is no effect on a cognizable liberty/privacy interest. In other words, if nobody is there to hear the tree, or identify the actor, it really does not make a sound.

LESSON 8: FEDERAL COURT REFORM

The Debate of Lesson 8:

"Resolved: That the United States Federal Court system should be significantly reformed."

The United States has perhaps the most impressive federal judiciary in the world, but that isn't to say injustices do not happen. There is much that could be changed in the federal court system. In 2015-2106 school year, one league attempted to propose changes when they debated, "Resolved: That the United States Federal Court system should be significantly reformed."

For this lesson, you will study the history of a specific area of federal reform: bankruptcy court. After studying the problem, you then will model a case that reforms the system and, likewise, debate against the reform. The purpose of this lesson is to give you a brief history of the US federal court system, specifically about one of the cases that you will be running in this unit, "The Case for the Bankruptcy Venue Reform Act."

Understanding the Complications of Bankruptcy

Bankruptcy is a rather unfortunate reality in the world of business. Sometimes making money doesn't go off as business owners planned. Debts are racked up before revenues are attained, and business owners or corporations end up drowning in IOUs to creditors. If a business can prove to a court judge that it is not able to pay back its creditors, the court can oversee liquidation or reorganization of the said business to hopefully put it on a more productive path.

The federal jurisdiction of bankruptcy court is established in Article I, Section 8 of the US Constitution:

> *The Congress shall have power…To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States…*

As American prosperity grew, so did those who were less fortunate. Bankruptcies needed to be handled, so in 1800 Congress enacted legislation authorizing judges of the district courts to appoint commissioners who would oversee the discharge of debts in bankruptcy. Later in 1841, Congress gave the courts the mandate to formulate rules for bankruptcy proceedings and granted them "jurisdiction in all matters and proceedings in bankruptcy." The 1898 bankruptcy act established the position of "referee," which was to be appointed by district judges to have the purpose of overseeing the administration of bankruptcy. Later federal legislation expanded the judicial power of these referees.

Further reforms came with the Bankruptcy Reform Act of 1978 that gave exclusive original bankruptcy jurisdiction to the district courts. This established a bankruptcy court in each judicial district to manage bankruptcy cases. These new courts were to be considered adjuncts of the district courts but would be presided over by bankruptcy judges appointed by the president and confirmed by the Senate for fourteen-year terms.

After the Supreme Court held that it was unconstitutional to grant bankruptcy jurisdiction to courts of judges who did not have life tenure or other Article III protections (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 US 50 (1982)), the Bankruptcy Amendments and Federal Judgeship Act of 1984 conferred bankruptcy jurisdiction on the district courts and authorized the district courts to refer any or all matters falling within that jurisdiction to the bankruptcy judges for the district. It also provided that bankruptcy judges would be appointed by the courts of appeals to

fourteen-year terms. Today all bankruptcy cases are referred to an Article I bankruptcy court to decide most of the issues. If one of the parties does not consent to the decision, the bankruptcy court will submit proposed findings of fact and conclusions of law to the district court who enters the final order. That decision is reviewed by the US Court of Appeals or bankruptcy appellate panels.

Another perceived loophole in the federal system has to do with bankruptcy laws. Congress has provided that bankruptcy is under the exclusive jurisdiction of the federal courts, specifically the bankruptcy courts and, in turn, the federal district courts. Federal law provides, however, that where a bankruptcy case is tried can be determined by several factors, including the place of incorporation, where the assets are located, where the company is headquartered, etc. There is also evidence to suggest that this provides an opportunity for companies to shop around for a court that would be more likely to give them a favorable judgment (a practice called "forum-shoping"). This could lead to some unjust outcomes that might be fertile grounds for reform.

This is where the problem comes in.

The Specific Problem of Bankruptcy Court

True story: A corporation in Dallas, Texas, fell upon hard times and considered bankruptcy. Most of its employees and creditors lived in Texas. Its headquarters building was only a 10-minute walk from the Dallas federal bankruptcy court. Yet they filed for bankruptcy, of all places, at a federal court in Delaware. Why would they do that?

First, because they can. As already explained, Article I of the Constitution puts the control of bankruptcy law in the hands of the federal government, not Texas or any other state. So bankruptcy cases are handled in accordance with Congressional legislation. Federal bankruptcy law currently allows a troubled corporation to file for bankruptcy in federal bankruptcy court in any state where it has substantial business operations, its headquarters, where one of its affiliated corporate entities has already filed for bankruptcy, or the state where it officially was incorporated (even if it does little or no business there).

Herein lies the problem. For obscure legal and financial reasons, a very large percentage of corporations choose to incorporate in Delaware, even if they have no intention of doing business there. An unexpectedly large percentage of bankruptcy filings (larger than would be explained by where companies are headquartered) take place in the federal bankruptcy courts in either Delaware or the Southern District of New York (i.e., Manhattan). These two courts have become "magnets" attracting cases from all over the country.

So, even if you live in Texas, and did business with a Texas company, you could face having to appear in Delaware or New York to collect an outstanding bill. This is the status quo of many bankruptcy court cases.

The Proposed Solution

This case argues that this is unjust and harmful.

First, it harms the creditors who need to get paid or at least need to be heard during the bankruptcy proceedings. If you are in Texas and the company who owes you money is in the same town in Texas, why should you have to keep buying plane tickets to Delaware to tell the court about the money they owe you? At some point, the travel cost exceeds the debt and you give up. Maybe that's what the debtor company was hoping you would do, and maybe that's why they filed in Delaware, where you couldn't reach them.

Second, the Delaware and New York courts, because they are magnets for debtors, tend to "go easy" on the debtors and allow them to continue mismanaging their companies rather than getting tough and imposing reforms. Chapter 11 bankruptcies are supposed to provide a company with an opportunity to reform and reorganize and get back to profitability. But the track record of bankruptcy cases handled by the "magnet" courts shows higher rates of failure than those in other districts.

This plan enacts the Bankruptcy Venue Reform Act, a bill that was introduced in Congress a few years ago but never passed. It removes "place of incorporation" as a venue for bankruptcy court filing, thus requiring corporations to file near their headquarters or where they have substantial business assets and presence.

Makes sense, right? There are arguments against it, however.

Negating the Case

Negatives will argue that "magnet courts" are a good thing, not a bad thing. The Delaware and New York courts have handled so many bankruptcy cases that they have developed a reputation for managing them quickly and efficiently. In fact, this reputation for speed and efficiency is what draws so many cases, not the evil motives assumed by the affirmative.

Removing the state of incorporation as a venue for bankruptcy court jurisdiction would slow things down and also create needless litigation, as lawyers fight over where a business has substantial assets or operations. In the digital and globalized world, many companies are widely dispersed, and nailing down one location versus another could be a long legal battle. The delays would be costly for all involved.

Worksheet for Lesson 8

Name: _____ Date: _____

Read Lesson 8. Answer the following in the spaces provided.

1. What exactly does the US Constitution say concerning how to handle bankruptcies?

2. What is "forum shopping" and how does it affect bankruptcies?

3. Why would a business want to file for bankruptcy in Delaware or Manhattan, even though the business resides in another state?

3. What exactly does the Bankruptcy Venue Reform Act do to reform the status quo?

4. What are two reasons negative teams will give against the Bankruptcy Venue Reform Act?

Extension for Lesson 8

We hope you enjoyed your first debate round. Are you ready for another try? With your background knowledge of the topic, your model case ready, and one try at policy debate in your belt, we're sure you are. And it's going to be better!

Understand that this case and accompanying negative brief does not necessarily reflect any political views held by any of us at Monument Publishing. This plan for change is offered because it is supported by certain experts in published literature. We may or may not agree with them, and it's never our goal to use *Blue Book* to express our own political views. It is our goal to provide an evidentially supported case that would make for a good educational debate round, and that's all. We hope you understand the topic and how to use the case in a debate round.

THE CASE FOR THE BANKRUPTCY VENUE REFORM ACT

A corporation in Dallas, Texas, falls upon hard times and considers bankruptcy. Most of its employees and creditors live in Texas. Its headquarters building is only a 10-minute walk from the Dallas federal bankruptcy court. Yet they file for bankruptcy, of all places, at a federal court in Delaware. We'll show you why they would do that and why you should put a stop to it, as we affirm: That the United States Federal Court system should be significantly reformed.

OBSERVATION 1. We offer the following DEFINITIONS.

Significant: "large enough to be noticed or have an effect" (*Merriam Webster Online Dictionary, copyright 2015* http://www.merriam-webster.com/dictionary/significant)

Reform: "to amend or improve by change of form or removal of faults or abuses" (*Merriam Webster Online Dictionary, copyright 2015 http://www.merriam-webster.com/dictionary/reform)*

System: "a group of related parts that move or work together" *(Merriam-Webster Online Dictionary, copyright 2015 http://www.merriam-webster.com/dictionary/system)*

Venue: "The jurisdiction within which a criminal or civil case may or must be heard." (Oxford Dictionaries copyright 2015 https://www.oxforddictionaries.com/definition/english/venue)

OBSERVATION 2. INHERENCY or the conditions of the Status Quo. Two key FACTS

FACT 1. Venue Shopping.

Current federal law allows bankruptcy cases to be filed in many different places, allowing the debtor to practice venue shopping

Patrick M. Birney, Michael R. Enright, Steven J. Boyajian and Travis R. Searles 2014 (attorneys with Robinson & Cole law firm) 29 July 2014 "Venue reform three years later" http://www.lexology.com/library/detail.aspx?g=230db10d-4519-4867-b055-016de5dee778

Current federal law, first enacted in 1979, allows a bankruptcy case involving a business entity to be commenced in a host of different venues, including the debtor's place of incorporation, where its principal assets are located, where it is headquartered, or where the bankruptcy case of a corporate affiliate is pending. New York and Delaware bankruptcy professionals have been the biggest beneficiaries of the current venue provisions and would likely see their work diminish if the H.R. 2533 legislation succeeded. H.R. 2533's proponents liken the current venue provisions to a "forum-shopping" license, enabling practitioners to choose a bankruptcy court that is most convenient for a particular party or that may offer a strategic advantage, such as favorable decisional law on a certain topic.

FACT 2. Magnet Courts.

A large percentage of bankruptcies go to Delaware and New York, regardless of where the corporations are located

Rep. Howard Coble 2011 (R-N. Carolina, and Chairman of the Subcommittee on Courts, Commercial and Administrative Law) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

Over the past 3 decades, the bankruptcy system has witnessed the concentration of large Chapter 11 reorganization cases in the two so-called magnet districts, Delaware and the Southern District of New York. Many debtors have filed there, including those with little or no tangible connection to those respective districts. For example, in the last 10 years nine large North Carolina-based companies filed for bankruptcy protection in either Manhattan or Wilmington, Delaware. R.H. Donnelly Corporation, based in Cary, had 3,800 employees and over $12 billion in claimed assets at the time it filed. In 2001, Greensboro-based Burlington Industries, which had almost 14,000 employees on the petition date, also filed in Delaware. The same was true of Pillowtex which was based in Kannapolis, North Carolina. This concentration of cases in two districts is made possible by section 1408 of title 28 of the United States Code. That section permits the debtor to file a Chapter 11 case where it is incorporated, where it has its principal assets, or where it has its headquarters.

OBSERVATION 3. The HARMS.

HARM 1. Injustice. It's unjust for debtors to choose far away courts for their bankruptcy case in order to get different legal results.

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue (brackets added to fix a typographical error in the original) http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

Often, law-shopping motivates venue-shopping. To facilitate venue-shopping, law firms representing debtors often maintain elaborate charts detailing what courts have ruled on what issues that their clients are concerned about. This is unjust. A legal system in which there are in the normal course conflicts in judicial decisions ought not allow one party in litigation to choose which of those courts has more favorable decisions and then go there to file its case. There is no sound reason why, for example, a debtor headquartered in New York, should be permitted to have its right to reject a collective bargaining agreement with its union in New York subject to Ninth Circuit case law just because it is incorporated in Alaska or has a subsidiary in Idaho. Such was surely not within the reasonable expectation of the parties to the agreement when they executed it. The law applicable to a debtor's bankruptcy case ought to be the law applicable in the state of its principle place of business, without an opportunity to cho[o]se other law.

HARM 2. Communities suffer.

When a business goes bankrupt, the local creditors, employees and citizens will suffer if the case is heard in a remote venue where they can't participate in the process

Peter Califano 2011 (bankruptcy attorney at Cooper White & Cooper in San Francisco where he chairs the bankruptcy and creditors' rights groups) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm (brackets added)

First, the consequences of corporate bankruptcy are most profound in the communities where the debtor's principal place of business or assets are located. Not only are jobs involved, but they may affect other matters such as hospitals, the closing of plants, and waste removal. Second, if bankruptcies are filed in remote districts, the parties with the most familiarity with the debtor's operations and who have an important stake in the case's outcome might be cut off or minimized in the process. Employees, small creditors, and retirees will suffer.

END QUOTE. You can imagine yourself, Judge, if a local business owed you $5,000 and was going bankrupt. Would you prefer if they filed for bankruptcy in Delaware, or in a city nearby to where you

live? Your chances of being able to make your claim known and collect some of the debt will be a lot higher if the bankruptcy is handled locally, and that's what this Harm is about.

HARM 3. High failure rates.

Bankruptcy proceedings are supposed to help a company reorganize and get back on track to profitability. But Delaware bankruptcies fail more often than bankruptcies elsewhere, resulting in large business impacts

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy"
https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

Seeing the outcomes of the Delaware refailures shown in Table 4, readers may be tempted to assume that the weakest companies chose Delaware reorganization. Recall, however, that after testing numerous possibilities, Ayotte, Skeel, and we have been able to find no preexisting difference in the firms choosing Delaware that might account for Delaware's higher refailure rates. The evidence suggests that if these companies had filed their first cases in Other Courts, they would have suffered much lower refailure rates. Thus the total costs of reorganization refailure are the direct and indirect costs of the second bankruptcy, the cost of goods sold and selling and general administrative expenses between bankruptcies, the capital expenditures between bankruptcies, the loss of NOLs from refailure delays, creditors' lost opportunity costs from the end of the first case to the end of the second, and the probable complete destruction of the company. From this list, it should already be apparent that the total cost of Delaware's refailures were far too high to be efficient.

HARM 4. Mismanagement. Debtors will choose courts that will not supervise their mismanagement or jeopardize their cash bonuses

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy"
https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

The control that debtors' managers and professionals exert over the placement of cases creates different kinds of problems. The managers will prefer courts willing to leave them in unfettered control of their companies, release them from liability for their own wrongdoing, approve bonuses, and not inquire too deeply into their motives for any particular course of action. The attorneys prefer courts that approve generous fees and do not complain about conflicts of interest.

OBSERVATION 4. We offer the following PLAN

1. Congress reintroduces and passes the proposed Bankruptcy Venue Reform Act also known as HR2533.
2. Funding from existing budgets of existing agencies.
3. Enforcement through the federal courts.
4. Plan takes effect 30 days after an affirmative ballot.
5. All affirmative speeches may clarify the plan.

OBSERVATION 5. The Plan SOLVES. We see this in 3 sub-points:

A. Solves venue shopping. HR 2533 limits venue in bankruptcy cases by eliminating "place of incorporation" as an option.

Patrick M. Birney, Michael R. Enright, Steven J. Boyajian and Travis R. Searles 2014 (attorneys with Robinson & Cole law firm) 29 July 2014 "Venue reform three years later" http://www.lexology.com/library/detail.aspx?g=230db10d-4519-4867-b055-016de5dee778

House bill H.R. 2533 was introduced three years ago with much fanfare by the then Chairman of the House Judiciary Committee. H.R. 2533 proposes amending "title 28 of the United States Code with respect to proper venue for cases filed by corporations under chapter 11 of title 11 of such Code." It is intended to reduce the number of jurisdictions available for filing a bankruptcy case by effectively eliminating a debtor's "place of incorporation" as a venue option.

B. Solves the injustice. HR2533 would solve the biggest cause of injustice in bankruptcy cases: the venue law

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

My 28 years on the bankruptcy bench have persuaded me that the current bankruptcy venue law, 28 U.S.C. § 1408, is the single most significant cause of injustice in chapter 11 bankruptcy cases. Accordingly, I support the amendment to this law in H.R 2533 (2011). This bill would provide for chapter 11 venue in the district of the debtor's principal place of business or principal assets and in the district where an affiliate has filed when the affiliate owns more than 50% of the debtor's voting shares.

C. Saves Money. Venue Reform Act would save money by eliminating extra expenses of the remote venues

Mark Curriden 2012 (J.D. (law degree), legal journalist) ABA JOURNAL (publication of the American Bar Association) 1 Mar 2012 Playing on Home Court: New York and Delaware May Lose Their Grip on Bankruptcy Cases http://www.abajournal.com/magazine/article/playing_on_home_court_new_york_and_delaware_may_lose_their_grip_on_bankrupt/

After Biden became vice president, U.S. House Judiciary Committee Chairman Lamar Smith, R-Texas, seeing an opening, introduced the Chapter 11 Bankruptcy Venue Reform Act of 2011 in July. The act is co-sponsored by the Judiciary Committee's ranking Democrat, Rep. John Conyers Jr., D-Mich., and appears to be gaining support. It strips away the ability of corporations to file for restructuring and reorganization in the jurisdictions of their incorporation if that is not their "principal place of business" or where they have "principal assets." Lawyers say the legislation would reduce the cost of bankruptcy for even midsize companies by as much as $1 million. "Not being forced to file in Delaware or New York means that you don't have to hire local Delaware counsel for your client," says Karol Denniston, a bankruptcy partner at Brownstein Hyatt Farber Schreck in Los Angeles. "It means not having to get on a plane dozens of times to travel to the East Coast for hearings and depositions, and not having to stay in hotels."

2A EVIDENCE: BANKRUPTCY VENUE REFORM ACT

OPENING QUOTES / AFF PHILOSOPHY

Venue Shopping let the Los Angeles Dodgers baseball team file for bankruptcy in Delaware!

Rep. Howard Coble 2011 (R-N. Carolina, and Chairman of the Subcommittee on Courts, Commercial and Administrative Law) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

These rules allow a large Chapter 11 debtor to forum shop for a district it perceives as most friendly to its ultimate goal. This leads to some strange results, as you all know. Recently the Los Angeles Dodgers, an entity with ``Los Angeles'' in its very name, filed for bankruptcy in Delaware, approximately 3,000 miles from the closest California bankruptcy court.

Why do bankruptcy attorneys do venue shopping? Because they want more favorable outcomes

Rep. Trey Gowdy 2011 (R-SC) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

Well, maybe bankruptcy attorneys are different, but usually you pick a venue not based on the experience and expertise of the judge, but whether or not you think you will get a more favorable outcome. It might be that bankruptcy attorneys are just different and they are more interested in fairness than winning, but they would be unique among attorneys if that is what they were motivated by.

DEFINITIONS / TOPICALITY

Full text of HR2533, the Bankruptcy Venue Reform Act, is located here

https://www.govtrack.us/congress/bills/112/hr2533/text

Bankruptcy courts are a federal "court system" created by Congress

Kevin M. Eckhardt and Matthew Mannering 2012 (attorneys; senior associates in the Charlotte office of Hunton & Williams, LLP) PRATT'S JOURNAL OF BANKRUPTCY LAW, Oct 2012
https://www.hunton.com/files/Publication/e5fde3f9-2390-41c0-9ccf-7e5f8859f32e/Presentation/PublicationAttachment/4e45d656-248f-4a14-aaa8-883f9e1d8866/Reform_of_Bankruptcy_Venue_and_Compensation_Rules.pdf

Congress has established this specialized nationwide bankruptcy court system in order to avoid the unfairness, delay, and expense of litigating debtor-creditor disputes in state courts and "regular" federal courts.

"Principal place of business"

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue
http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

The Supreme Court has defined a corporation's "principal place of business" as follows:
We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion). *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93, 130 S. Ct. 1181, 1192 (2010).

INHERENCY

35% of large companies file bankruptcy in Delaware, another 18.5% in New York

WALL STREET JOURNAL 2015 "Does the Bankruptcy Code Need a Venue Rule Reform?" 26 Feb 2015
http://blogs.wsj.com/bankruptcy/2015/02/26/does-the-bankruptcy-code-need-a-venue-rule-reform/

As it stands, the bankruptcy code allows companies to file for bankruptcy in a location where they have a domicile, residence, principal place of business or principal assets—that includes the location of the company's incorporation. An effect of this rule has been that a lot of filings end up in Wilmington, Del., or in Manhattan. We recently took a deeper look and noted that 35% of large, public-company filings are in Delaware and another 18.5% happen in the Southern District of New York.

"Venue can be challenged and transferred" – Response: It's not effective – too expensive to mount a challenge

Honorable Frank J. Bailey 2011 (Chief Judge, Bankruptcy Court for the District of Massachusetts) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

My second point is that the transfer of venue statute is simply not effective. It is enormously expensive for a party to mount a challenge to venue. The debtor has chosen that location and will always fight back hard.

"Technology" or "Transfer" solve – Response: Transfers don't happen, technology doesn't balance the playing field

Prof. Melissa Jacoby 2011 (professor law, Univ. of N. Carolina Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

Some justify the system based on the possibility of requesting transfer and technology. We have already heard some responses to that. Absent support from the most powerful creditors in a case, transfer is not happening in the large cases, and we have known that really for at least 20 years. Technology is helpful but not seamless, and I am open to thinking about better ways to use it. It doesn't balance the playing field.

Remote conferencing doesn't solve venue distance problems

Prof. Laura Napoli Coordes 2015 (Visiting Assistant Professor, Sandra Day O'Connor College of Law, Arizona State University. J.D., University of Chicago Law School) VANDERBILT LAW REVIEW " The Geography of Bankruptcy" http://www.vanderbiltlawreview.org/content/articles/2015/03/The-Geography-of-Bankruptcy.pdf

Before moving on to the proposal, it is worth addressing one common argument put forward by proponents of forum shopping: technology's potential to reduce forum shopping's negative effects. Technological advances can help address problems relating to lack of stakeholder participation, but they are not a panacea for venue problems. Although all bankruptcy courts currently accept electronic filings, technological glitches and other problems still abound, making remote participation inferior to face-to-face interaction in several ways.

Large percentage of bankruptcies are choosing Delaware as their venue

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy" https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

Prior to 1990, the United States Bankruptcy Court for the District of Delaware was a one-judge backwater. In the 1980s—the first decade in which significant numbers of large public companies filed for bankruptcy reorganization—that court presided over only a single one of them. In 1990, the Delaware court attracted two large public companies from outside the state. In 1991 it attracted four, and in 1992, six. By 1996, the Delaware bankruptcy court had a near monopoly on large public company bankruptcies. That year, thirteen of the fifteen large public companies that filed for bankruptcy anywhere in the United States did so in Delaware.

Delaware judge refused to send "Energy Future" bankruptcy to Dallas, even though the company headquarters was a 10-minute walk from the Dallas courthouse

Patrick M. Birney, Michael R. Enright, Steven J. Boyajian and Travis R. Searles 2014 (attorneys with Robinson & Cole law firm) 29 July 2014 "Venue reform three years later" http://www.lexology.com/library/detail.aspx?g=230db10d-4519-4867-b055-016de5dee778

Notably, the indenture trustee pointed out that the debtors' corporate headquarters location was less than a ten-minute walk from the Dallas bankruptcy court while the Delaware bankruptcy court was 1,436 miles away, and any court appearance in Delaware would include costly and time-consuming travel. In short, according to Wilmington Savings, Dallas was a more convenient venue for the company's constituents and executives. In denying the indenture trustee's motion, the Delaware bankruptcy court concluded that the decision on the motion was not even a "close call." The judge stated that the statutory venue provisions authorized the chapter 11 filing in Delaware in the first instance because certain of Energy Future's corporate affiliates were incorporated there.

Bankrupt companies choose carefully where to file, because the venue can make a big difference in the outcome

Jones Day law firm 2011 (large international law firm) Proposed chapter 11 venue legislation introduced 13 Oct 2011 http://www.lexology.com/library/detail.aspx?g=f38417f4-b39b-4958-9d95-ad16660d7a63

A significant consideration in a prospective chapter 11 debtor's strategic pre bankruptcy planning is the most favorable venue for the bankruptcy filing. Given varying interpretations among different bankruptcy courts of certain important legal issues (e.g., a debtor's ability to pay the claims of "critical" vendors at the inception of a chapter 11 case, to include non-debtor releases in a chapter 11 plan, or to reject collective bargaining agreements) and the reputation, deserved or otherwise, of certain courts or judges as more "debtor friendly" than others, choice of venue (if a choice exists) can have a marked impact on the progress and outcome of a chapter 11 case.

Companies could choose any venue to file bankruptcy, making it inconvenient or unfair for creditors

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

The Supreme Court has observed, "In most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-184 (1979). Many other cases echo this view. The treatises also reflect this view. Likewise, the purpose of restricting venue in bankruptcy ought to be to protect creditors against the debtor's venue choice. The current law, however, does not accomplish that purpose. Under current law, a chapter 11 debtor may file in the state where its only connection is its incorporation or in any state where a subsidiary is incorporated. 11 U.S.C. § 1408. Indeed, it is not too farfetched to observe that under present law, many large corporations can find a way to file for chapter 11 bankruptcy in *any* judicial district. Simply stated, this venue "restriction" does nothing to protect creditors against the debtor's selection of an unfair or inconvenient forum.

Venue reform is unlikely in the Status Quo

Patrick M. Birney, Michael R. Enright, Steven J. Boyajian and Travis R. Searles 2014 (attorneys with Robinson & Cole law firm) 29 July 2014 "Venue reform three years later" http://www.lexology.com/library/detail.aspx?g=230db10d-4519-4867-b055-016de5dee778

The lesson of Energy Future and Jacoby & Meyer is that, as long as venue is plausibly supported by current statute, bankruptcy courts will be wholly reluctant to transfer a bankruptcy case to a new venue, even if the debtor's connections to the new venue are formidable and connections to the existing venue are tenuous. The lesson of H.R. 2533 is that venue reform is not likely to occur in the near future.

Big incentive to pick a court that will resolve the case in the interest of the one placing the case. Creditors' interests will not be protected

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy" https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

The fact that creditors will vote at the end of a case gives the case-placers no incentive to select a court that will protect the interests of the creditors. Once the case-placers select a court, that court will resolve the case. No vote of the creditors can alter that reality. Hence the case-placers' incentives are to select the court that will most strongly favor the case-placers' interests and least protect those of the other creditors.

HARMS

Venue shopping is unjust

Judge Stephen Rhodes 2015 (30 years' experience as a bankruptcy judge) WALL STREET JOURNAL 9 Feb 2015 "The Baffling Rejection of Venue Reform by the ABI Chapter 11 Reform Commission"
http://blogs.wsj.com/bankruptcy/2015/02/09/the-baffling-rejection-of-venue-reform-by-the-abi-chapter-11-reform-commission/

But venue laws ought not allow one party in litigation to choose the law that will apply to its case. This is highly prejudicial to the other parties in the case. Law shopping is unjust. There is no sound reason why, for example, a debtor that is based in Fairbanks, Alaska, and that has a collective bargaining agreement with its union in Fairbanks should be permitted to have its right to reject that agreement determined under Second Circuit case law just because it is incorporated in New York or has a subsidiary that filed there first. Such was surely not within the reasonable expectation of the parties to the collective bargaining agreement when they executed it. The law applicable to a debtor's bankruptcy case ought to be the law applicable in the state of its principle place of business, without an opportunity to choose other law.

Venue shopping demeans the entire system – it suggests the bankruptcy courts are for sale

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy"
https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

For example, in a survey by the Federal Judicial Center, 22 percent of bankruptcy judges said that they were aware of one or more Chapter 11 cases filed in another district that should have been transferred to their district but were not. Federal Judicial Center, *Chapter 11 Venue Choice by Large Public Companies* 19 (1997). A large majority of the cases they identified were filed in the District of Delaware or the Southern District of New York. Id at 20. Chicago bankruptcy lawyer Gerald Munitz told the National Bankruptcy Review Commission that forum shopping "demeaned the entire system by suggesting that the bankruptcy courts were for sale."

Venue shopping undermines the legitimacy of the court system. We see this in 2 sub-points

A. The Link: Legitimacy is undermined because parties are blocked from participating in the legal process

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue (brackets and ellipses in original)
http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

Venue-shopping in chapter 11 cases undermines judicial legitimacy when it prevents or even impairs the meaningful participation of any of the parties. It also underlines the integrity of the adjudication process itself. Because the fulfillment of the judiciary's mission depends so fundamentally on its legitimacy in the eyes of the public, chapter 11 venue should be carefully restricted to maximize the participation of the parties. Although there is likely no single venue in a large chapter 11 case that will perfectly facilitate this goal, venue in the district of the debtor's principal place of business appears to offer the best opportunity.

B. The Impact: Legitimacy is key to the functioning of the judicial branch of government and to public respect for the law

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue (brackets and ellipses in original)
http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

Legitimacy is essential to the proper functioning of the judiciary. "As Americans of each succeeding generation are rightly told, the [Supreme] Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy." *Planned Parenthood v Casey*, 505 US 833, 865 (1992). Alexander Hamilton famously stated, "The judiciary has the power of neither the purse nor the sword." Federalist 78 (Hamilton), in The Federalist Papers 521, 523 (Wesleyan 1961) (Jacob E. Cooke, ed). This commentator concisely argues the case for judicial legitimacy:
Positive public perception of the judiciary's role in American political life is indispensable to the effectiveness of the judicial branch. Indeed, this collective perception is the very source of judicial legitimacy, the *sine qua non* of our common law system. The concept of judicial legitimacy resides at the center of the constitutional doctrine of an independent judiciary and is the primary reason why people respect and obey the law. Thus, when the public views the judiciary as legitimate, the legitimacy of the entire legal system is nourished and strengthened. In short, if judicial independence is the lifeblood of the legal body politic, then judicial legitimacy is the immune system. *** Thus the concern here is not simply whether people generally believe in the legitimacy of judges, but for what reasons and with what reservations.
Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry Into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1102 -1103 (2007).

Delaware bankruptcy court caseload is skyrocketing, but their failure rate is 2 to 7 times higher than other courts

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy"
https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

From 1990 through 1996 the Delaware bankruptcy court went from judicial backwater to near monopoly of the large public company bankruptcy business. Congress's recent award of four additional bankruptcy judgeships to the Delaware court virtually assures that court's continued prominence. To advocates of regulatory competition, the Delaware bankruptcy court is a success story. The abysmal record of the companies reorganized during Delaware's period of ascendancy, however, casts a pall over the celebration. Failure rates two to seven times higher than those in Other Courts are difficult to justify.

New York has high bankruptcy failure rates, just like Delaware

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy"
https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

New York is separated from Other Courts for purposes of analysis because of its similarity to Delaware. Like Delaware, New York both attracts cases and has elevated refailure rates.

"Delaware had more failures because the companies there were in worse shape" – Response: No difference between the Delaware companies and any others

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy" https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

If a selection effect large enough to generate Delaware's high refailure rates exists in the real world, one would expect the difference between the two sets of companies to be apparent. But after comparing the firms filing in Delaware with the firms filing in Other Courts on several measures of the firms' financial distress prior to bankruptcy, on the firms' size, on the complexity of the firms' financial structures, and on the firms' industries, we found no significant differences that could account for Delaware's higher failure rates. After seeing Ayotte and Skeel's review touting EBITDA as the best measure of firm performance, we also compared the prefiling EBITDA of the Delaware and Other Court groups. Again, we found no statistically significant difference. With regard to each of these characteristics, the firms choosing Delaware appear no weaker or more difficult to reorganize than the firms choosing Other Courts. Ayotte and Skeel present no evidence to the contrary and suggest no additional characteristics for testing.

Delaware bankruptcy court's record is indefensible: It's a catastrophic failure

Prof. Lynn M. LoPucki & Prof. Joseph W. Doherty 2006. (LoPucki - Professor of Law at the UCLA School of Law. Doherty - Visiting Professor of Law at the Harvard Law School) UNIVERSITY OF CHICAGO LAW REVIEW, "Delaware Bankruptcy: Failure in the Ascendancy" https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/73.4/73_4_LoPucki_Doherty.pdf

The model's principal value is in showing us what it would take to defend the Delaware court's record. The first is proof that Delaware suffered from a selection effect. That is, the companies that chose the Delaware court were in some respect more difficult to reorganize successfully. The second is proof that the costs of refailure are negligible. Delaware's defenders are unlikely to be able to produce either. Delaware's eleven refilings from twenty-six cases are likely just what they appear to be: a catastrophic failure of Delaware's laissez-faire reorganization process.

Cases go to Delaware because they do what debtor companies want, and they allow big legal fees

Reuters news service 2014 (journalists Tom Hals and Nick Brown) 29 Apr 2014 Delaware messes with Texas, sparks fight over mega-bankruptcy http://www.reuters.com/article/2014/04/29/efh-bankrkputcy-venue-idUSL2N0NL1VQ20140429

Critics have long complained that the Wilmington and Manhattan bankruptcy courts bend over backwards to please lawyers that represent bankrupt companies, often to the detriment of creditors and employees. Lynn LoPucki, a law professor at the University of California Los Angeles, describes a form of quid pro quo in his book "Courting Failure": The court tends to defer to the wishes of debtors while approving big legal fees, so lawyers bring almost every sizeable case to one of those courts.

Real life example: A Memphis, Tenn. Company filed for bankruptcy in Delaware. It cost the landlord $4,000-$5,000 because he didn't have the resources to resist.

Analysis: It shows that debtors use a remote venue to avoid paying what they owe when they know the creditor can't get to the courthouse to make their claim.

Peter Califano 2011 (bankruptcy attorney at Cooper White & Cooper in San Francisco where he chairs the bankruptcy and creditors' rights groups) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

In the Perkins & Marie Callender's case, this is a company that is headquartered in Memphis, which is in Mr. Cohen's district. The bankruptcy was filed in Delaware. The commencement of the case--the debtor filed a motion to reject various real property leases back to the petition date and, in effect, eliminate any basis to claim administrative rent. The debtor was also allowed to leave its personal property at the premises. One of the landlords was a retiree who did not have the resources to resist the motion. The outcome of the motion probably cost the individual landlord retiree about $4,000 or $5,000.

Remote venues hurt small creditors and workers because they can't collect on their claims

Rep. John Conyers 2011 (D-Michigan) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

By choosing to file for Chapter 11 in a distant venue such as New York, a business--with its principal assets and most of its creditors and employees located in Michigan or California for example--makes it much more difficult for these creditors, particularly smaller creditors and workers, to participate in the case and defend their claims. These creditors are forced to retain counsel in the distant venue and, if they want to physically appear, incur travel costs. In effect, they have to pay more to collect on their claims. As a result, the ability of these small creditors and workers to influence the bankruptcy proceedings is greatly diminished.

Remote venues hurt small creditors, employees and other stakeholders

Rep. Steve Cohen (D-Tenn.) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

Such a result threatens to undermine the purpose of having venue rules in the first place, which is to ensure that legal right rules and rights be adjudicated in the places most convenient and fair for all the parties in a case. I think a convenient forum is one of the first things you learn about in law school and the need for that. In a Chapter 11 bankruptcy context, filing a case in a venue where a debtor has no substantial ties harms small creditors, employees, and other affected stakeholders who lack the resources of larger creditors and corporate debtors to assert or protect their interest in these distant forums.

Skeel is wrong: Impacts on small businesses and affected individuals alone justify local venues for bankruptcy cases

Honorable Frank J. Bailey 2011 (Chief Judge, Bankruptcy Court for the District of Massachusetts) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

Those opposed to the amendments ask why does all of this matter. Sort of like, so what? The bankruptcy system is working well, Professor Skeel tells us. Well, as a judge that sits on consumer cases as well as business cases, both large and small, I can tell you that it matters a great deal. In both consumer cases and in business cases, I regularly have employees, small vendor creditors, retirees, former employees who attend hearings in my courtroom. They can generally take public transportation to my courtroom, and I give them the chance to say their piece. And I frequently have to deliver bad news to them, sometimes life-changing bad news to them. And I have found that they can accept that bad news. They are not happy about it, but they can accept that bad news if they understand from whence it is being delivered by a local judge in a Federal system that has placed that local judge in the Boston courthouse where I sit. They may not be happy, but ultimately I believe they are satisfied with the system that Congress has created for them when they have that opportunity.

Venue shopping helps promote mismanagement

Rep. John Conyers 2011 (D-Michigan) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

This effectively permits management of a company--which is most likely to blame for the company's financial distress--to pick and choose the venue with the case law most friendly to management through this affiliate venue filing option. Particularly in cases where collective bargaining agreements may need to be rejected under the Bankruptcy Code, a jurisdiction espousing a pro-management, anti-union perspective would likely be very attractive to a company's management.

"Bankruptcy is different from other types of cases" – Response: Other cases have the same issues, and it doesn't justify remote venues

Prof. Melissa Jacoby 2011 (professor law, Univ. of N. Carolina Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

The second point is that the justifications often heard are just not persuasive. Some justify the departure by saying bankruptcy is exceptional. It is different. It involves more parties. It is more complicated. But there are other Federal actions that raise exactly those same concerns. So there is the Judicial Panel on Multi-District Litigation that assigns consolidated cases to certain districts. They don't consider place of incorporation of the corporate defendant. They might consider the headquarters. They consider a variety of other factors, including expertise. But place of incorporation is not among them.

"Importance of Delaware state law on companies incorporated there" – Response: Doesn't justify moving bankruptcies to Delaware

Prof. Melissa Jacoby 2011 (professor law, Univ. of N. Carolina Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

Some justify the current rules based on place of incorporation having a strong tie to bankruptcy and the relationship between corporate law and bankruptcy law. And I agree that bankruptcy courts need to respect State law, including State corporate law, but I am not sure that ties Delaware any more to these cases than the employment law, the tax law, the environmental laws of other jurisdictions. And outside of bankruptcy, when corporations get sued in Delaware, it is not unheard of for them to complain that it is inconvenient, that all of their resources are somewhere else, that their management is across the country.

SOLVENCY / ADVOCACY

Principal place of business should be the venue for bankruptcy law

Judge Steven Rhodes 2013. (US Bankruptcy Judge, Eastern District of Michigan) 22 Nov 2013 statement to the ABI Commission to Study the Reform of Chapter 11 on Chapter 11 Venue
http://commission.abi.org/sites/default/files/statements/22nov2013/Rhodes-ABI-Commission.docx

Similarly, creditors (and the public) can reasonably expect that a debtor should be required to file its reorganization proceeding in the district of its principal place of business - its nerve center, where the debtor's officers "direct, control, and coordinate the corporation's activities." Only with that restriction can the historical purpose of venue restrictions be fulfilled.

HR2533 would block bankruptcy venue shopping

Jones Day law firm 2011 (large international law firm) Proposed chapter 11 venue legislation introduced 13 Oct 2011
http://www.lexology.com/library/detail.aspx?g=f38417f4-b39b-4958-9d95-ad16660d7a63

On July 14, 2011, the chairman of the House Judiciary Committee, Lamar Smith (R-Texas), and ranking member John Conyers, Jr. (D-Michigan), introduced the Chapter 11 Bankruptcy Venue Reform Act of 2011 (H.R. 2533) to prevent what they deem to be forum shopping in chapter 11 cases. The proposed legislation would modify 28 U.S.C. § 408 by limiting venue to: (i) the location of the debtor's principal place of business or principal assets in the U.S. during the year immediately preceding the commencement of the chapter 11 case (or the portion of such one-year period exceeding that of any other district in which the debtor had such place of business or assets); or (ii) the district in which an affiliate of the debtor that owns, controls, or holds with power to vote more than 50 percent of the outstanding voting securities of such debtor has its chapter 11 case pending. If it were to become law, this proposed legislation would in many cases prevent a debtor from commencing a chapter 11 case in its state of incorporation or from "piggybacking" on the filing of a subsidiary.

HR2533 would solve problem of participants being left out due to long distance from the bankruptcy court

Rep. Howard Coble 2011 (R-N. Carolina, and Chairman of the Subcommittee on Courts, Commercial and Administrative Law) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

When a large Chapter 11 case is filed far from the debtor's principal place of business, many stockholders in the company lose a meaningful opportunity to make their views known to the bankruptcy court. Small creditors must defend preference claims filed in a remote jurisdiction. Employees, not unlike those at Burlington Industries, must travel long distances to present evidence of any claims they may have. New York and Wilmington may be convenient for the big financial folks, but small business creditors oftentimes are left in the dust when a reorganization takes place in a faraway district. H.R. 2533 addresses these inequities by eliminating the place of incorporation as a district in which a debtor can file its Chapter 11 case and doing away with the pending affiliate rule by which many companies bootstrap their way into a New York or Delaware courtroom.

HR2533 is better because a local venue can manage the community impacts better than a remote court

Peter Califano 2011 (bankruptcy attorney at Cooper White & Cooper in San Francisco where he chairs the bankruptcy and creditors' rights groups) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm (brackets added)

H.R. 2533 attempts to rebalance the interests of all parties in bankruptcy by making sure that the bankruptcy process remains within the communities that have the most significant vested interest in the outcome. This is accomplished by determining where a bankruptcy case may be filed. The CLLA [Commercial Law League of America] strongly believes that when these businesses fail and need rehabilitation in bankruptcy, the local bankruptcy courts are the best positioned to oversee the process. Let me explain why. First, the consequences of corporate bankruptcy are most profound in the communities where the debtor's principal place of business or assets are located. Not only are jobs involved, but they may affect other matters such as hospitals, the closing of plants, and waste removal. Second, if bankruptcies are filed in remote districts, the parties with the most familiarity with the debtor's operations and who have an important stake in the case's outcome might be cut off or minimized in the process. Employees, small creditors, and retirees will suffer.

Fairness to creditors requires end to bankruptcy venue shopping, and requirement to file at the principal place of business

Judge Stephen Rhodes 2015 (30 years' experience as a bankruptcy judge) WALL STREET JOURNAL 9 Feb 2015 "The Baffling Rejection of Venue Reform by the ABI Chapter 11 Reform Commission" *http://blogs.wsj.com/bankruptcy/2015/02/09/the-baffling-rejection-of-venue-reform-by-the-abi-chapter-11-reform-commission/*

Likewise, the purpose of restricting venue in bankruptcy ought to be to protect creditors against the debtor's "unfair or inconvenient" venue choice. Why else have any venue laws? In large cases, the current law, however, does not accomplish that purpose, or really any purpose. On the other hand, requiring a debtor to file where its principal place of business is located, although perhaps imperfect, is more likely to fulfill this purpose. The Supreme Court, in *Hertz Corp. v. Friend (2010)*, defined a corporation's principal place of business as "the place where a corporation's officers direct, control, and coordinate the corporation's activities…the corporation's 'nerve center'…the place where the corporation maintains its headquarters." Significantly, the Supreme Court also observed, "The public often (though not always) considers it the corporation's main place of business." Creditors and the public can reasonably expect that a debtor should be required to file its reorganization proceeding in the district of its principal place of business. Only with that restriction can the historical purpose of venue restrictions be fulfilled.

Example: PG&E case. It proves local bankruptcy courts can successfully manage cases, which will happen with HR2533

Peter Califano 2011 (bankruptcy attorney at Cooper White & Cooper in San Francisco where he chairs the bankruptcy and creditors' rights groups) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 *http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm*

Now, let me give you an example of a local case that is successful or was successful, the Pacific Gas and Electric Company case. This bankruptcy was the largest utility bankruptcy case ever to be filed. It had $35 billion in assets and approximately 20,000 employees. The case was commenced in the Northern District of California. Immediately local builders and lawyers formed an informal group to negotiate and litigate with the debtor over the assumption of highly regulated and specialized agreements for extending power into new subdivisions. The group was successful in achieving an early resolution for the home builders. There are many examples of this kind of thing in this case. Please note that this case was with the Honorable Dennis Montali resulting in a confirmed plan and a successfully reorganized debtor. This confirms that there are other courts around the country who have the skill and ability to handle a mega bankruptcy case. The point of these examples are that creditors can get left behind when bankruptcy cases are filed in remote courts, and these cases lose important local input. In conclusion, H.R. 2533 remedies the overly permissive venue provisions for corporate bankruptcies resulting in bringing back bankruptcy cases to communities most affected by the outcome.

Restricting venue restores bankruptcy court legitimacy

Judge Stephen Rhodes 2015 (30 years' experience as a bankruptcy judge) WALL STREET JOURNAL 9 Feb 2015 "The Baffling Rejection of Venue Reform by the ABI Chapter 11 Reform Commission" *http://blogs.wsj.com/bankruptcy/2015/02/09/the-baffling-rejection-of-venue-reform-by-the-abi-chapter-11-reform-commission/*

Venue shopping in chapter 11 cases undermines judicial legitimacy when it prevents or even impairs the meaningful participation of any of the parties. It also undermines the integrity of the adjudicative process itself. Because the fulfillment of the judiciary's mission depends so fundamentally on its legitimacy in the eyes of the public, chapter 11 venue should be carefully restricted to maximize the participation of the parties. Although no single venue in a large chapter 11 case may perfectly facilitate this goal, venue in the district of the debtor's principal place of business does offer the best opportunity.

DISADVANTAGE RESPONSES

"Magnet courts have expert judges, we lose all that expertise" – Response: Other courts are well qualified and we should be using them

Honorable Frank J. Bailey 2011 (Chief Judge, Bankruptcy Court for the District of Massachusetts) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

My third point and last point is there are talented and sophisticated judges in other districts. We should be using them. In Massachusetts and all over the country, we have accomplished and sophisticated judges capable of handling their fair share of large, complex business cases. We put a slide up. The slide will speak for itself. These judges are no slackers. In fact, they include the incoming President of the National Conference of Bankruptcy Judges, my colleague, Judge Joan Feeney. The past presidents of that august organization in just the last few years have come from Texas, Nevada, Ohio, and Oregon. The way our judicial system is supposed to work is to rely on the creativity and innovation of judges from around the country in handling these large company cases. Right now, the concentration of cases in the magnet districts, I am afraid, restricts that innovation.

"Lost expertise" – Response: Non-magnet court judges will not be a problem

Prof. Melissa Jacoby 2011 (professor law, Univ. of N. Carolina Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

And finally, some justify with fears that judges will handle the cases less well than judges in magnet courts. And I do think that that is unfounded. Even if it were true, I think there are ways that we could structure the system to overcome that concern.

"Lost expertise if we move away from Delaware and N.Y." – Response: No evidence those courts are better than others

Prof. Melissa Jacoby 2011 (professor law, Univ. of N. Carolina Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

Certainly there are some judges empirically who have had more experience with big cases than judges in other districts. There are also relatively new judges in New York and Delaware who, again, may be doing a great job but they do not all come from the same level of experience. When we take apart the pieces of what is desired in a judge, we want fairness and competence and accessibility and speed. I think those are things that both the judiciary is well equipped to handle and that also can be adapted and come up with new innovations. I can understand why parties want to hire very experienced lawyers, but I think that expertise—we have to be careful with how we make that argument. We have no evidence that things are going better in these two districts than other places.

NEGATIVE BRIEF: BANKRUPTCY VENUE REFORM ACT

NEGATIVE PHILOSOPHY / OPENING QUOTES

Venue reform is a solution in search of a problem

J. Scott Victor 2015 (a founding partner and managing director of investment banking firm SSG Capital Advisors LLC and president of the Turnaround Management Association.) 4 Mar 2015 The Examiners: Venue Reform Is a Solution in Search of a Problem, WALL STREET JOURNAL http://blogs.wsj.com/bankruptcy/2015/03/04/the-examiners-venue-reform-is-a-solution-in-search-of-a-problem/

As with most things in life—particularly legislation—if something isn't broken, then don't fix it. Venue reform is a solution in search of a problem.

Status Quo bankruptcy system works fine: Venue reform isn't needed

Prof. David Skeel 2011 (prof. of law at Univ. of Pennsylvania Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

What I don't think we ought to be doing is changing the venue rules. What that would do, in my view and from the work that I have done, is undermine a system that works remarkably well. There are some problems with the bankruptcy system, it seems to me, and I think we should be dealing with them. There are problems like the fact that derivatives aren't regulated in bankruptcy. Venue reform doesn't seem to me to be one of those problems.

SOURCE INDICTMENT

Lynn LoPucki

Mark E. Felger 2007 (bankruptcy attorney) Bankruptcy: Delaware As A Venue Of Choice 1 May 2007 http://www.metrocorpcounsel.com/articles/8292/bankruptcy-delaware-venue-choice

With respect to state of incorporation as a venue option, there has been a movement afoot to amend the Bankruptcy Code to eliminate state of incorporation as a filing option, principally kept alive by the writings of Professor Lynn LoPucki. I believe that when you really analyze and drill behind Professor LoPucki's data you find that his conclusions do not necessarily follow from the data and are out of step with reality. Further, when he went so far as to call the judges in New York and Delaware "corrupt," I believe he lost a good deal of credibility and momentum in his effort.

HARMS

Delaware and N.Y. bankruptcy judges are not corrupt

Prof. David Skeel 2011 (prof. of law at Univ. of Pennsylvania Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

The second issue is the claim that the current venue rule has led to a so-called ``race to the bottom.'' The leading academic advocate for reform, Lynn LoPucki of UCLA, has argued that Delaware and New York attract cases by, among other things, paying high fees to bankruptcy lawyers, permitting the debtor's managers to keep their jobs, and simply rubber-stamping the company's proposed reorganization plan or asset sale. Professor LoPucki accuses the bankruptcy judges in Delaware and New York and other judges that have adopted similar practices of being corrupt. I believe that the allegations of corruption are unfounded and deeply unfair.

No evil motives for venue shopping: Companies go to Delaware if the local bankruptcy judge is inexperienced

Prof. David Skeel 2011 (prof. of law at Univ. of Pennsylvania Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

In my own work, I have tried to investigate some of Professor LoPucki's claims. What a co-author and I found is that Delaware cases turn out to be much quicker than cases in other districts and that the best predictor of whether a company will file for bankruptcy in Delaware, as opposed to its local court, is how experienced the local court is. If the local court is inexperienced, the company is much more likely to file in Delaware; if the local court is more experienced, the company is much less likely to file for bankruptcy in Delaware.

No evil motives: Delaware attracts cases because it has the most efficient and effective bankruptcy judges

Ronald S. Gellert 2008 (bankruptcy attorney) The Untold Story of the Bankruptcy Courts Mar/Apr 2008 "Business Law Today," a publication of the American Bar Association https://apps.americanbar.org/buslaw/blt/2008-03-04/gellert.shtml

Perhaps the most well-known court for handling mega cases is the United States Bankruptcy Court for the District of Delaware. Until recently, the two full-time bankruptcy judges, the Honorable Mary Walrath and Peter Walsh, handled nearly the entire caseload. With help from a number of visiting judges who volunteered to assist, the Delaware bankruptcy court was one of the busiest in the country. Now that four additional judges have been sworn in, the Honorable Kevin Carey, Kevin Gross, Brendan Shannon, and Christopher Sontchi, the Delaware bankruptcy court has grown in consistency and capacity. The recent inflow of cases to Delaware undoubtedly is due to the special abilities of the members of the bench and the court's effectiveness in handling larger bankruptcy matters.

Small creditors aren't harmed: They don't want to be involved in the process and there isn't much they can do anyway

Prof. David Skeel 2011 (prof. of law at Univ. of Pennsylvania Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

It is also important, it seems to me, to be realistic about the extent to which small creditors really want to participate in these big bankruptcy cases. Most small creditors don't want to be actively involved. It takes time and often money. And those who do are often very frustrated that there isn't more they can do, even if they can appear in court, to affect the outcome as an individual creditor.

Delaware venue doesn't harm creditors. Turn: it's actually better for them and they are more likely to prefer it

Prof. Kenneth Ayotte and Prof David Skeel 2004 (Ayotte – Columbia Business School. Skeel – U. of Penn. Law School) 18 Oct 2004 "Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy" http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.506.6872&rep=rep1&type=pdf

We also find results supporting the likelihood that the trend to Delaware was largely creditor-driven, particularly by secured creditors, rather than manager or equity-driven. Our venue choice regressions consistently demonstrate that a larger fraction of the firm's assets financed by secured debt implies a significantly larger probability of a Delaware filing.

Venue shopping isn't harming small creditors

J. Scott Victor 2015. (a founding partner and managing director of investment banking firm SSG Capital Advisors LLC and president of the Turnaround Management Association.) 4 Mar 2015 The Examiners: Venue Reform Is a Solution in Search of a Problem, WALL STREET JOURNAL http://blogs.wsj.com/bankruptcy/2015/03/04/the-examiners-venue-reform-is-a-solution-in-search-of-a-problem/

Commentaries and proposed legislative changes over the years that have criticized the venue provision of the bankruptcy code as creating a haven for forum shopping are simply wrong. To argue that the convenience of creditors and other parties such as employees are in any way prejudiced by a debtor's choice of venue is misguided. There are outstanding insolvency professionals across the country, and bankruptcy courts in all states and territories are more than happy to hear them.

Convenience of venue isn't a problem in status quo

Prof. David Skeel 2011 (prof. of law at Univ. of Pennsylvania Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

The final issue is convenience for small creditors. Critics of Delaware and New York argue that it is much harder to attend a hearing in Delaware or New York than it would be to attend hearings in the company's principal place of business. In reality, the vast majority of Chapter 11 cases—-and this is about 90 percent. My math isn't great but I don't think this is too far off—are filed in the district where the company has its principal place of business. And even with the largest cases, only half of them, end up in Delaware or New York. And these cases, whatever you think of convenience, you are going to get that convenience. The headquarters, principal place of business, and State of incorporation are all going to be in one State—in one district. Many of the debtors that do file for bankruptcy in Delaware or New York are far-flung companies for which there is no single location that would be convenient for most of the creditors.

Delaware venue choice doesn't lead to higher bankruptcy failure rates – there are other factors involved

Kenneth Ayotte, Edith Hotchkiss and Karin Thorburn 2013. (Ayotte – Northwestern Univ. School of Law. Hotchkiss – Carroll School of Management, Boston College. Thorburn – Dept of Finance and Management Science, Norwegian School of Economics) THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE, Chap. 22 "Governance in Financial Distress and Bankruptcy" https://books.google.fr/books?id=RnsUZlwgXEQC&pg=PA504&lpg=PA504&dq=skeel+bankruptcy+venue&source=bl&ots=vd6lHtqoFL&sig=TRRVDEXVTd6iOGTQvUHTxH54ros&hl=en&sa=X&ei=bYehVfL7EMf1UIn6paAM&ved=0CDYQ6AEwAzgU#v=onepage&q=skeel%20bankruptcy%20venue&f=false

Theoretically, the main criticism of these studies is the reliance on refiling rates as a measure of bankruptcy court effectiveness (Rasmussen and Thomas, 2001). For example, Kahl (2002) suggests that firms emerging from bankruptcy might be optimally kept on a "short leash" through higher leverage, so as to limit agency costs of inefficient continuation. This implies that higher refiling rates in a particular court can be consistent with a more efficient bankruptcy process. Empirically, scholars have noted the potential selection biases that might lead firms with higher unobserved refiling propensities to file in Delaware or New York, leading to a mistaken inference that venue choice causes failure (Skeel, zool).

Attorney fees in bankruptcy cases are not excessive

American Bankruptcy Institute 2014. (multi-disciplinary, nonpartisan organization devoted to the advancement of jurisprudence related to problems of insolvency; includes more than 13,000 attorneys, bankers, judges, accountants, professors, turnaround specialists and other bankruptcy professionals, providing a forum for the exchange of ideas and information) ABI Commission to Study the Reform of Chapter 11 http://business-finance-restructuring.weil.com/wp-content/uploads/2014/12/Ch11CommissionReport.pdf

The estate's administrative outlay for professionals' fees is often the focal point of debates concerning the costs of chapter 11. Headlines such as *Extra! Extra! Tribune Fees Top $150 Million*, and *American Airlines Bankruptcy Advisors Seek $400 Million in Fees, Expenses* catch the attention of policymakers and the public alike, but a look behind the numbers cited in these headlines may reveal a different story. In fact, empirical studies show that the total amount in professionals' fees in a chapter 11 case is generally a modest percentage of the debtor's assets, revenues, and distributions to creditors. But these studies do not change the perception — whether or not accurate — that every dollar an estate pays in chapter 11 costs is one less dollar available to pay creditors. As pointed out by one professor who has studied professionals' fees extensively, this perception necessarily ignores the value that professionals add to the estate during the pendency of a chapter 11 case for the benefit of all parties in interest.

INHERENCY

Bankruptcy case of Caesars Entertainment shows how status quo venue reviews protect the integrity of the system

Eric J. Monzo 2015. (bankruptcy attorney) March 26, 2015 Reviewing 'Caesars' and Bankruptcy Venue in the Ides of March http://www.morrisjames.com/blogs-Delaware-Business-Bankruptcy-Report (brackets added)

The careful analysis in Caesars should serve as a reminder that while corporate debtors will be permitted significant deference when making strategic business and filing planning decisions, the Bankruptcy Code permits bankruptcy courts and its judges to closely examine the circumstances to protect the integrity of the bankruptcy system. After briefly discussing whether transferring venue was convenient to the parties, [US Bankruptcy Judge Kevin] Gross found that the interests of justice in this specific circumstance required significant deference to the judgment of the debtor and its selection of bankruptcy venue. The court concluded that the debtor offered sufficient justification for its choice of forum, despite the fact that the debtor's pre-petition behavior would seem to indicate that the choice was made for the benefit of non-debtor insiders. The petitioning creditors' first-filed Delaware involuntary bankruptcy was supported by a substantial majority of the debtor's creditors, but the fact remained that the debtor's bankruptcy filing was anticipated and imminent when the involuntary petition was filed. As such, the court was unwilling to reward the petitioning creditors' pre-emptive filing to win the race to the courthouse. Significant deference was provided to the debtor notwithstanding the "serious allegations" raised by the petitioning creditors and plaintiffs in various pre-petition lawsuits relating to alleged self-dealing that resulted in potential breaches of duties and fraudulent conduct that may be reviewed by the fully capable Illinois bankruptcy court. While such issues were left to the Illinois bankruptcy court to decide, critics of the Bankruptcy Code's venue provisions should take heart that the courts are well-equipped to strike a balance between protecting the debtor's judgment and safeguarding the process.

Majority of cases that could file in Delaware actually file where the company is based, like AFF wants them to

Christopher Ward 2015. (Delaware bankruptcy attorney) 27 Feb 2015 Does the Bankruptcy Code Need a Venue Rule Reform? http://blogs.wsj.com/bankruptcy/2015/02/26/does-the-bankruptcy-code-need-a-venue-rule-reform/tab/comments/

The venue fight is misguided. Rather than trying to fix a process that is not broken, we should focus on fixing distressed companies into healthy companies as the Bankruptcy Code contemplates. The reality is that the statistics do not lie. A majority of cases that could file in Delaware actually file in the jurisdiction where the company is based. The problem is that the Wall Street Journal and other major publications do not cover those cases, only the mega-cases receive publicity. Therefore, the general population only hears about Caesars (which was transferred to Chicago) and other high publicity cases.

They can always file for a transfer out of Delaware – but they don't because the status quo works fine

Christopher Ward 2015. (Delaware bankruptcy attorney) 27 Feb 2015 Does the Bankruptcy Code Need a Venue Rule Reform? http://blogs.wsj.com/bankruptcy/2015/02/26/does-the-bankruptcy-code-need-a-venue-rule-reform/tab/comments/

Another little known fact is that the Delaware courts, by example, have actually transferred a good portion of cases where a motion to transfer venue was actually filed. The problem is that most parties do not file motions to transfer venue. Why is that? Because the system works. People gripe about having to retain Delaware counsel, but they are a cog in the system that keeps the machine running smoothly.

If venue is a problem, Status Quo rules allow for a transfer

J. Scott Victor 2015 (a founding partner and managing director of investment banking firm SSG Capital Advisors LLC and president of the Turnaround Management Association.) 4 Mar 2015 The Examiners: Venue Reform Is a Solution in Search of a Problem, WALL STREET JOURNAL

There is already a specific section, 28 U.S.C. §1412, which provides that venues in bankruptcy cases may be transferred in the interest of justice or for the convenience of the parties. That provision has been successfully used in large and small cases over many years to transfer venue where appropriate, including recently when Caesars was transferred from the District of Delaware to the Northern District of Illinois. Any party may move to transfer venue, even if all the other parties don't want the change. The one moving party could be right, but it's not a democracy. Rather, it's up to the bankruptcy court to decide.

If venue is such a big problem, why do the parties involved hardly ever file for transfer of venue?

American Bankruptcy Institute 2014. (multi-disciplinary, nonpartisan organization devoted to the advancement of jurisprudence related to problems of insolvency; includes more than 13,000 attorneys, bankers, judges, accountants, professors, turnaround specialists and other bankruptcy professionals, providing a forum for the exchange of ideas and information) ABI Commission to Study the Reform of Chapter 11 http://business-finance-restructuring.weil.com/wp-content/uploads/2014/12/Ch11CommissionReport.pdf (brackets in original)

A party in interest who disagrees with the debtor's venue selection, or simply believes that another venue is more convenient for the parties, may file a motion to transfer venue of the case to another jurisdiction or, in certain circumstances, to dismiss the case. Specifically, section 1412 of title 28 provides that "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." Section 1406 of title 28 provides, in turn, that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Despite these statutory provisions, relatively few motions to transfer venue or to dismiss cases based on venue are filed. The dearth of venue motions is in stark contrast to the long-running, high-profile debate concerning the utility of the existing venue statute.

Video and teleconference can solve for remote distance bankruptcy inconvenience

Prof. David Skeel 2011 (prof. of law at Univ. of Pennsylvania Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

I do think that convenience is very important, but I think there are much better ways to deal with the convenience concern. Video and telephone hearings have become much more common than they were in the past, and they are going to continue to become more common.

SOLVENCY

Requiring "principal place of business" is too vague and confusing, would result in endless litigation over its meaning

James L. Patton 2013 (bankruptcy attorney) 22 Nov 2013 Statement to the ABI Commission to Study Reform of Chapter 11 http://commission.abi.org/sites/default/files/statements/22nov2013/James-Patton-Testimony.pdf

Venue based on state of incorporation or organization provides a clear, bright-line venue option that is easily ascertained and practically undisputable. Elimination of venue based on a company's place of incorporation—the only venue option that is clear and easily ascertainable in advance by all parties in interest—will result in increased litigation concerning a debtor's "principal place of business" and "principal assets." Proponents of restricting a debtor's venue choice to principal place of business or location of principal assets presume the venue choice is easily determinable. However, the determination of a debtor's principal place of business or location of principal assets in large chapter 11 cases often will require an intensive factual and legal inquiry and result in substantial litigation in the critical early stages of a corporation's bankruptcy. Circuits diverge sharply on many important points of bankruptcy law that significantly affect the rights of stakeholders. No doubt, if these more amorphous venue tests were to be the only bases for venue, tactical litigation over venue will proliferate. As businesses expand into multiple states and nations, and corporate decision making becomes more and more diffuse, the concepts of "principal place of business" and "location of principal assets" each become increasingly vague.

Even with the Supreme Court's definition in the Hertz case, it could still be contentious determining where a large company's center of operations is

James L. Patton 2013 (bankruptcy attorney) 22 Nov 2013 Statement to the ABI Commission to Study Reform of Chapter 11 http://commission.abi.org/sites/default/files/statements/22nov2013/James-Patton-Testimony.pdf

Ascertaining the principal place of business of a large company with diverse operations and an intricate corporate structure has never been an easy task. For nearly a century, courts have disagreed over the test to be applied in determining a corporation's principal place of business in connection with a bankruptcy case. Although in The Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010), the Supreme Court has recently held, in the context of construing the federal diversity jurisdiction statute, that a company's principal place of business "refer[s] to the place where a corporation's officers direct, control, and coordinate the corporation's activities," it is far from clear whether this test, referred to as the "nerve center test," will control the inquiry of what is a corporation's "principal place of business" in a bankruptcy venue determination. Even assuming the "nerve center" test set forth in Hertz were to be uniformly applied in the bankruptcy context, the test described in Hertz is a fact-intensive and time-consuming determination for many, businesses, in particular large entities with dispersed operations and management, that is likely to be the subject of litigation if state of incorporation is removed as a basis for venue under the Bankruptcy Code. In today's global economy, many large companies have widely dispersed management and operations, some of which are intentionally segregated to allow for the effective control of business lines or services that have different geographic sales or manufacturing concentrations. For such entities, determining the location of their "nerve centers"—unlike the state of incorporation—is far from straightforward.

Company Headquarters standard won't stop bankruptcy forum shopping: They'll just move the headquarters

James L. Patton 2013 (bankruptcy attorney) 22 Nov 2013 Statement to the ABI Commission to Study Reform of Chapter 11 http://commission.abi.org/sites/default/files/statements/22nov2013/James-Patton-Testimony.pdf

Additionally, due to technological advances that enable virtually instantaneous communication, companies are highly mobile and may move their headquarters with regularity. One recent study concluded, among other things, that (1) U.S. headquarters relocate a significant 5% a year; (2) of the 500 largest U.S. headquarters, 36 moved between 1996 and 2001, or 7.2% every five years; (3) headquarters of U.S. multi-site firms are typically disconnected from production sites; and (4) many of these moves have little to do with operations and instead are due to economic factors such as a state's offer of tax breaks or other economic incentives. If rampant forum shopping truly exists, many sophisticated companies will relocate their headquarters to jurisdictions perceived to be favorable, the effectiveness of which will almost certainly be challenged (engendering more litigation) by parties in interest.

“Place of principal assets” venue test won’t work. We should be expanding venue choices, not restricting them

James L. Patton 2013 (bankruptcy attorney) 22 Nov 2013 Statement to the ABI Commission to Study Reform of Chapter 11 http://commission.abi.org/sites/default/files/statements/22nov2013/James-Patton-Testimony.pdf

Like venue based on a principal place of business, the venue based on "place of principal assets" presents a fact-intensive inquiry and is likely to be litigated more frequently if state of incorporation is no longer a basis for chapter 11 venue. This is as true for companies with hard assets as it is for companies with intangible assets, but in the case of companies in which substantial value is in the form of intangible assets (such as trademarks, trade names, patents, technology, computer-related products, information systems, licenses, contracts, etc.), the term has little meaning. In these cases, "place of principal assets" is a far less "real" contact than state of incorporation, and it is a great deal more difficult to determine. Even with respect to debtors whose value is in the form of "hard assets," like inventory, equipment, owned or leased wholesale and retail locations, and other non-movable assets, the place of "principal assets" is not easily ascertained. National and regional retailers and restaurants, by way of common examples, have stores in several states. As should be clear, determining venue based on the location of "principal assets" in these cases can be expensive and time-consuming and, if anything, points out the need to expand rather than limit venue choices so as to reduce litigation, uncertainty, and expense.

DISADVANTAGES

1. Specialized Expertise

Link: N.Y. has bankruptcy court with specialized expertise in tough cases

Prof. David Skeel 2011 (prof. of law at Univ. of Pennsylvania Law School) 8 Sept 2011 HEARING BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TWELFTH CONGRESS FIRST SESSION ON H.R. 2533 http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68185/html/CHRG-112hhrg68185.htm

New York has developed the administrative capacity and expertise to handle the very largest cases, the cases that are seen as too big for Delaware or other districts. The idea that it makes sense to have courts with special expertise dealing with particularly complex cases is widespread in American law. The new Dodd-Frank Act resolution rules, to give just one example of this, is based on precisely this principle, that we ought to put in a specialized court cases that are very large and very complicated.

Impact: Net benefits. Benefits of forum shopping exceed bad effects in some cases

Prof. Laura Napoli Coordes 2015 (Visiting Assistant Professor, Sandra Day O'Connor College of Law, Arizona State University. J.D., University of Chicago Law School) VANDERBILT LAW REVIEW " The Geography of Bankruptcy" http://www.vanderbiltlawreview.org/content/articles/2015/03/The-Geography-of-Bankruptcy.pdf

Debtors may be inclined to file a case in Delaware because of Delaware's reputation as a corporate law center, or they may choose New York because of its strong connections to capital markets and finance. Thus, in certain cases, forum shopping's benefits may outweigh its bad effects. Restricting debtors' choice of venue could eliminate these benefits.

Impact: Net Benefits. Banning forum shopping goes too far, eliminates too many of the benefits

Prof. Laura Napoli Coordes 2015 (Visiting Assistant Professor, Sandra Day O'Connor College of Law, Arizona State University. J.D., University of Chicago Law School) VANDERBILT LAW REVIEW " The Geography of Bankruptcy" http://www.vanderbiltlawreview.org/content/articles/2015/03/The-Geography-of-Bankruptcy.pdf

In short, prior attempts to curb forum shopping often did not recognize that, in some cases, forum shopping has value. That value needs to be weighed against the drawbacks of forum shopping in each particular case, not discarded entirely. Forum shopping is not necessarily bad simply because it can produce negative effects, and many proposed remedies may be too harsh or impractical given forum shopping's potentially positive aspects.

Impact: Hurts creditors. Reduces their chances for maximum recovery when less experienced courts handle the cases

Joseph DiStefano 2011 (journalist) 27 Sept 2011 Lawyer wars: US attack on Delaware bankruptcy haven http://www.philly.com/philly/blogs/inq-phillydeals/Lawyer-wars-US-attack-on-Delaware-bankruptcy-haven.html

"Removing the state of incorporation from the definition of 'venue' would only hurt creditors' chances at a maximum recovery," warns Ted Gavin, principal at NHB Advisers, a Wilmington "turnaround and crisis management expert" that serves bankruptcy clients. "Delaware has developed very sophisticated corporate law" and "expert courts (that) allow quicker results that are best for all parties."

2. Inconsistent outcomes

Link: Judges in other forums (outside Delaware and New York) are unpredictable, like a monkey with a machine gun

Mark Curriden 2012 (J.D. (law degree), legal journalist) ABA JOURNAL (publication of the American Bar Association) 1 Mar 2012 Playing on Home Court: New York and Delaware May Lose Their Grip on Bankruptcy Cases http://www.abajournal.com/magazine/article/playing_on_home_court_new_york_and_delaware_may_lose_their_grip_on_bankrupt/

In contrast to the perceived pro-debtor predictability of the Delaware and New York courts, bankruptcy judges in other parts of the country developed a different reputation. For example, former long-serving Dallas bankruptcy judge Harold Abramson prided himself on being unpredictable. Judge Abramson, who was on the bench for nearly two decades, once described himself in court as "a monkey with a machine gun." Lawyers say that cities across the country have similar stories about bankruptcy judges in their jurisdictions.

Link: Delaware has much better consistency standards than other bankruptcy courts

Rafael X. Zahralddin-Aravena & Shelley A. Kinsella 2012. (both are bankruptcy attorneys) 26 Mar 2012 Delaware and Business Insolvency http://www.corporatelivewire.com/top-story.html?id=delaware-and-business-insolvency

A criticism of many other jurisdictions outside of Delaware is that the judges have varied judicial Chambers procedures and the local rules are limited in scope or out of touch with the practice as it evolves. The Delaware Bankruptcy judges have all agreed to use a uniform set of chambers procedures with some few small exceptions dealing with limited elements of trial practice. These, and other permanent procedural rules, are located conveniently, and updated often, on the website for the Bankruptcy Court. The bar and the court also moved to incorporate several standing orders and existing local practice into one set of local rules about a decade ago. Many Courts in other jurisdictions do not have uniform rules that govern case procedures, which results in disjointed case by case procedural orders. Delaware sets the standard in this respect, with a vibrant set of local rules that cover the depth of most procedural issues and having a local rules committee that is not limited to Delaware Judges and lawyers, but also includes prominent and frequent practitioners who often practice in Delaware.

Link: Consistency in bankruptcy court is vital

Bobby Guy 2011 (attorney with law firm Frost Brown Todd LLC) "Choosing a Venue in Chapter 11 Cases: A Practical View " 18 Jan 2011 http://www.morrisanderson.com/company-news/entry/choosing-a-venue-in-chapter-11-cases-a-practical-view/#sthash.744qQfMN.dpuf

Consistency in courts is also vital, not just on the law, but among judges as well. In a district with multiple judges, if drawing the wrong judge can result in a completely different outcome, the district is not likely to be a popular one. Highly consistent bankruptcy courts are sometimes dubbed "debtor-friendly," but a better phrase would probably be "value- and-process-friendly."

Link: Delaware bankruptcy judges are experienced and consistent

Larry Nagengast 2009 (journalist) DELAWARE BUSINESS, Boom for Bankruptcy Law, May/June 2009 http://www.bayardlaw.com/wp-content/uploads/2012/05/Marketing._Article_Boom_for_Bankruptcy_01312686.pdf

Delaware's U.S. Bankruptcy Court, whose bench expanded from two judges to six in March 2006, has a reputation for efficiency and consistency. "Our bankruptcy judges are experienced, consistent, pragmatic and generous with their time," says Jeffrey Wisler, chair of the Bankruptcy Section in the Business Law Group at Connolly Bove Lodge & Hutz LLP in Wilmington.

Impact: Legal predictability and consistency are key to justice and avoiding wasted money on useless litigation

Ted Frank 2007 (J.D. from Univ. of Chicago Law School, former director and fellow of the Legal Center for the Public Interest at American Enterprise Institute) http://overlawyered.com/2007/06/the-rule-of-law-why-is-predictability-important/

Of course, predictability—that like cases are treated alike—is a fundamental component of the definition of justice. The social benefits of the rule of law are so obvious that it should hardly be necessary to list them, but, aside from issues of fundamental fairness enshrined in our Constitution in the *ex post facto* clause among other places, predictability has other advantages. If a result is predictable, settlement is easier: there's little point in continuing to litigate on either side, because additional money spent on lawyers cannot change the result. If a result is predictable, one can more easily conform conduct to be law-abiding. Corporations aren't incentivized to break contracts with one another to see whether they can get a better deal in the courts; individuals and corporations know where the line is in dealing with the public and won't step over it.

3. Too slow. Delaware and N.Y. do bankruptcy cases faster. We lose that if we deny them as preferred venues

Link: Delaware has a mediation program that manages the caseload faster

Ronald S. Gellert 2008 (bankruptcy attorney) The Untold Story of the Bankruptcy Courts Mar/Apr 2008 "Business Law Today," a publication of the American Bar Association https://apps.americanbar.org/buslaw/blt/2008-03-04/gellert.shtml

The ability to handle this voluminous litigation is due, primarily, to the court's adoption of streamlined case management procedures. First, by instituting uniform pretrial schedules and procedures, bankruptcy courts have placed the cases on a track which balances the parties' discovery needs and motion practice, and which facilitates settlement negotiations. Further, districts such as Delaware have instituted a mandatory mediation program which has become an exceptional tool in prompting settlements, thereby whittling down the massive caseload. In sum, the ability to efficiently handle large numbers of related litigation matters further demonstrates that bankruptcy courts are effective places to conduct business.

Impact 1. Difference between failure and survival for troubled companies. NY & Delaware can move fast enough to save them

Bobby Guy 2011 (attorney with law firm Frost Brown Todd LLC) "Choosing a Venue in Chapter 11 Cases: A Practical View " 18 Jan 2011 http://www.morrisanderson.com/company-news/entry/choosing-a-venue-in-chapter-11-cases-a-practical-view/#sthash.744qOfMN.dpuf

Filers should be wary of courts that do not have reasonably good and responsive first-day procedures. Nothing is worse than filing a Chapter 11 and not getting a first-day hearing for weeks or even months—one West Coast company shut down several years ago after being forced to wait 10 days for a first-day hearing. Companies need to have first-day hearings promptly so that they can access cash, pay employees, continue centralized cash management and pay essential suppliers. Poor first-day hearing procedures can also signal a more general lack of responsiveness, a major stumbling block for operating companies in Chapter 11, which often need to schedule emergency or expedited hearings. Delaware and the Southern District of New York have led the way on first-day responsiveness and many other courts, such as the Southern District of Texas, have followed suit by adopting similar local rules and procedures.

Impact 2. Significant economic impacts on large creditors (they're waiting to collect on their debt, so the faster things move, the faster they get paid)

Prof. Kenneth Ayotte and Prof David Skeel 2004 (Ayotte – Columbia Business School. Skeel – U. of Penn. Law School) 18 Oct 2004 "Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy" http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.506.6872&rep=rep1&type=pdf

One possible justification for secured creditors' preference for Delaware becomes apparent when we analyze the effect of venue choice on the speed with which a firm reorganizes in bankruptcy. Given existing bankruptcy rules that result in secured creditors losing more value in longer cases, we should expect a strong secured creditor preference for fast cases. While the Delaware court appears similar in terms of the likelihood of reorganization, it is an outlier in terms of speed. Controlling for other characteristics, our estimates indicate that Delaware cases are faster than equivalent cases in other courts. The estimated effects are economically large and statistically significant in most cases.

Impact 2. Creditors harmed. Speedy resolution benefits secured creditors, and Delaware is faster

Prof. Kenneth Ayotte and Prof David Skeel 2004 (Ayotte – Columbia Business School. Skeel – U. of Penn. Law School) 18 Oct 2004 "Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy" http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.506.6872&rep=rep1&type=pdf

While Delaware does not appear significantly different with respect to deviations from absolute priority in favor of equity or likelihood of producing reorganizations, it does differ along the dimension of speed. Controlling for other factors, we find that a Delaware reorganization is between 140 and 190 days faster than an equivalent case in another court. Given that speed benefits secured creditors most, we conclude that Delaware's popularity in the 1990s was unlikely to have resulted from a pro-debtor bias combined with a manager or equity holder preference for Delaware.

4. Excess venue litigation

Link: Place of incorporation is simple and clear. Removing it as a venue leads to costly legal fights over alternative venues

James L. Patton 2013 (bankruptcy attorney) 22 Nov 2013 Statement to the ABI Commission to Study Reform of Chapter 11 http://commission.abi.org/sites/default/files/statements/22nov2013/James-Patton-Testimony.pdf

In light of the challenges that courts and parties have had in making fact-intensive venue determinations in chapter 15 cases, it is truly puzzling why the proponents of venue alteration would want to inject more uncertainty and opportunities for costly and burdensome litigation into the determination of venue for corporate debtors in chapter 11 cases. The venue choices that would remain will be increasingly difficult to apply, but ultimately less meaningful in large cases, as businesses continue to expand into multiple states and corporate decision-making becomes more diffuse. A chapter 11 debtor's state of incorporation is the single venue option that can be conclusively and indisputably determined and, unlike principal place of business or location of principal assets, is never subject to challenge.

Impact: Excess venue litigation will be disastrous to the debtor's estate

James L. Patton 2013 (bankruptcy attorney) 22 Nov 2013 Statement to the ABI Commission to Study Reform of Chapter 11 http://commission.abi.org/sites/default/files/statements/22nov2013/James-Patton-Testimony.pdf

Stated simply, removing state of incorporation from the venue choices for corporations seeking chapter 11 protection would be an anomaly in the federal system, no doubt in large part as a result of the clarity provided by such an option (as well as other jurisdictional concerns, of course), and should be rejected. In the absence of a clear venue option, creditor groups may strategically commence value-destroying fights to move cases to jurisdictions perceived to be more favorable by alleging a case was filed in an improper venue; cases may be determined to have been filed in an improper (not just inconvenient) venue, resulting in further litigation regarding whether such cases should be dismissed or only transferred, and the possible dismissal (as opposed to transfer) of these cases in accordance with Bankruptcy Rule 1014(a)(2). Any such dismissal could be disastrous to a debtor's estate, potentially resulting in the forfeiture of preference recoveries and other avoidance actions tied to a petition date that would cease to be operative, and the quintessential "race to a courthouse" before a case could be re-filed.

LESSON 9: TRADE WITH CHINA

The Debate of Lesson 9:

"Resolved: The United States federal government should substantially reform its trade policy with China."

The United States is the largest economy in the world, while China is the second. Given the differences between our two nations' systems of governance and rapidly changing economic conditions, it is no surprise that there are tensions and conflicts in the area of foreign trade between us.

In this lesson, we will give you a brief history of the United States trade relations with China and propose a solution to a specific problem, "The Case for WTO Retaliation for Chinese Cyber Piracy."

What is Trade?

Trade is "the activity or process of buying, selling, or exchanging goods or services" (Merriam-Webster). When it is performed in the normal course of events as a voluntary transaction, economists describe it as a mutually beneficial exchange in which both parties engage because they each believe they will be better off giving up what they have for what the other party has.

You have probably done this many times without thinking about it. If you want a cup of coffee at a high-end store, you give up $5 in exchange for the large cup of coffee because you believe your happiness or satisfaction would be better if you had the coffee rather than the $5. The store voluntarily gives up to you the cup of coffee because the store owner believes he or she would be better off having $5 than having the coffee beans and hot water.

The possibility of trade allows for great increases in human prosperity and well-being that would not otherwise occur if each person, family, or village had to produce itself all of the things it consumed. Dark periods of history—including the aptly termed "Dark Ages" in Europe—were particularly low in development and prosperity because of the limitations of trade policies between countries and nations. Without trade a region can only produce things that are within the skills of the local residents using the natural resources available only in that region. Most of the things we rely on for our daily lives would not be available, and our lifestyles would of necessity revert to subsistence agriculture and basic handicrafts.

News articles, pundits, and even economists often talk of trade as if it were conducted between national governments or entire nations. For example: "China trades raw minerals to US for computers." But does the government of China collect up raw materials, send them to the government of the US, and then the government of the US in exchange send a boat load of computers to China? Not at all. In this example, the raw materials would be produced by mining companies run by private individuals and perhaps owned by stockholders. A raw material company (let's say a producer of iron ore) negotiates by letter, on the phone, or on the Internet, with a company in China that wants to use iron in its manufacturing process. They agree on a price and the Chinese iron producer then contracts with a shipping company to transport the iron to the US, while the US company sends the funds through a bank for currency conversion, and ultimately into the bank account of the Chinese iron producer. Ultimately, in this example, the end purchasers of the imported iron are the US consumers who buy the manufactured products containing the iron.

And in reverse, the US computers are manufactured in response to demand from Chinese consumers who go to the stores to buy computers. In response to their demand, those private US companies' manufacturers make the computers and ship them to China, where they go on sale, and individuals buy them. Trade is thus, ultimately, a set of transactions between individuals and corporations, not a

decision made by any legislature or government.[14] The sum total of all of these private decisions can be aggregated into general statements or statistics about "US trade" or "China's trade."

This leads to a possible analysis of trade, not as a government decision, but as a personal freedom and a human right. If my property is truly and legally mine, normal notions of ownership and human rights would indicate I have the right to trade my property to anyone else in exchange for any property they legally own. And the fact that they live on the other side of a border, rationally, should play no role at all in the moral calculus of my exercise of that right. If it's mine, I have the right to trade it with whomever I want to, and who has the moral right to stop me? Or the right to tell me I may trade with this person (on this side of the border), but not with that person (on the other side of the border)? This view of trade as a human right based on the right to own property calls into question all legal restrictions on international trade as a possible violation of human rights. Governments don't view it that way, but some philosophers do.

This is where it gets tricky with this resolution. China is officially a communist country, and pure communist countries do not allow for private ownership. Since the late 1970s, however, China has opened up its economy to private business, with a resulting explosion in economic growth.

World Trade Organization (WTO)

The World Trade Organization, or WTO, was established in 1995 and currently consists of 161 nations. Countries must agree to follow its rules in order to join, and its rules are generally designed to reduce barriers to trade, although WTO adjusts its rules in many cases to take into account special circumstances of lesser-developed countries.

WTO also has dispute resolution mechanisms, where a country that believes it has been the victim of a trade practice in violation of WTO rules can call out the offending nation and demand it stop its bad practice. If the WTO panel agrees, the offender must change its trade policy, "or else." The "or else" can include authorization by WTO for the victimized trade partner to impose retaliatory tariffs on goods exported by the offender. For example, at the time of this writing, Canada and Mexico are in the process of receiving WTO permission to impose retaliatory tariffs against the United States. They're upset because of an imported meat labeling law that Congress passed a few years ago, in which the meat labeling requirements (a possible "non-tariff barrier" in the form of a regulation either designed to or having the effect of discouraging imports) exceed those agreed to under WTO rules.

[14] With two possible exceptions: 1) when a government itself is purchasing a product, like military equipment, for government usage; 2) when the business entity is owned by the government but functioning in the market like a private business (like Amtrak or the Postal Service in the U.S. or State Owned Enterprises in China)

"Fiat" is a policy debate principle that assumes the right of the affirmative to enact a plan upon an Affirmative ballot without worrying about the real-world political environment. The affirmative can assume a law change or court decision will be adopted when the judge votes affirmative regardless of how difficult it would be to do in the real world. This assumption is made so debaters will focus on the issue of "should the plan be adopted" rather than "would" it be adopted.

Affirmative teams can fiat that Congress does some trade policy even if it violates WTO rules. Negative teams cannot argue that the changes won't happen—the WTO doesn't override the sovereignty of Congress over American trade law. However, if an affirmative does enact a plan that the negative team can prove would run afoul of the WTO, negatives can argue that the disadvantages of breaking WTO rules and therefore inviting foreign trade retaliation would outweigh the benefits of whatever the affirmative is doing.

Understanding the WTO and the debate strategy of fiat power makes for an interesting debate when it comes to Chinese cyber policy.

The Specific Problem of Chinese Cyber Piracy

American companies have been growing more and more upset at China's lax prosecution of online theft. In fact, many believe the government itself is deliberately hacking the Internet to steal intellectual property. You and your partner will attempt to solve this.

Corporations expend vast sums on highly trained employees and research facilities in order to develop new technologies. Patents and copyrights on those inventions protect a company's right to profit from the fruits of their labors. When someone copies an advanced technology and begins producing the same product, with none of the research costs, the company that developed it may quickly be put out of business by the cheaper competitor's product that appears suddenly on the market. Not only does it harm the targeted company, but it damages the economy as a whole by creating disincentives for research and investment. Why bother to do all that work if it's just going to be pirated by someone else and you will never profit from it?

Recently the US Department of Justice indicted five members of the Chinese Army for cyber industrial espionage. Investigators were able to trace back hacking of US businesses to computers in China. While those five individuals are unlikely ever to be brought to the US and prosecuted, the fact that the Chinese Army has been caught red-handed proves it's a deliberate policy of the Chinese government, not rogue individuals. We need to take stronger steps that will go to the source of the problem by directly going after the Chinese government.

The WTO (World Trade Organization) has dispute settlement mechanisms that allow a country to lodge a complaint against a fellow-WTO member they believe has committed some unfair trade

practice. Your plan takes the advice of experts who advocate that the US government should file a complaint with the WTO and provide the evidence that China is committing the unfair trade practice of government-sponsored industrial espionage. Experts say pressure from WTO would motivate China to change its ways, because the US would likely win the case and would then be authorized to impose trade sanctions against China.

There is a downside to this, of course.

Negating the Case

Negatives will argue that Chinese cyber hacking really doesn't have much impact. For example, even if someone in China steals a bunch of data or charts in English on advanced technology they don't have, what would they do with it? They don't have the capacity to just start making such products the next day, and they might never really be able to do anything with it at all.

After the Snowden revelations of US spying, it's hard to argue that the United States is an innocent victim of other countries' electronic espionage. Maybe we need to clean up our own house first.

In addition, the negative team will argue that WTO mechanism is the wrong forum to resolve issues of espionage. It probably would take too long, if it even worked at all. Meanwhile, the damage to US-China relations would cause much bigger problems.

Worksheet for Lesson 9

Name: _____ Date: _____

Read Lesson 9. Answer the following in the spaces provided.

1. How does Merriam-Webster define trade?

2. Explain how the following news headline is really not accurate: "China trades raw minerals to US for computers."

3. How do the way governments and philosophers differ in their views of trade between countries?

4. What is "fiat" power and what does it allow in the debate round?

5. What is the problem with China pirating US technology? Why is this a big deal?

6. What three general responses can a negative team give to the case against China piracy?

Extension for Lesson 9

The following extensions consist of:

1. Your Case. This is one of many cases that could be run that affirm the resolution, “Resolved: The United States federal government should substantially reform its trade policy with China.” You or your partner, depending on who is the 1A, will run this case against a negative team in one of the two rounds you will be running.

2. Your 2A Evidence. For every section in your case, you have more evidence to back up your arguments. This will be used by both debaters throughout the debate round, but it will be used primarily in the 2AC, and somewhat in the 1AR and 2AR.

3. Your negative Brief. You will also run as the negative team against the same case you will be for as the affirmative. This brief quotes experts who oppose the affirmative’s idea for solving for Chinese cyber piracy.

You also have another flowsheet with a pre-flow of the 1AC on the flow. You will want to take proper notes throughout the debate in order to convince the judge that your side is the winning side.

Good luck debating! And may the best team win.

THE CASE FOR WTO RETALIATION FOR CHINESE CYBER-PIRACY

The United States has warned China about the dangers of its practice of using computer hacking, or "cyber espionage," to copy pirated technology from American companies. Wayne Morrison with Congressional Research Service in 2015 said QUOTE:

> *Wayne M. Morrison 2015 (Specialist in Asian Trade and Finance, Congressional Research Service) March 17, 2015 China-U.S. Trade Issues*
> *https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=37&cad=rja&uact=8&ved=0CEYQFjAGOB4&url=https%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Frow%2FRL33536.pdf&ei=3wRqVaG5D8rkUfDZgNAG&usg=AFQjCNEn_j9n5J08-uopqlFBfNEcUnGjhQ&sig2=MWYX9j8fJDWPfzJaaMI9UA*
>
> Following a meeting with Chinese President Xi Jinping in June 2013, President Obama warned that if cyber security issues are not addressed and if there continues to be direct theft of United States property, then "this was going to be a very difficult problem in the economic relationship and was going to be an inhibitor to the relationship really reaching its full potential."

END QUOTE. Unfortunately, China has ignored our warnings, and we need to escalate our response. It's time for us to affirm that: The United States federal government should substantially reform its trade policy with China.

OBSERVATION 1. We offer the following DEFINITIONS.

> **Trade**: "the activity or process of buying, selling, or exchanging goods or services" *(Merriam Webster Online Dictionary, copyright 2015 http://www.merriam-webster.com/dictionary/trade)*
>
> **Policy**: "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body" *(Merriam Webster Online Dictionary, copyright 2015 http://www.merriam-webster.com/dictionary/policy)*
>
> **WTO**: The World Trade Organization

OBSERVATION 2. INHERENCY, or the structure of the Status Quo. We offer 2 key FACTS

FACT 1. Criminal indictments. The Justice Dept. is prosecuting members of the Chinese Army for industrial espionage

> *Wayne M. Morrison 2015 (Specialist in Asian Trade and Finance, Congressional Research Service) March 17, 2015 China-U.S. Trade Issues*
> *https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=37&cad=rja&uact=8&ved=0CEYQFjAGOB4&url=https%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Frow%2FRL33536.pdf&ei=3wRqVaG5D8rkUfDZgNAG&usg=AFQjCNEn_j9n5J08-uopqlFBfNEcUnGjhQ&sig2=MWYX9j8fJDWPfzJaaMI9UA*
>
> On May 19, 2014, the U.S. Department of Justice issued a 31-count indictment against five members of the Chinese People's Liberation Army (PLA) for cyber espionage and other offenses that allegedly targeted five U.S. firms and a labor union for commercial advantage, the first time the Federal government has initiated such action against state actors. The named U.S. victims were Westinghouse Electric Co. (Westinghouse); U.S. subsidiaries of SolarWorld AG (SolarWorld); United States Steel Corp. (U.S. Steel); Allegheny Technologies Inc. (ATI); the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW); and Alcoa Inc. The indictment appears to indicate a high level of U.S. government concern about the extent of Chinese state-sponsored cyber commercial theft against U.S. firms. It is not clear how the U.S. indictment will impact U.S.-China relations. China strongly condemned the U.S. indictment and announced that it would suspend its participation in the U.S.-China Cyber Working Group, established in 2013.

FACT 2. Not enough. The Justice Department isn't enough, we need the WTO.

Sen. Chuck Schumer 2014. (D-NY) quoted by journalists James Politi and Shawn Donnan in "US claims victory over China in WTO car dispute" 23 May 2014 http://www.ft.com/intl/cms/s/0/25c785ee-e222-11e3-915b-00144feabdc0.html (Brackets in original)

"Cyber attacks from China and other nations could prove crippling to American businesses in the years to come, so we need real teeth in our response," said Mr. Schumer. "[The Department of Justice] did the right thing in filing these indictments, but the only way to really punish China for these outrageous attacks is through the WTO."

OBSERVATION 3. The HARM. Chinese cyber industrial espionage harms the US and global economies.

Sub-point A. Thousands of companies hacked. Thousands of American companies are victims of Chinese economic cyber espionage

James Lewis 2014. (cyber security expert at the Center for International and Strategic Studies) 19 May 2014 The Obama administration has put China on notice—with indictments for cyber espionage http://www.pri.org/stories/2014-05-19/obama-administration-has-put-china-notice-indictments-cyber-espionage

China is the leading source of economic espionage against the US. An internal study from the Department of Defense showed that Chinese economic espionage dwarfed that of all other countries, including Russia. Last year, the FBI notified 3,000 American companies that they'd been hacked. (That works out to more than eight per day.) It's simply amazing. We're talking huge numbers of incidents and significant economic harm to the US.

Sub-point B. Massive job losses. Chinese industrial espionage costs the US 100,000 to 200,000 jobs

James Lewis 2014. (cyber security expert at the Center for International and Strategic Studies) 19 May 2014 The Obama administration has put China on notice—with indictments for cyber espionage http://www.pri.org/stories/2014-05-19/obama-administration-has-put-china-notice-indictments-cyber-espionage

I find that a really useful argument, because this kind of commercial espionage probably costs the US between 100,000 and 200,000 jobs. It's not that these people are out on the street, although that does happen. It means they go from a high paying job in manufacturing to a low paying job in some kind of service industry. This hurts our economy. China is not playing by the WTO rules. If China wants to be a major power and be a global economic leader, it has to play by the rules.

Sub-point C: Loss of technological innovation. Chinese theft of intellectual property does long-term damage to the US and global economy by destroying business incentives for innovation.

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report" published by the National Bureau of Asian Research http://www.ipcommission.org/report/ip_commission_report_052213.pdf

The scale of international theft of American intellectual property (IP) is unprecedented—hundreds of billions of dollars per year, on the order of the size of U.S. exports to Asia. The effects of this theft are twofold. The first is the tremendous loss of revenue and reward for those who made the inventions or who have purchased licenses to provide goods and services based on them, as well as of the jobs associated with those losses. American companies of all sizes are victimized. The second and even more pernicious effect is that illegal theft of intellectual property is undermining both the means and the incentive for entrepreneurs to innovate, which will slow the development of new inventions and industries that can further expand the world economy and continue to raise the prosperity and quality of life for everyone. Unless current trends are reversed, there is a risk of stifling innovation, with adverse consequences for both developed and still developing countries. The American response to date of hectoring governments and prosecuting individuals has been utterly inadequate to deal with the problem. China has been the principal focus of U.S. intellectual property rights (IPR) policy for many years. As its economy developed, China built a sophisticated body of law that includes IPR protection. It has a vibrant, although flawed, patent system. For a variety of historical reasons, however, as well as because of economic and commercial practices and official policies aimed to favor Chinese entities and spur economic growth and technological advancement, China is the world's largest source of IP theft.

OBSERVATION 4. We offer the following PLAN, to be implemented by the Congress, the President and the US Trade Representative

1. The US trade representative files a formal complaint against China with the WTO over the existing case of 5 PLA officers caught doing industrial cyber espionage.
2. The US trade representative files a new complaint with WTO for every additional Chinese cyber industrial espionage event discovered in the future.
3. Congress votes to impose any retaliatory trade sanctions authorized by WTO.
4. Funding through existing budgets of existing agencies.
5. Enforcement through the Justice Department and all existing agencies that enforce existing trade sanctions.
6. Plan takes effect 3 days after an affirmative ballot.
7. And all affirmative speeches may clarify.

OBSERVATION 4. SOLVENCY. WTO sanctions are the solution. We see this in 2 sub-points

A. We can win. The US can win the WTO complaint

James P. Farwell & Darby Arakelian 2014. (Farwell is an attorney and expert in cyber who has advised the Department of Defense and the U.S. SPECIAL OPERATIONS COMMAND. Arakelian is a former CIA Officer and a national security expert) 20 May 2014 THE NATIONAL INTEREST "China Cyber Charges: Take Beijing to the WTO Instead" http://nationalinterest.org/blog/the-buzz/china-cyber-charges-take-beijing-the-wto-instead-10496

Finally the burden of proof in a WTO proceeding is far easier to sustain than a criminal indictment in U.S. District Courts. Some WTO decisions indicate that once a prima facie case is made, the burden shifts to the party against whom the claim is made. One might argue whether that is the correct standard rather than preponderance of evidence, but clearly WTO proceedings entail a burden of proof that is far less onerous that proving guilty beyond a reasonable doubt. If the U.S. believes it can prove the latter, it clearly must feel the evidence exists to make the far more difficult case required for a criminal conviction.

B. The right solution. A WTO complaint will make China stop piracy

James P. Farwell & Darby Arakelian 2014. (Farwell is an attorney and expert in cyber who has advised the Department of Defense and the U.S. SPECIAL OPERATIONS COMMAND. Arakelian is a former CIA Officer and a national security expert) 20 May 2014 THE NATIONAL INTEREST "China Cyber Charges: Take Beijing to the WTO Instead" http://nationalinterest.org/blog/the-buzz/china-cyber-charges-take-beijing-the-wto-instead-10496

China may dislike the idea of criminal convictions against PLA members in a U.S. court. That's nothing compared to being branded a pirate in a forum of internationally sanctioned justice for theft of intellectual property. If we're going after the Chinese, we need to be hard-nosed and give no quarter. A WTO victory would be substantive and for the Chinese, it would hurt. China won't refrain from piracy because that's the right thing to do. It will act only when it perceives the cost of piracy exceeds the benefits. This is the way to achieve that result.

2A EVIDENCE: WTO RETALIATION FOR CHINESE CYBER PIRACY

DEFINITIONS & BACKGROUND

Distinguishing between traditional national security espionage and industrial espionage: they're not the same thing

Analysis: "Traditional" espionage consists of things like spying to find out how big your opponent's army is or where it's moving. Countries have been doing that since the dawn of time and it's not unusual. Economic espionage is different and should be condemned – it means the government is getting economic information and giving it to businesses within their country.

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

Part III addresses the anormativity surrounding economic cyber espionage. It argues that economic cyber espionage violates well-established norms of customary international law, such as sovereignty, non-intervention, and state responsibility. It discusses how the existing principle of state sovereignty also provides a derivative right to economic sovereignty, which is directly violated by economic cyber espionage. Moreover, to the extent states sponsor the economic cyber-intervention of non-state actors—i.e., cyberspies—those states can be held accountable under the doctrines of state responsibility or non-intervention. In short, Part III argues that economic cyber espionage is illegal under customary principles of international law, even if traditional espionage is not.

OPENING QUOTES / AFFIRMATIVE PHILOSOPHY

We must take action against cyber espionage: Bad behavior has to have consequences

James Lewis 2013. (cyber security expert at the Center for International and Strategic Studies) Feb 2013 Conflict and Negotiation in Cyberspace https://csis.org/publication/conflict-and-negotiation-cyberspace

The key to greater security is to establish consequences for hostile action in cyberspace. The greatest weakness in American cybersecurity policy has been the failure to respond to repeated hostile action by foreign powers. This signals that Americans are either indifferent or inept. The issue is to identify the policies and actions that will reduce the incentives for cyberattack and cyber espionage and to build international support for a more stable and secure cyberspace. Hostile actions in cyberspace must have political and military consequences.

INHERENCY

No WTO cases have been filed yet on commercial cyber espionage

Prof. Stewart S. Malawer 2014. (Professor of Law and International Trade at George Mason University) 23 Dec 2014 "Confronting Chinese Economic Cyber Espionage With WTO Litigation" NEW YORK LAW JOURNAL https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCYQFjAAahUKEwjyw5zz_OLGAhVF8RQKHUCtB3s&url=http%3A%2F%2Fwww.internationaltraderelations.com%2FMalawer.Chinese%2520Economic%2520Cyber%2520Espionage%2520(NYLJ%252012.23.14).pdf&ei=qGGpVfLPJcXiU8DantgH&usg=AFQjCNE3yAJLkl3l1xodaVYv5jXHRBwEmQ&bvm=bv.97949915,bs.1,d.d24

It is clear that TRIPS, adopted in 1994 and effective in 1995, does not explicitly address economic cyber espionage for commercial or trade gain. Of course, it doesn't. The agreement preceded the great changes brought about by the revolution in information and communications technologies in the last 20 years or so. But one needs to see how the general and specific provisions of that agreement, as a multilateral agreement that is intended to govern intellectual property rights, apply to newer events in the future. As of today, no WTO cases have addressed this issue.

The US has not pursued any WTO action against China for cyber espionage

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

At first blush, the WTO thus appears an obvious forum for asserting complaints about economic cyber espionage. Indeed, some experts already "have argued that the United States should use international trade law's protections for intellectual property against countries engaged in economic cyber espionage." However, WTO members have apparently "shown no interest" in pursuing this path, "despite mounting worries about this practice." And the United States has not yet pursued any claim against China for economic cyber espionage through the WTO.

China's not following WTO rules on intellectual property

James Lewis 2014. (cyber security expert at the Center for International and Strategic Studies) 19 May 2014 The Obama administration has put China on notice—with indictments for cyber espionage http://www.pri.org/stories/2014-05-19/obama-administration-has-put-china-notice-indictments-cyber-espionage

It's a hard problem for China. It links to the People's Liberation Army and military modernization. It links to economic growth. And it links to corruption. That's a really tough basket for any government to deal with. This is only the first step in trying to get the Chinese to realize that they've got a problem here. On the US side, nobody forced China to join the World Trade Organization. And when they joined the WTO, they promised to abide by rules, including protection of intellectual property. They haven't abided by those rules. The US is saying, 'China is a country that we want to see grow, but you need to play by the rules.'

Justice Department action alone is unlikely to have measurable impact

Robert Westervelt 2014 (journalist) 20 May 2014 Chinese Cyberespionage Crackdown Prompts Look At Intellectual Property Theft http://www.crn.com/news/security/300072881/chinese-cyberespionage-crackdown-prompts-look-at-intellectual-property-theft.htm

Intellectual property theft was at the heart of a report issued last year by Alexandria, Va.-based Mandiant (acquired by FireEye) on a Chinese group linked to sustained cyberespionage activity. The move by the Justice Department is not likely to have a measurable impact on global espionage, said Jon Heimerl, a senior security strategist at Solutionary, an Omaha, Neb.-based managed service provider and subsidiary of the NTT Group. Private and government-backed espionage will continue regardless of how this particular case progresses, Heimerl said.

Justice Department prosecutions of Chinese military hackers won't have much impact

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 (brackets in original) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

The covert theft of U.S. intellectual property and industrial secrets is well covered by domestic criminal law. For one, the Economic Espionage Act of 1996 directly criminalizes this behavior. The statute provides that economic espionage occurs when an actor knowingly or intentionally commits an offense that "will benefit any foreign government, foreign instrumentality, or foreign agent," and "knowingly": (1) steals or obtains a trade secret by "fraud, artifice, or deception" or by other unauthorized means; (2) "conveys a trade secret" by various methods of copying (without authorization); or (3) "receives, buys, or possesses a trade secret knowing" it was stolen or otherwise taken without authorization. Given the breadth of this statute, it is surely intended to capture economic espionage that is perpetrated in cyberspace and with cybertools. In fact, the United States has recently used this statute to charge five Chinese military hackers for acts of economic cyber espionage, among other crimes, against U.S. companies. In reality, however, a U.S. prosecution for economic cyber espionage likely does not loom large for foreign actors such as these. It has been noted that "[e]spionage is nothing but the violation of someone else's laws."

The Chinese hackers will never really face trial in the US: China will refuse to hand them over

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 (brackets in original)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

Yet, as a practical matter, cyberspies can indefinitely evade prosecution if their host state refuses to cooperate. In the case of China, for example, under the terms of the U.S.-Hong Kong Extradition Treaty, China can refuse to extradite a person within its borders if "surrender implicates the 'defense, foreign affairs or essential public interest or policy' of the People's Republic of China." Thus the efficacy of the United States' criminal action will depend on China's cooperation and the "hope[] that Beijing will 'respect our criminal justice system and let justice take its course.'" But given Chinese officials' denials of economic cyber espionage activities, it seems unlikely that its government will submit the accused to U.S. courts.

China admits that their government does cyber espionage

Robert Hackett 2015 (journalist) Gasp! China admits to having cyber warriors, FORTUNE 26 Mar 2015
https://fortune.com/2015/03/26/china-admits-cyber-warriors/

So China has at last admitted, albeit obliquely, that it sponsors offensive hacker units—martial cyber corps, if you will. It's an unprecedented confession for the state, whose persistent denials have been met for years with the diplomatic equivalent of, "Yeah, right." China's admission, however unsurprising, is a rare ray of light piercing the murky fathoms of international cyber warfare. The news arrived in the most recent edition of The Science of Military Strategy, a much pored-over document produced by China's Academy of Military Sciences, the top research institute of the country's military.

Chinese Army participates in cyber industrial espionage

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report"
http://www.ipcommission.org/report/ip_commission_report_052213.pdf (ellipses in original)

While traditional industrial espionage techniques have been used extensively, cyber methods for stealing IP have become especially pernicious. In a March 2012 report to Congress, the People's Liberation Army (PLA) was identified as a key player, and was noted as often acting in concert with commercial entities. The report suggests that "rather than isolate certain state owned IT firms as exclusively 'defense' in orientation, the PLA…alternately collaborates with China's civilian IT companies and universities." The report concludes that "computer network operations have assumed a strategic significance for the Chinese leadership that moves beyond solely military applications and is being broadly applied to assist with long term strategies for China's national development."

Chinese government has a fully organized system of cyber industrial espionage

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report"
http://www.ipcommission.org/report/ip_commission_report_052213.pdf (brackets in original)

Similarly, Mandiant Corporation's February 2013 study, entitled "Exposing One of China's Cyber Espionage Units," traces Chinese government sponsorship for cyberattacks on IP. All the industries targeted by the PLA unit studied by Mandiant fall into those considered strategic by the PRC, "including four of the seven strategic emerging industries that China identified in its 12th Five-Year Plan." The PLA unit began operations in 2006, the year that the indigenous innovation policy was approved. The purposes of the cyberattacks were found to be straightforward: to commit espionage and steal data. The unit was judged to access networks over months or even years to "steal broad categories of intellectual property, including technology blueprints, proprietary manufacturing processes, test results, business plans, pricing documents, partnership agreements, and emails and contact lists from victim organization's leadership." In the words of the report, "the cyber command is fully institutionalized within the CPC [Communist Party of China] and able to draw upon the resources of China's state-owned enterprises to support its operations."

"China is improving, let's give them time" – Response: We can't afford to wait, we need to act now

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report" http://www.ipcommission.org/report/ip_commission_report_052213.pdf

The Commission has also reviewed the current actions being taken by the U.S. government and international organizations like the World Trade Organization (WTO) and the recommendations of official and private studies of the problem. Both current and proposed actions generally emphasize more intensive government-to-government communication requesting foreign governments to rein in their companies and other actors. The Commission judges that the scope of the problem requires stronger action, involving swifter and more stringent penalties for IP theft. The Commission believes that over the long term, as their companies mature and have trade secrets to protect, China and other leading infringers will develop adequate legal regimes to protect the intellectual property of international companies as well as domestic companies. The United States cannot afford to wait for that process, however, and needs to take action in the near term to protect its own economic interests.

China can't solve IP violations internally

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report" http://www.ipcommission.org/report/ip_commission_report_052213.pdf

In China, for example, the courts are overwhelmed with cases, and judges in the IP courts are spread thinly. Barriers to discovery in China also remain a vexing problem for U.S. parties seeking redress both there and in U.S. courts. Despite improvements in some sectors following China's 2010 Special IPR Enforcement Campaign, the country remained on the "priority watch list" published by the United States Trade Representative (USTR) in 2012 and 2013. The USTR notes that IP protection and enforcement remain a significant challenge.

"UN / International Telecom Union will solve" – Response: It's being run by the biggest violators: China and Russia

Richard Clarke 2013 (chairman of Good Harbor Security Risk Management. He was special adviser to the president for cybersecurity in the George W. Bush administration.) A global cyber-crisis in waiting 7 Feb 2013 WASHINGTON POST http://www.washingtonpost.com/opinions/a-global-cyber-crisis-in-waiting/2013/02/07/812e024c-6fd6-11e2-ac36-3d8d9dcaa2e2_story.html

At the World Conference on International Telecommunications in Dubai last year, global regulations concerning cyberspace were also discussed, but the two major culprits of malicious cyber-activity were at the table dominating the meeting. The conference largely turned out to be an attempt by China and Russia to establish more control of cyberspace through the United Nations-sponsored International Telecommunications Union. Yet it is the Chinese and, to a lesser extent, the Russians who are behind much of the pandemic of online espionage and crime that costs Americans and Europeans hundreds of billions of dollars a year.

Status Quo international efforts won't solve for Chinese economic cyber espionage

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

This anormativity and lack of institutional arrangements for enforcing norms on the international level has created a moral hazard and legal vacuum. In this landscape, economic cyber espionage is arguably perceived by some states, like China and others that are similarly motivated, as a rational strategy for advancing an upward economic trajectory.

Markets won't solve for cybersecurity

James Lewis 2013. (cyber security expert at the Center for International and Strategic Studies) Feb 2013 Conflict and Negotiation in Cyberspace https://csis.org/publication/conflict-and-negotiation-cyberspace

The United States cannot be said to have a strategy to deal with cybersecurity, although several documents bearing the title "Strategy" have been issued by various administrations. There are several reasons for this, the most important being that the United States is hampered by a seductive idea that has dominated American politics for the last 30 years—that the role of government should shrink and that the private sector and market are best placed to solve public problems (thus eliminating the need for taxes). This may have been true in the 18th century, but it is not true now in an interconnected, high-technology security environment.

Private sector can't solve – businesses can't defend themselves against foreign government attacks

James Lewis 2013. (cyber security expert at the Center for International and Strategic Studies) Feb 2013 Conflict and Negotiation in Cyberspace https://csis.org/publication/conflict-and-negotiation-cyberspace

More than a decade of experience illuminates the requirements for strategy. A "homeland defense approach is inadequate because securing a global network is a problem for international security. Voluntary private action, where the disaggregated and uncoordinated actions of companies are pitted against powerful and unscrupulous state actors, is also inadequate. The many successful attacks against companies highlight the difficulties for any private-sector actor to successfully defend against foreign military and intelligence services.

HARMS / SIGNIFICANCE

"US does the same thing, ask Ed Snowden" – Response: NSA was not doing economic espionage

James Lewis 2014. (cyber security expert at the Center for International and Strategic Studies) 19 May 2014 The Obama administration has put China on notice—with indictments for cyber espionage http://www.pri.org/stories/2014-05-19/obama-administration-has-put-china-notice-indictments-cyber-espionage

First, if there was evidence that the NSA stole information to help US companies, don't you think it would have been leaked by now? There is no such evidence. Second, the US has always been really open with China. Espionage is a two-way street. We know great powers engage in espionage. What we object to is commercial espionage.

Important data was stolen by Chinese government agents from US companies

Robert Westervelt 2014 (journalist) 20 May 2014 Chinese Cyberespionage Crackdown Prompts Look At Intellectual Property Theft http://www.crn.com/news/security/300072881/chinese-cyberespionage-crackdown-prompts-look-at-intellectual-property-theft.htm

"The indictment alleges that these PLA [People's Liberation Army, the Chinese Army] officers maintained unauthorized access to victim computers to steal information from those entities that would be useful to their competitors in China, including state-owned enterprises," Holder said. "In some cases, they stole trade secrets that would have been particularly beneficial to Chinese companies at the time they were stolen. In others, they stole sensitive, internal communications that would provide a competitor, or adversary in litigation, with insight into the strategy and vulnerabilities of the American entity." At Westinghouse, the intruders allegedly stole design specifications for pipes, pipe supports and pipe routing designed for nuclear power plant buildings. At aluminum producer Alcoa, one of the hackers allegedly stole thousands of email messages and attachments from the company's systems regarding a partnership between Alcoa and a Chinese state-owned company.

Chinese cyber espionage is the greatest transfer of wealth in history

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

Though there are no doubt other actors who have resorted to economic cyber espionage, Chinese actors appear to be at least one significant source of this activity. In the past few years, China has reportedly attacked many sectors of the U.S. economy and agencies critical to our national security, penetrating the online systems of the U.S. Departments of Homeland Security and State, Coca-Cola, Lockheed Martin, Dow Chemical, Adobe, Yahoo!, and Google, to name just a few. According to General Keith B. Alexander, head of the United States Cyber Command and director of the National Security Agency, these cyber "attacks have resulted in the 'greatest transfer of wealth in history.'"

Intellectual Property theft hurts world economic growth, and it's an urgent issue now

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report" *http://www.ipcommission.org/report/ip_commission_report_052213.pdf*

Because IP theft is not a new phenomenon, it is important to understand why it is an urgent issue now. Compared with prior eras, today's economic world is far more interconnected and operates at a far higher speed, with product cycles measured in months rather than years. Companies in the developing world that steal intellectual property from those in the developed world become instant international competitors without becoming innovators themselves. Bypassing the difficult work of developing over decades the human talent, the business processes, and the incentive systems to become innovators, these companies simply drive more inventive companies in the developed world out of markets or out of business entirely. If more and more companies compete for the same amount of business using the same technology and processes, growth stagnates. It is only through innovation that world economic growth can be sustained.

Cyber industrial espionage is NOT the same as, and should NOT be accepted as, military/national security spying

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 (brackets in original) *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326*

As one scholar has argued, in this way states "preserve[] the practice [of espionage] as a tool by which to facilitate international cooperation." On this view, the "rules" of espionage are not prescribed by law, but rather "are situational." However, it would be a mistake to afford the same legal treatment to economic cyber espionage. For one, unlike traditional espionage, economic cyber espionage takes place on a much larger scale. The volume of information stolen via cyberspace, using cybertools, is much more significant and happens at a quicker pace than traditional human or technical intelligence gathering. Moreover, the penetration of computer systems and databases is far more difficult to detect and stop than traditional human espionage. Finally, with economic espionage, there is no custom of reciprocity or cooperation that states should be concerned about preserving. With traditional espionage, which focuses on state strategy and military capacity, one can assume that state spying ensures the collective security of all nations. A state's knowledge about its neighbors' military capabilities allows it to hedge against or prevent a threat. This, in turn, might decrease the likelihood of any successful or surprise attack. In this way, traditional espionage functions as a structural constraint against open conflict and preserves global stability. Yet there is no such corresponding benefit to global security that accrues from economic cyberespionage. In the most likely scenario, the states that perpetrate this economic spying are motivated to do so because they are still developing and lack desirable technology, innovation, or best practices. Therefore, no state would be incentivized to preserve its option to return the favor. The spying state merely harms the victim state's incentive to innovate, natural comparative advantages, and robustness as a trading partner. For these reasons, it is a mistake not to draw any legal distinction between traditional espionage and economic cyber espionage.

SOLVENCY / ADVOCACY

Criminal indictment isn't enough, we need the WTO. It would deal a blow to Chinese cyber piracy

James P. Farwell & Darby Arakelian 2014. (Farwell is an attorney and expert in cyber who has advised the Department of Defense and the U.S. SPECIAL OPERATIONS COMMAND. Arakelian is a former CIA Officer and a national security expert) 20 May 2014 THE NATIONAL INTEREST "China Cyber Charges: Take Beijing to the WTO Instead" *http://nationalinterest.org/blog/the-buzz/china-cyber-charges-take-beijing-the-wto-instead-10496*

The criminal indictment of five People Liberation Army officers for hacking into the computers of six U.S. companies for economic espionage to steal trade secrets and sensitive information sends a message but the bite has no teeth. The better way to hold China accountable is to take them to a World Trade Organization panel, which could issue a ruling that deals Chinese cyber piracy a telling blow. The TRIPS Agreement (Trade Related-Aspects of Intellectual Property Rights) provides specific protection against theft of intellectual property. It would enable the U.S. to accomplish confluent goals more effectively than a criminal prosecution that the U.S. will never be able to enforce.

WTO complaints would be effective at curbing cyber espionage violations

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

This Article urges the international community to respond to the normative and institutional gap in the law in order to treat the problem of economic cyber espionage. In so doing, the Article explains how certain norms of public international law can be said to apply to cyber espionage and should be incorporated into the existing treaty-based framework of the World Trade Organization (WTO). The Article also explains why pressing claims in the WTO would be effective against perpetrators of economic cyber espionage. Namely, this approach would both solidify customary norms against economic cyber espionage and leverage a credible source of authority to curb cyber-violations.

WTO is the right forum to address Chinese cyber industrial espionage, and it would be effective at stopping it

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

This Part argues that an international economic institution like the WTO is the most appropriate and effective forum for regulating economic cyber espionage, particularly when perpetrated by states motivated by the simultaneous desire for economic expansion and economic integration, such as China. The WTO provides a legal framework already dedicated to fair trade and competition, and it has the power and authority necessary to ensure compliance with its judgments. This Part first considers how the WTO rules of law fit together with the customary principles developed in Part III. It argues that certain WTO rules, when considered through the lens of a contemporary right to economic sovereignty, protect member states against economic cyber espionage. This Part also argues that the right to economic sovereignty—and a state's corresponding obligation to refrain from economic cyber espionage—can be asserted within the WTO's existing dispute settlement framework. Finally, this Part details how a trade-based system would be effective in halting and deterring illegal cyber conduct in the case of China.

China would comply with WTO ruling on a US complaint about economic cyber espionage

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

By interpreting the WTO treaty rules in the context of the lex generalis of economic sovereignty and non-economic intervention, member states may arguably assert a claim under the WTO's Dispute Settlement Understanding ("DSU") against any member state that engages in or sponsors economic cyber espionage. On that basis, Part IV urges the United States to assert a claim in the WTO against member states that violate its economic sovereignty through economic cyber espionage. In the specific case of China, Part IV argues that the WTO—as the anchor of the international economic order and thus a necessary role-player in China's plan to obtain superpower status—has the ability to ensure Chinese compliance. And given the procedures of the WTO dispute resolution mechanism, China would be likely to engage cooperatively with the process, avoiding unnecessary confrontation between the United States and China or a deterioration in U.S.-Sino relations.

WTO complaint would have an immediate effect on Chinese decision-making

James Lewis 2013. (cyber security expert at the Center for International and Strategic Studies) Feb 2013 Conflict and Negotiation in Cyberspace https://csis.org/publication/conflict-and-negotiation-cyberspace

One area of consequence that the United States has never pursued is in the WTO. The explanation for this is that the WTO processes themselves are very legalistic and that the United States for many years has lacked a strategic vision for international trade. Trade lawyers will tell you that in the absence of compelling evidence, there is no way to take cyber espionage and the theft of IP before the WTO. This is far too timid. A state always has the right to exercise "force majeure," to go to a body and say that it agreed to procedures and concession on the grounds that other parties would similarly honor their commitments, and since they are not, the agreement no longer holds. This is a major step, but even to discuss it would raise the stakes for China and others to continue their camping of espionage and the theft of IP. The United States could probably also find major economic partners that would be willing to join it in this effort. Some would say that this would risk the collapse of the WTO, but a carefully managed discussion of repercussions for economic espionage could mitigate this risk. China and others might threaten to withdraw, but they are unlikely to do so as they benefit the most from the agreement. An astute diplomatic strategy would first pose the issues before taking any formal action. Even a credible hint that the United States is considering this would have an immediate effect on Chinese decision making.

Best approach is to file a WTO complaint before doing sanctions: China has a good record of following the WTO dispute resolution system

Prof. Stewart S. Malawer 2014. (Professor of Law and International Trade at George Mason University) 23 Dec 2014 "Confronting Chinese Economic Cyber Espionage With WTO Litigation" NEW YORK LAW JOURNAL https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCYQFjAAahUKEwjyw5zz_OLGAhVF8RQKHUCtB3s&url=http%3A%2F%2Fwww.internationaltraderelations.com%2FMalawer.Chinese%2520Economic%2520Cyber%2520Espionage%2520(NYLJ%252012.23.14).pdf&ei=qGGpVfLPJcXiU8DantgH&usg=AFQjCNE3yAJLkl3l1xodaVYv5jXHRBwEmQ&bvm=bv.97949915,bs.1,d.d24

It is interesting to point out that in a recent corporate filing with the U.S. Department of Commerce (International Trade Administration) concerning the import of solar panels from China, a U.S. firm is asking for higher tariffs to counter the Chinese government's hacking and theft of trade secrets from it. This case could give the Obama administration another statutory means of imposing unilateral restrictions. This would be via the actions of the two agencies (the U.S. Department of Commerce and the U.S. International Trade Commission) charged with administering trade remedy laws.
Conclusion
The best approach is for the United States to file an action in the WTO to receive the blessings of the WTO before imposing sanctions. This would garner the most international support for U.S. actions. The fact of the matter is that China has a pretty good record of observing recommendations of the WTO's dispute resolution system. It has found it to be in its national interest.

Fidler is wrong: WTO is the right forum to dispute Chinese cyber industrial espionage

Prof. Stewart S. Malawer 2014. (Professor of Law and International Trade at George Mason University) 23 Dec 2014 "Confronting Chinese Economic Cyber Espionage With WTO Litigation" NEW YORK LAW JOURNAL http://www.newyorklawjournal.com/id=1202712784205/Confronting-Chinese-Economic-Cyber-Espionage-With-WTO-Litigation?slreturn=20150431145551

Two pieces published by David Fidler from Indiana Law School last year argued that the WTO is not an appropriate venue for addressing economic cyber espionage by China. His three arguments can be summed up as making the following points: that intellectual property rights are granted and protected by TRIPS on a territorial basis, burden of proof is difficult to carry in the dispute resolution system, and there is a lack of public international law on economic espionage. My response is that cyber actions by China outside of its territory but with effects and benefits within its territory, as to its own firms, are reasonably included within the language of the National Treatment Principle of TRIPS. The burden of proof in WTO's trade and commercial proceedings is much less stringent than in criminal proceedings against Chinese officials in the United States. The WTO proceedings are not criminal but typical trade disputes. We are not talking about public international law and 'economic' espionage generally but only the more properly termed 'commercial' espionage against specific firms in the context of particular WTO obligations.

Fidler is wrong: WTO rules can and should apply to international cyber espionage

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 (brackets and ellipses in original) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

As David Fidler points out, WTO members would likely agree that to "covertly obtain intellectual property of nationals of other WTO members operating in their territories could violate WTO obligations to protect such property." But whether members would also consider WTO rules violated where a member state obtained such "information from private sector entities located outside their territories" remains an open question. Member states may thus assume that there is no basis for claiming economic cyber espionage violates the TRIPS Agreement because WTO rules create obligations for WTO members to fulfill within their territories and do not generally impose duties that apply outside those limits." This assumption may prove too much. If a member state's actions taken from within its territory infringe on another member state's intellectual property rights, should not the WTO rules apply? That the harm is done in cyber space seems a poor reason to limit application of the TRIPS Agreement, which was, in any event, negotiated before the rise of cyber threats to trade and intellectual property rights. After all, the general goals of the TRIPS Agreement, found in its preamble, are to "reduce distortions and impediments to international trade . . . [and] promote effective and adequate protection of intellectual property rights." In short, to remain relevant, the WTO Agreements must consider the possibility of cyber violations.

WTO's "TRIPS" [Trade-Related Aspects of Intellectual Property Rights] agreement can and should cover cyber piracy

Christina Skinner 2014 (law degree from Yale Law School) "An International Law Response to Economic Cyber Espionage" CONNECTICUT LAW REVIEW May 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305326

No TRIPS provision has explicitly (and entirely) contracted out of the fundamental tenants of state sovereignty and state responsibility. Nor is TRIPS inconsistent with these general principles. The economic corollaries of sovereignty and non-intervention—in addition to the well-recognized requirement to comply with one's treaty obligations in good faith—should therefore give rise to a cognizable claim that economic cyber espionage violates TRIPS. On this view, the WTO agreements would not exclude a claim of economic cyber espionage simply because the conduct "involves governments obtaining information from private-sector companies located outside their territories." Arguably, it would be contrary to both the letter and spirit of the WTO agreements to fail to recognize such a claim.

DISADVANTAGE RESPONSES

"Starting a trade war" – Response: We're already in a trade war

Prof. Peter Navarro 2012 (professor at the Paul Merage School of Business, University of California-Irvine) China's Currency Manipulation: A Policy Debate, FOREIGN AFFAIRS Sept/Oct 2012
http://www.worldaffairsjournal.org/article/china%E2%80%99s-currency-manipulation-policy-debate

Richard McCormack, the editor and publisher of Manufacturing & Technology News, gets to the heart of the mercantilist matter by observing, "For China to sell something at one tenth the price of what it would cost in the United States to produce, they are cheating monumentally, in a major, massive sort of way." According to Dan Slane, head of the US-China Economic and Security Review Commission, "We are in a trade war and stealing, lying, and cheating on the part of the Chinese are all part of it."

"US / China War Risk" – Response: Won't happen; everyone knows it would be too catastrophic

Zack Beauchamp 2014 (master's degree in International Relations from the London School of Economics) 7 Feb 2014 Why Everyone Needs To Stop Freaking Out About War With China
http://thinkprogress.org/world/2014/02/07/3222021/china-japan-war/

But there's one big factor shaping the balance of power in East Asia that means the talk is likely to remain just that: nuclear weapons. The tagline for World War I in 1914—"The War To End All Wars"—would have a decidedly different meaning in 2014, as war's end would be accomplished by the world's end. So whereas, in 1914, all of the European powers thought they could win the war decisively, East Asia's great powers recognize the risk of a nuclear exchange between the United States and China to be catastrophic. Carleton University's Stephen Saideman calls this the end of the "preemption temptation;" nobody thinks they can win by striking first anymore.

"US / China War Risk" – Response: No brink. China is not aggressive and not even close to considering acts of war

Zack Beauchamp 2014 (master's degree in International Relations from the London School of Economics) 7 Feb 2014 Why Everyone Needs To Stop Freaking Out About War With China
http://thinkprogress.org/world/2014/02/07/3222021/china-japan-war/

First, while it's easy to see China as an aggressive expansionist power bent on retaking its "rightful place" in East Asia by force, that's simply inconsistent with China's track record to date. In an influential 2003 article, Iain Alasdair Johnston, a professor of "China in World Affairs" at Harvard, argued that there's overwhelming evidence China is more-or-less happy with the current international order. Johnston tested various measures of Chinese interest in upending the global order—like its willingness to work inside the U.N. and internal dialogues within PRC strategists about overtaking the United States—and found very little evidence of China seeking to overturn the global structure, including the U.S.–Japan–Korea alliance system that sets the terms in East Asia. "The regime appears to be unwilling," according to Johnston, "to bear the economic and social costs of mobilizing the economy and militarizing society to balance seriously against American power and influence in the region, let alone globally."

"WTO sanctions will start trade war with China" – Response: Didn't happen the last time we filed complaints, back in '07. WTO process doesn't lead to trade wars

Daniel J. Ikenson 2007. (director of Cato Institute's Herbert A. Stiefel Center for Trade Policy Studies; former director of international trade planning for an international accounting and business advisory firm; co-founded the Library of International Trade Resources (LITR), a consulting firm providing interactive information access and international trade consulting. M.A. in economics from George Washington University) Growing Pains: The Evolving U.S.-China Trade Relationship 7 May 2007 http://www.cato.org/publications/free-trade-bulletin/growing-pains-evolving-us-china-trade-relationship

Although some suggest that recent U.S. actions will spark a trade war with China, such an outcome is unlikely. For starters, tit-for-tat trade wars between WTO members are unheard of. The WTO was created, in part, so that trade wars would be relegated to history. Under the rules-based system of trade, members can retaliate in response to an action or inaction of another member only when such a course has been authorized by the Dispute Settlement Body, and only in measured proportions.

"Hurts US/China relations" – Response: Non-unique. China has already given up on meaningful relationship with the US

Stephen Harner 2015. (worked in Japan for more than 12 years in the eighties and nineties with the U. S. State Department, Citibank and Merrill Lynch. After many more years in China in banking (Deutsche Bank and Ping An Bank) and consulting, now works in Tokyo for Yangtze Century Ltd. (Hong Kong/Shanghai)) 18 Feb 2015 FORBES magazine Has China Given Up On The U.S.? Short Answer: Yes
http://www.forbes.com/sites/stephenharner/2015/02/18/has-china-given-up-on-the-u-s-short-answer-yes/

Of course, it is easy for those of a Panglossian mentality—i.e., most of the mainstream commentariat toward the policies of the Obama administration–to be misled or encouraged to think that all is–or soon will be—right with the world, to view any development in China-U.S. relations in a positive light, as a signal of steadily and inevitably improving relations, if not systematic convergence." Such has been the general reception of Chinese President Xi Jinping's acceptance of Obama's invitation to make a "state visit" to Washington, D.C. in September. A more objective and sober assessment would question whether the Obama administration extended the invitation at the state visit level as a needed inducement to a China reluctant to accept it. Why might China be reluctant? It is because, after four years of sincere and painstaking, but fruitless, unreciprocated Chinese efforts to initiate a "new type of great power relations" with the United States—rather, meeting only the seemingly unstoppable bureaucratic momentum of the administration's bellicose political/military power "pivot (or "rebalance") to Asia"–China has largely given up on beginning a meaningful, positive reset of China-U.S. strategic relations. Now, instead, China has embarked on what is being termed by some its own "pivot to Asia"–redirecting its foreign policy and strategic emphasis to its regional neighbors, and to the regions and countries along its New Maritime Silk Road and New Silk Road.

NEGATIVE BRIEF: CHINESE CYBER PIRACY

NEGATIVE PHILOSOPHY

Fears of Chinese cyber threat are exaggerated

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/international_security/v039/39.3.lindsay.pdf

Exaggerated fears about the paralysis of digital infrastructure and the loss of competitive advantage contribute to a spiral of mistrust in U.S.-China relations. In every category of putative Chinese cyber threat, there are also considerable Chinese vulnerabilities and Western advantages. China has inadvertently degraded the economic efficiency of its networks and exposed them to foreign infiltration by prioritizing political information control over technical cyber defense. Although China also actively infiltrates foreign targets, its ability to absorb stolen data is questionable, especially at the most competitive end of the value chain, where the United States dominates.

International trade law is the wrong forum to deal with any form of espionage

Prof. David Fidler 2013. (Visiting Fellow for Cybersecurity at the Council on Foreign Relations and is the James Louis Calamaras Professor of Law at Indiana Univ.) 11 Feb 2013 Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage http://armscontrollaw.com/2013/02/11/why-the-wto-is-not-an-appropriate-venue-for-addressing-economic-cyber-espionage/

The potential for trade relations to deteriorate into something more dangerous helps explain why states have never considered international trade law and institutions as appropriate instruments for addressing national security threats posed by any form of espionage.

INHERENCY

1. China is improving

Industrial espionage is done by private parties, and the Chinese government is getting better at stopping it. We need to let the justice system deal with it, not strategic diplomacy.

Greg Austin 2013. (Professorial Fellow with the East-West Institute in New York and a Visiting Professor at the Australian Centre for Cyber Security in the University of New South Wales at the Australian Defense Force Academy) 26 Sept 2013 China's Cyber Espionage Priorities http://ewipolicy.tumblr.com/post/62325267109/chinas-cyber-espionage-priorities

Stamping out this public-private espionage at the source is probably not a high priority for Chinese leaders. They do not have the political will to look that deeply into the activities of intelligence agencies. They may and indeed can only respond to facts on the ground that reveal the IP theft through physical production based on it. For fifteen years, China has—in good faith—been progressively strengthening its intellectual property rights (IPR) regime as a primary foundation of its own national innovation strategy. It may be a long way from the standards of the IPR regimes elsewhere, but the civil legal system, not strategic diplomacy, has to be the locus of Western sanction against Chinese actors for cyber-assisted IP theft.

HARMS/SIGNIFICANCE

1. US does the same thing

Who are we to complain? Snowden proves the US does the same thing

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

Indeed, the intelligence leaks from Edward Snowden in 2013 underscored the sophistication and extent of internet surveillance by the United States and its allies against targets worldwide, including in China. The Snowden revelations not only invigorated debate about the balance between security and privacy in a democracy but also undercut the moral force of American complaints about Chinese penetration of commercial, government, and defense networks. Chinese writers hasten to compare the United States to "a thief crying stop thief."

US spying DOES help US firms economically

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

A White House spokesperson insisted, "We do not give intelligence we collect to U.S. companies to enhance their international competitiveness or increase their bottom line." In practice, however, this line can blur. The U.S. government might spy on a foreign trade delegation to improve its position in negotiating trade agreements, which would benefit U.S. firms indirectly. It might spy on foreign defense firms and pass on weapon designs to U.S. contractors to develop countermeasures or future requirements, which could improve their profitability.

US intelligence activities offset China's economic spying: Net result is no clear advantage for either one

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

The chairman of the U.S. House Intelligence Committee alleged that there "is a concerted effort by the government of China to get into the business of stealing economic secrets to put into use in China to compete against the U.S. economy." Director of the National Security Agency Gen. Keith Alexander described the result of this effect as "the greatest transfer of wealth in history." Chinese espionage activity alone, however, cannot produce this result. To realize competitive advantage, China needs to be able to absorb and apply the data it steals. Moreover, the United States is also a formidable intelligence actor, which can be expected to offset Chinese advantages to some degree. The category of contested cyberspace highlights the increasing intensity of intelligence competition, not a clear advantage for one side or the other.

US spying is what's hurting US business competitiveness, not Chinese spying

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf (brackets added)

Some of the Snowden leaks suggest a combination of witting and unwitting assistance to the NSA from U.S. internet firms, ranging from the sharing of metadata and technical design information to exploitation of technical control points in cloud infrastructure located on U.S. soil. Notably, it took an insider leak to compromise the NSA, but lax operator tradecraft has compromised Chinese CNE; this imbalance suggests a higher degree of competency and attention to detail in U.S. tradecraft. Ironically, and contrary to the death-by-a-thousand-cuts narrative, it may be American CNE [computer network exploitation] against China, rather than Chinese CNE against the United States, that ends up adversely affecting the competitiveness of American firms. The Snowden trove has provided China with credible evidence of CNE via some major American internet firms. This, in turn, has prompted a wider backlash against the "eight King Kongs" (bada jingang)—Apple, Cisco, Google, IBM, Intel, Microsoft, Oracle, and Qualcomm. Cisco reported an 18 percent drop in orders from China in the fall quarter of 2013, while Hewlett-Packard, IBM, and Microsoft also reported declining Chinese sales.

2. Threat is receding

Increased awareness motivates companies to take more defensive measures now. Golden age of hacking may be over

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction *http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf*

Prior to 2010, Western firms could be accused of complacency regarding cybersecurity. Since then, however, Western cybersecurity defenses, technical expertise, and government assistance to firms have improved. Also, the increased reporting on long-duration APTs (i.e., those that might be expected to be the most difficult to root out) may reflect a growing discovery rate of hard-to-find APTs by network defenders. The potential improvement in Western cyber defense stands in stark contrast to the popular perception of helplessness in the face of growing Chinese intrusion threats. It is possible that one day Chinese cyber operators may look back on 2010–13 much the way German submariners looked back on the "happy time" of 1940–41—namely, as a brief period rich in easy targets before victims learned how to develop active tracking and countermeasures to protect themselves.

3. Useless data

They collect cyber industrial espionage data, fine: But then what do they do with it?

Greg Austin 2013. (Professorial Fellow with the East-West Institute in New York and a Visiting Professor at the Australian Centre for Cyber Security in the University of New South Wales at the Australian Defense Force Academy) 26 Sept 2013 China's Cyber Espionage Priorities *http://ewipolicy.tumblr.com/post/62325267109/chinas-cyber-espionage-priorities*

As we contemplate the international threat picture for cybersecurity, how can we evaluate claims about China's cyber espionage intended to aid Chinese firms in production of items copied from competitors' designs? According to some sources, the country is engaged in the biggest illicit transfer of wealth in history through the theft of intellectual property from the United States and other advanced economies. The United States has, according to newspaper reports, compiled several case studies demonstrating specific IP theft by Chinese government actors that has been converted to competitor production and that undercut the original American IP owner's profitability. Beyond these few cases, one of the gaps in the publicly available allegations is a fine-grained and comprehensive analysis of how exactly Chinese intelligence agencies handle the information they are allegedly vacuuming up by the terabyte. Do they have an army of technically skilled translators who immediately render all documents into Chinese? Or is there an intermediary team of technically qualified staff brought in from China's R&D establishments, specific to each design secret being reviewed, to make a judgment that a particular document needs to be translated and then to determine who in the industry should receive it to set about copying it? In the absence of any discussion in public by United States official sources of this sort of fine-grained detail, we are left to make our own thinly-sourced assessment.

China has trouble actually doing anything useful with the stolen data

Dr. Jon R. Lindsay 2015 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) May 2015 "Exaggerating the Chinese Cyber Threat" *http://belfercenter.ksg.harvard.edu/publication/25321/exaggerating_the_chinese_cyber_threat.html*

There is strong evidence that China continues to engage in aggressive cyber espionage campaigns against Western interests. Yet it struggles to convert even legitimately obtained foreign data into competitive advantage, let alone make sense of petabytes of stolen data. Absorption is especially challenging at the most sophisticated end of the value chain (e.g., advanced fighter aircraft), which is dominated by the United States. At the same time, the United States conducts its own cyber espionage against China , as the Edward Snowden leaks dramatized, which can indirectly aid U.S. firms (e.g., in government trade negotiations). China's uneven industrial development, fragmented cyber defenses, erratic cyber tradecraft, and the market dominance of U.S. technology firms provide considerable advantages to the United States.

They don't have the skills to do much with stolen technology: too much bureaucracy and not enough technical skills

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

China faces major challenges in converting foreign inputs into innovative output given the notoriously compartmentalized and hierarchical nature of Chinese bureaucracy, underdeveloped high-end equipment manufacturing capacity, and chronic dependence on foreign technology and know-how. Reliance on Russia for fighter jet engines despite years of access to technical design information and assistance from Russian technicians is a particularly notable but hardly unique example in the Chinese defense industry. Foreign expertise is only one input in the overall innovation process, which also requires "hard" factors such as materials, universities, skilled labor, laboratories, and factories, as well as "soft" factors such as leadership, regulation, contract enforcement, standards and protocols, and an innovative culture. The utility of even the best CNE [computer network exploitation] is sensitive to the performance of the rest of these factors working in synergy, and China still has far to go in integrating them.

Just because they're stealing tons of data doesn't mean they know what to do with it

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf *(brackets added)*

Remote access to target networks is only the first step toward developing an intelligence advantage, much less downstream competitive advantage. Although Western cyber defenders can observe the exfiltration of petabytes of data to Chinese servers, they cannot so readily measure China's ability to use the data. It is possible, for example, that operators in the Third Department of the PLA General Staff are simply rewarded for the number of foreign targets penetrated and terabytes exfiltrated, with little attention to the satisfaction of the intelligence customer, thereby creating lots of measurable CNE [computer network exploitation] with little improvement in national competitiveness. The acquisition, absorption, and application of foreign information from any source is a complicated process. Transaction costs at every step along the way caused by information overload, analytic misinterpretation, or bureaucratic silos can undermine the translation of stolen data into new production knowledge and successful competition in the marketplace.

China can't easily absorb the information it gets and probably won't get any enduring technical advantage

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

Chinese espionage is impressive in its scope, but it does not translate easily into industrial absorption, which is a prerequisite for competitive advantage. Furthermore, U.S. intelligence appears to be more technically adept, even if its target set differs somewhat from China's. Both sides are engaged in commercial and intelligence contests using a range of political, economic, and technical tools. Charges of unfair competition and attempts to redress it will remain a chronic feature of U.S.-China relations. There is no reason to expect the side playing catch-up to realize an enduring advantage for technical reasons alone.

4. Not much US business impact to IP theft

Loss of a trade secret from cyber espionage does not automatically result in economic damage

Greg Austin 2015. (Professorial Fellow with the East-West Institute in New York and a Visiting Professor at the Australian Centre for Cyber Security in the University of New South Wales at the Australian Defense Force Academy) China's Cyberespionage: The National Security Distinction and U.S. Diplomacy, May 2015 http://thediplomat.com/wp-content/uploads/2015/05/thediplomat_2015-05-21_22-14-05.pdf

In the indictments, the United States says it has evidence of transfer of trade secrets to civil sector companies in the cases of Westinghouse and USS, but while other instances have been asserted, few have been evidenced. It is axiomatic that loss of a trade secret does not automatically convert to damaging competition any more than theft of credit card details translates into losses for all of the victims. In fact, very few people suffer personal financial losses as result of the theft and illegal sale of millions of credit card details.

US business impacts of Chinese industrial cyber espionage are exaggerated

Dr. Jon R. Lindsay 2015 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) May 2015 "Exaggerating the Chinese Cyber Threat" http://belfercenter.ksg.harvard.edu/publication/25321/exaggerating_the_chinese_cyber_threat.html

The rhetorical spiral of mistrust in the Sino-American relationship threatens to undermine the mutual benefits of the information revolution. Fears about the paralysis of the United States' digital infrastructure or the hemorrhage of its competitive advantage are exaggerated. Chinese cyber operators face underappreciated organizational challenges, including information overload and bureaucratic compartmentalization, which hinder the weaponization of cyberspace or absorption of stolen intellectual property. More important, both the United States and China have strong incentives to moderate the intensity of their cyber exploitation to preserve profitable interconnections and avoid costly punishment. The policy backlash against U.S. firms and liberal internet governance by China and others is ultimately more worrisome for U.S. competitiveness than espionage; ironically, it is also counterproductive for Chinese growth. The United States is unlikely to experience either a so-called digital Pearl Harbor through cyber warfare or death by a thousand cuts through industrial espionage.

5. Turn: Hacking leads to Chinese technological dependency – may hurt them more than it helps

Reliance on industrial espionage locks them into permanent "second place" status. Example: Soviets during Cold War

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf (brackets added)

The Soviet Union's reliance on systematic industrial espionage to catch up with the West provides a cautionary tale: the Soviet system became optimized for imitation rather than innovation and was thus locked into a form of second-place dependency, even as it shortened research and development timelines. Chinese espionage can potentially narrow the gap with the West, but only at the price of creating dependency through investment in a large-scale absorption effort. Chinese CNE [computer network exploitation] poses a genuine intelligence threat, to be sure, but it is neither singularly grave nor unprecedented.

6. [In case AFF plan links industrial espionage into Chinese military threats] No Chinese military threat from hacking

US/China economic cyber threats will not escalate into a cyber war, nor a conventional war

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction
http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

This article argues that for every type of purported Chinese cyber threat, there are also serious Chinese vulnerabilities and Western strengths that reinforce the political status quo. Cyberwar between the United States and China, much like U.S.-China conventional war, is highly unlikely. Nevertheless, the economically driven proliferation of information technology enables numerous instances of friction to emerge below the threshold of violence.

Chinese Army (PLA) would be disadvantaged in a cyber war: The US military is better prepared

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction
http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

If cyberwarfare is as effective as Chinese writers believe it is but they underestimate the costs of mastery, then the PLA is doubly disadvantaged. Chinese attacks can be expected to be less skillfully coordinated against more robust U.S. defenses, and vice versa. The United States already has, while China still struggles to develop, the institutional complements and experience required to plan and control cyber operations in synchrony with the larger battle. Meanwhile the fear of cyberwarfare has prompted considerable U.S. military investment in network protection, active cyber defense measures (e.g., counterintelligence deception and “hack back” counterattack), and exercises in cyber-degraded conditions. The vaunted asymmetry of cyberwarfare, usually posed as an advantage for the weaker power, in fact runs in the opposite direction, giving the stronger and more experienced force the advantage.

China’s military cyber capabilities aren’t a big threat

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction
http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

Despite high levels of Chinese political harassment and espionage, there is little evidence of skill or subtlety in China's military cyber operations. Although Chinese strategists describe cyberspace as a highly asymmetric and decisive domain of warfare, China's military cyber capacity does not live up to its doctrinal aspirations. A disruptive attack on physical infrastructure requires careful testing, painstaking planning, and sophisticated intelligence. Even experienced U.S. cyber operators struggle with these challenges. By contrast, the Chinese military is rigidly hierarchical and has no wartime experience with complex information systems. Further, China's pursuit of military "informatization" (i.e., emulation of the U.S. network-centric style of operations) increases its dependence on vulnerable networks and exposure to foreign cyberattack. To be sure, China engages in aggressive cyber campaigns, especially against nongovernmental organizations and firms less equipped to defend themselves than government entities. These activities, however, do not constitute major military threats against the United States, and they do nothing to defend China from the considerable intelligence and military advantages of the United States.

China’s economic and military cyber capabilities are exaggerated: The gap between them and us is growing (i.e. US capabilities are rising faster than theirs and leaving China behind)

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction
http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

Although China also actively infiltrates Western networks, its ability to absorb stolen data is questionable, especially at the most competitive end of the value chain, where the United States dominates. Similarly, China’s military cyber capacity cannot live up to its aggressive doctrinal aspirations, even as “informatization” creates vulnerabilities that more experienced foreign cyber operators can attack. Outmatched by the West, China has resorted to a strategy of institutional reform, but it benefits too much from multi-stakeholder governance to pose a credible alternative. The secrecy of cyber capabilities and operations on all sides makes it difficult to estimate with confidence the magnitude of the gap between China and the United States in the balance of cyber power, but it is potentially growing, not shrinking.

SOLVENCY

1. Wrong target. Affirmative wants to sanction the Chinese government, but they're not the primary culprit.

Chinese IP theft is mainly a private, not government, activity

Greg Austin 2013. (Professorial Fellow with the East-West Institute in New York and a Visiting Professor at the Australian Centre for Cyber Security in the University of New South Wales at the Australian Defense Force Academy) 26 Sept 2013 China's Cyber Espionage Priorities http://ewipolicy.tumblr.com/post/62325267109/chinas-cyber-espionage-priorities

I believe that China would devote most of its IP espionage activities to purposes other than industrial production in China based on that IP. Relying on the small amount of public evidence available, I find it hard to credit the "illicit transfer of wealth theory"—the belief that cyber espionage by the Chinese government is a threat to United States industrial security because of production based on the IP thus obtained. Based on what I know about the high impunity enjoyed by cyber criminals everywhere and what I know about Chinese legal and corporate culture, I am more inclined to think the that stealing of IP through cyber means by Chinese actors with a view to replicating it for the market is mainly a private activity in China, perhaps with intelligence officials involved on an unauthorized basis.

US government study says Chinese industrial hacking mostly isn't coming from the Chinese government

Greg Austin 2015. (Professorial Fellow with the East-West Institute in New York and a Visiting Professor at the Australian Centre for Cyber Security in the University of New South Wales at the Australian Defense Force Academy) China's Cyberespionage: The National Security Distinction and U.S. Diplomacy, May 2015 http://thediplomat.com/wp-content/uploads/2015/05/thediplomat_2015-05-21_22-14-05.pdf (brackets added)

For that reason, the [U.S. National Counter Intelligence Executive] 2009-2011 report concentrates on cyber espionage, while keeping up past practice of reporting on other means. The report cites one China-related example from the military sector and one from the civil sector on trade secret theft, and reports that six of the seven cases prosecuted under the Economic Espionage Act in 2010 involved Chinese entities. The report alluded to an "onslaught" of China-related cyberattacks but noted that the U.S. intelligence community "has not been able to attribute many of these private sector data breaches to a state sponsor". It noted that some private sector companies it had consulted reported Chinese attacks, asserting a variety of differing private or governmental purposes.

2. WTO dispute mechanism takes too long

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report" http://www.ipcommission.org/report/ip_commission_report_052213.pdf

A qualified success, WTO dispute mechanisms have seen more than 339 settlement reports and arbitration awards issued by the organization's dispute body from 1995 (its year of inception) through 2011. Of these, the United States participated in 140. Participation rates notwithstanding, WTO dispute mechanisms have several problems. Chief among these is the time required to reach a resolution. The process can be so time-consuming that recapturing any damages through this process is often illusory. As noted above, many products today, especially in the software and other high-tech industries, generate the bulk of profits for their companies in the first weeks or months of release.

3. WTO attorneys working disputes on Intellectual Property don't understand it

The Commission on the Theft of American Intellectual Property 2013 (independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics; co-chaired by Dennis C. Blair ,former Director of National Intelligence and Jon M. Huntsman, Jr. former Ambassador to China and Deputy U.S. Trade Representative) May 2013 "The IP Commission Report" http://www.ipcommission.org/report/ip_commission_report_052213.pdf

Dispute mechanisms for trade in goods have worked reasonably well. However, resolutions to disputes involving IP are often reached behind closed doors, by lawyers lacking a sufficient background to make decisions on important issues of IP protection. This stands in contrast to most modern procedural codes, which generally adhere to common transparent guidelines, including that "judicial proceedings must be public and that, in principle, the control of the allegations and proof belongs to the parties."

4. Text of the WTO doesn't apply

Prof. David Fidler 2013. (Visiting Fellow for Cybersecurity at the Council on Foreign Relations and is the James Louis Calamaras Professor of Law at Indiana Univ.) 11 Feb 2013 Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage http://armscontrollaw.com/2013/02/11/why-the-wto-is-not-an-appropriate-venue-for-addressing-economic-cyber-espionage/

So, China must accord IP owned by nationals of other WTO members registered or otherwise protected in China certain minimum standards of treatment, such as national treatment (TRIPS, Article 3). If the Chinese government disclosed IP used in China by a company from another WTO member to a competing Chinese enterprise, then China would violate TRIPS by failing to accord national treatment to those foreign-owned IP rights within its territory. But, as noted above, the most serious worries about Chinese economic cyber espionage do not fit within this territorial-centric scenario and focus on espionage conducted outside China. Clarke, Lewis, and others concerned about economic cyber espionage are not, by and large, complaining about theft by the Chinese government of IP owned by US nationals that is already present in Chinese territory. Cybersecurity experts are worried about a more geographically expansive problem. Nothing in the WTO generally or TRIPS specifically mandates that China (or any other WTO member) protect commercially valuable information found in the territories of other countries. TRIPS does not require WTO members to prohibit their nationals or companies from engaging in corporate espionage inside foreign nations, nor does TRIPS regulate government-led economic espionage within other countries. Thus, the US cannot claim that China is violating TRIPS with respect to Chinese economic cyber espionage the US fears is most damaging to US economic and commercial interests. Or, put another way, China has not made commitments under the WTO regarding espionage it conducts outside its territory, meaning the US cannot claim breach of legal obligations that justifies countermeasures involving trade restrictions against China.

5. Won't be able to win our case at WTO

Prof. David Fidler 2013. (Visiting Fellow for Cybersecurity at the Council on Foreign Relations and is the James Louis Calamaras Professor of Law at Indiana Univ.) 11 Feb 2013 Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage http://armscontrollaw.com/2013/02/11/why-the-wto-is-not-an-appropriate-venue-for-addressing-economic-cyber-espionage/

Further, the US might want to avoid meeting its burden of proof because doing so would require disclosing counter-intelligence means and methods. Allegations not backed with adequate empirical evidence of state responsibility will not satisfy the burden of proof the US would have in pursuing legal complaints in the WTO. The US could seek support within the WTO for amending TRIPS to cover extraterritorial economic espionage (e.g., extending the national treatment principle to cover extraterritorial government actions affecting IP rights protected in other WTO members), but opposition to such a proposal would come from more WTO members than just China, making it nearly impossible for such an amendment to become reality.

DISADVANTAGES

1. Damage relations with China

Link: Using WTO against China over cyber espionage would damage US/China relations

Prof. David Fidler 2013. (Visiting Fellow for Cybersecurity at the Council on Foreign Relations and is the James Louis Calamaras Professor of Law at Indiana Univ.) 11 Feb 2013 Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage http://armscontrollaw.com/2013/02/11/why-the-wto-is-not-an-appropriate-venue-for-addressing-economic-cyber-espionage/

As Lewis acknowledges, for the US to invoke the national security exception in order to restrict trade with China over economic cyber espionage would constitute a dramatic departure from long-standing practice and a potentially destabilizing step. China is unlikely to "turn the other cheek" and could respond in ways that damage US trade and commercial interests. China might respond by arguing that US government efforts under its "Internet freedom" agenda and/or the intense level of cyber espionage the US government conducts against China constitute threats to its essential security interests, justifying Chinese actions against US exports under WTO rules. A high-profile deterioration in trade relations would negatively affect other aspects of Sino-American diplomacy, making this geopolitically important relationship even more adversarial. In this context, espionage of all kinds would likely increase rather than decrease.

Impact: US/China cooperation is the most important foreign policy goal in the world – we need China for solving all major world problems

US-China Smart Power Commission 2009 (chaired by former US Defense Secretary William Cohen and Maurice R. Greenberg), March 2009, "Smart Power in US-China Relations," CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES http://csis.org/files/media/csis/pubs/090309_mcgiffert_uschinasmartpower_web.pdf

The evolution of Sino-US relations over the next months, years, and decades has the potential to have a greater impact on global security and prosperity than any other bilateral or multilateral arrangement. In this sense, many analysts consider the US-China diplomatic relationship to be the most influential in the world. Without question, strong and stable US alliances provide the foundation for the protection and promotion of US and global interests. Yet within that broad framework, the trajectory of US-China relations will determine the success, or failure, of efforts to address the toughest global challenges: global financial stability, energy security and climate change, nonproliferation, and terrorism, among other pressing issues. Shepherding that trajectory in the most constructive direction possible must therefore be a priority for Washington and Beijing. Virtually no major global challenge can be met without US-China cooperation.

2. Chinese retaliation at WTO

Link: Using the WTO against Chinese economic espionage would bring retaliation from China at the WTO

Prof. David Fidler 2013. (Visiting Fellow for Cybersecurity at the Council on Foreign Relations and is the James Louis Calamaras Professor of Law at Indiana Univ.) 11 Feb 2013 Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage http://armscontrollaw.com/2013/02/11/why-the-wto-is-not-an-appropriate-venue-for-addressing-economic-cyber-espionage/

Proposals favoring US use of the WTO against Chinese economic cyber espionage sometimes contain more political than legal flavor–that is, raising the issue in the WTO will put the Chinese under increasing diplomatic scrutiny, leading to a curtailment of Chinese economic cyber espionage. In other words, the purpose of taking the issue to the WTO is not to win a legal argument but to put political pressure on China through this high-profile diplomatic forum. However, this strategy could generate "blowback" against the US from China, which could itself attempt to use the WTO to turn the tables on the US by criticizing American political, military, and intelligence community behavior in cyberspace (e.g., intervening in the domestic affairs of other states under the "Internet freedom" agenda, launching Stuxnet against Iran, and engaging in extensive cyber espionage against many countries). Not wanting to be forced to take sides, other WTO members would want this unproductive standoff to go away and stop jeopardizing what the WTO does well, which does not include resolving spats about espionage practices.

Impact: Net benefits. Fighting with China at WTO on balance would not be in US interests

Prof. David Fidler 2013. (Visiting Fellow for Cybersecurity at the Council on Foreign Relations and is the James Louis Calamaras Professor of Law at Indiana Univ.) 11 Feb 2013 Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage http://armscontrollaw.com/2013/02/11/why-the-wto-is-not-an-appropriate-venue-for-addressing-economic-cyber-espionage/

China has made it clear it is willing to pick fights with the US on cyber issues in diplomatic forums, and I doubt whether an American attempt to enlist the WTO will bring a more cooperative Chinese diplomatic response.
Conclusion
Let me be clear: The US and other countries face a serious problem with traditional and economic espionage conducted through cyber technologies. I have written on how dangerous cyber espionage is (see David P. Fidler, "Tinker, Tailor, Soldier, Duqu: Why Cyberespionage is More Dangerous than You Think," International Journal of Critical Infrastructure Protection (March 2012), pp. 28-29). However, the WTO is not an appropriate venue for the US to use in addressing the threat posed by economic cyber espionage. Cold calculation of American interests suggests this idea should be put aside.

3. Increased China mistrust

Link: Hype about cyber operations raises US/China mistrust

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

Cyber operations and the rhetorical reactions to them on both sides of the Pacific have undermined trust in the Sino-American relationship. Exaggerated fears about the paralysis of digital infrastructure and growing concerns over competitive advantage exacerbate the spiral of mistrust. Closer consideration of domestic factors within China and China's strategic interaction with the United States reveals a more complicated yet less worrisome situation.

Link: Hyping the cyber threat makes US/China war more likely

Dr. Jon R. Lindsay 2014 (PhD in Political Science from M.I.T.; Assistant Research Scientist at Univ. of California Institute on Global Conflict and Cooperation) The Impact of China on Cybersecurity: Fiction and Friction http://belfercenter.ksg.harvard.edu/files/IS3903_pp007-047.pdf

As long as dense interconnection and economic interdependence remain mutually beneficial for powers such as the United States and China, they will be able to tolerate the irritants that they will inevitably inflict on one another. The modern intelligence-counterintelligence contest plays out in a complicated sociotechnical space where states take advantage of economic cooperation and hedge against security competition. If their broader mutual interest frays, however, then cyberwarfare becomes just one facet of a more serious strategic problem involving more dangerous means. Exaggeration of the cyber threat feeds spirals of mistrust, which make this undesirable outcome slightly more likely.

Impact: War with China would be economic and political disaster for PRC and US

Dr. Ted Galen Carpenter 2004 (PhD in Diplomatic History; vice president for defense and foreign policy studies at the Cato Institute, is the author of eight books on international issues) 10 Aug 2004, "China's Taiwan Policy and America's Difficult Choices" http://www.cato.org/pub_display.php?pub_id=2778

And a war in the Taiwan strait would be a disaster for both the PRC and the United States. The mutually beneficial economic relationship (now valued at more than $150 billion a year) would be severed, and America's relations with a major power would be poisoned for decades.

Unit IV

—

Ready for Competition

Each of the resolutions studied in Unit III was adapted from three debate leagues. Part of your ownership of *Blue Book* includes the August release of three cases specifically written for the current year's competition. Unit IV gives you the framework for mastering these cases along with further instruction on how to become a great competitive debater.

LESSON 10: YOUR POLICY DEBATE LEAGUE

Objective of Lesson 10:

Learn about the opportunities offered by each league and how to initially prepare for your first tournament.

Your ownership of *Blue Book* includes digital downloads specifically tailored to three leagues, each of which can take your policy debate training to a whole new level. In August, we upload brand new lessons that correspond to the source texts provided for you in Unit III, but in Unit IV they deliver on the resolutions from the following leagues:

- The National Speech and Debate Association (NSDA)
- The National Christian Forensics and Communications Association (NCFCA)
- Stoa (not an acronym, but the name of a classical architectural structure)

These three leagues consist of hardworking and dedicated educators and parents, all willing to run tournaments for students trained in policy debate. Every year is different from the previous—resolutions, rules, adaptations, new formats, innovative strategies—and students and teachers have to adjust. The change is good, and the debate activities available are diverse and filled with opportunity.

You may already know in which league you will compete. The following are summaries of each, along with websites for more information. You should bookmark and/or subscribe to the websites when you become part of their individual communities.

The Three Main Debate Leagues

NSDA—***www.speechanddebate.com***

The longest-lasting and largest debate league in America is the National Speech and Debate Association. Formerly known as the National Forensic League (NFL), the NSDA started in 1925. The league offers charter membership to all public, private and home schools. The league boasts of 150,000 students, 3500 schools and 1.4 million alumni. Its mission:

> *The National Speech and Debate Association believes communication skills are essential for empowering youth to become engaged citizens, skilled professionals, and honorable leaders in our global society. We connect, support, and inspire a diverse community of honor society members committed to fostering excellence in young people through competitive speech and debate activities.*[15]

Membership is done primarily through schools where students register as their own school or join a local school program. Each school applies for league membership and is entered in a points system. Students are then given a PIN for their school for which the points they are awarded at tournaments become points affiliated with the member school. A school membership is $99 per year, and each student membership is $15. Membership lasts a lifetime.

Schools gather for competition at *local, district,* and *national* invitational tournaments. Local tournaments are considered "practice" tournaments that students prepare for the district tournaments. District tournaments are sanctioned events that allow students the opportunity to compete for the NSDA National Tournament. The National Tournament is in June at a location that varies from year to year.

Other debate events include Congressional Debate, Lincoln-Douglas Debate and Public Forum Debate. The NSDA also offers several speech events. Policy debate is the NSDA's oldest competitive event,

[15] Taken from the NSDA website: http://www.speechanddebate.org/mission

starting in its founding year of 1925. The resolution debated was "Resolved: That the federal government should own and operate the railroads."

NCFCA—***www.ncfca.org***

The longest-lasting homeschool speech and debate league is the National Christian Forensics and Communications Association. Started by the Home School Legal Defense Association in 1996, the NCFCA has become one of the largest nationally recognized homeschool extracurricular organizations in the United States. Its mission:

> *The mission of the National Christian Forensics and Communications Association (NCFCA) is to promote excellence in communications through competitive opportunities where homeschool students develop the skills necessary to think critically and communicate effectively in order to address life issues from a biblical worldview in a manner that glorifies God. In keeping with its Mission Statement, the National Christian Forensics and Communications Association (NCFCA) has developed a Philosophy and Vision Statements to guide league activities.*[16]

NCFCA is centrally structured and sectioned into ten geographical regions. Families may "affiliate" with the NCFCA for $100 per year, a discount if completed before September 15, and a penalty if completed after December 31. The president governs over regional coordinators, who likewise govern over state coordinators. Debate rules are put together by the league, typically released before the end of the calendar year, and are subject to clarification throughout the school year. State leadership runs local or state tournaments, while national NCFCA leadership runs individual regional tournaments through its ten regions and three open tournaments throughout the year. State tournaments qualify competitors to the state's regional tournament, and the regional and open tournaments qualify competitors directly to the national tournament. The league also awards what they call "At-large Slots," given to students who have the opportunity to qualify to nationals based on their participation in their regional and state tournaments. NCFCA Nationals happens sometime in June, its date and location announced the previous year.

All qualifying tournaments must be sanctioned by the NCFCA, and hosting an open tournament (meaning it is open to the entire nation no matter what region a student is from) is done by the national leadership. By the end of the calendar year, students and coaches should have a calendar of tournament opportunities within their region where they can apply the skills learned in *Blue Book.*

Policy debate is the NCFCA's original event, dating back to its founding in 1996. The resolution was, "That the United States should change its rules governing foreign military intervention." In 1998 NCFCA opened one other debate event, Lincoln-Douglas Debate, which is a form of philosophical

[16] Taken from the NCFCA website: https://www.ncfca.org/who-we-are/our-mission/

debate that remains in competition today. They also provide competitive tracks for limited-preparation, interpretive and platform speaking.

Stoa—***www.stoausa.org***

A "stoa" in Greece and Rome was a gathering place for philosophers and citizens to mingle and exchange ideas. The name Stoa Speech and Debate League is derived from this classical architectural structure. Stoa started in 2009 and is estimated to have a membership roughly as large as NCFCA's. Like the NCFCA, Stoa serves home-educated students nationwide. Its website states the following on its About Us page:

> *StoaUSA.org purposes to inform, encourage, and equip members of the Christian homeschool speech and debate community. This reflects the purpose of the Stoa organization: "To train Christian homeschooled students in Speech and Debate in order to better communicate a biblical worldview."*[17]

A Stoa yearly membership cost is $50 per family, and coaches with no competing children are able to register as a member for $25. Stoa is decentralized in governance, allowing states and local clubs to run their own tournaments throughout the year. Stoa's responsibilities are limited to (1) running Stoa's national tournament called the National Invitational Tournament of Champions (NITOC), and (2) creating the qualifying rules for tournament directors and competitors to measure up the coming year of competition to get to NITOC.

NITOC is open to all homeschool speakers and debaters regardless of the league in which they participate. There are two types of tournaments that are able to qualify to NITOC: (1) tournaments that include NITOC events, and (2) tournaments that model NITOC itself. All tournaments are "open" tournaments in that students from other states are able to travel to any tournament they wish (provided there is room at the tournaments).

Stoa tournaments are loaded into the National Christian Homeschool Speech & Debate Rankings website *www.speechranks.com*, a Stoa-sponsored database where students are able to track their competitive success. Depending on the points and the number of qualifying checkmarks a student receives, members will receive an invitation to NITOC in April or May.

Watch for Rules and Resolutions

This is a lot of information, so it may help to narrow down the bare essentials. This involves the rules and resolutions from the league you are competing in.

[17] Taken from the StoaUSA website: http://www.stoausa.org/about

First, the rules. Each league makes their own set of modifications each year. *Blue Book* doesn't zero in on league-specific nuances or rules that the leagues adopt. We stick to the basic speech formats and enjoy teaching strategy—no matter what the league. That said, it is important to seek out the policy debate rules and read them word-for-word. Do not be caught missing an important change that could have easily been adjusted in your debate preparation.

Second, the resolutions. Each league releases their own policy resolutions through a detailed voting process of its members. Members can participate in the selection of their debate topics, narrowing down the resolution to what the individual membership desires. Release dates are roughly:

1. NSDA: After voting from membership, typically by January 31.
2. NCFCA: At the NCFCA National Tournament in June.
3. Stoa: At NITOC in May or June.

Start Studying—And Let the Evidence Guide You

Once the resolutions are announced, you should start studying. As you learned in previous lessons, let the evidence guide you. Once you know the topic, start reading articles online that talk about the topic in general. Then, narrow down your reading to specific articles advocating changes to the status quo. The more you know about the topic, the better debater you will be.

This will inevitably lead you to choosing the best case topic for you and your partner. But beware of this common mistake: "I have this really fantastic idea for a new affirmative case! I just don't have any evidence for it yet." Sorry to be blunt, but if you don't have any evidence for it, then you don't have a great case idea.

Such thinking puts the cart way in front of the horse. The debater who thinks that way will waste a lot of time looking for evidence that might not exist, when he could have spent his time working on a more realistic and winnable plan idea. Debaters who sit around trying to think up great case ideas and then run off to find evidence for them are doing it exactly backwards because they have failed to recognize one important fact: Few of us are qualified to propose great new public policies off the top of our heads (even though we may think we are). You will have to do a lot of background reading before you are ready to write a solid affirmative case of your own. The reason is simple: You have to find out what the experts on the topic are saying about what should be changed in public policy. Those are the people whom you are going to quote when you cite them as evidence in your 1AC and for backup evidence later in the round.

Read as much as you can about the topic, and at some point something surprising will happen. You will come across an expert who says something like, "If only we had X, it would solve all these

problems…" Take that expert's article and use it as the basis for a new plan idea. You know it's a "great plan idea" because there's actually an expert who said it! Look for other articles by that expert and see what else he or she wrote about it. Look for other articles or experts cited in the article and see if there are others who back the topic up. These articles taken together will become the evidence from which you can write a good affirmative case.

Worksheet for Lesson 10

Name: _____ Date: _____

Read Lesson 10. Answer the following in the spaces provided.

1. Which league will you be competing in?

2. For the league you are competing or interested in, fill out the following:

    a. The cost of membership is $_____ per _____.

    b. The league has approximately _____ (how many?) members.

    c. The name of the national tournament is: _____.

    d. The policy resolution for the new year releases (approx.) _____.

3. Visit your league's website. Find out these most recent pieces of information:

    a. The name of the league's president: _____

    b. The date, city and venue of the next national tournament:

    c. Other debate events include:

    d. Other speech events include:

Extension for Lesson 10

The extension lesson for Lesson 10 will be part of the download resources in the August addendum to *Blue Book.*

LESSON 11: UNDERSTANDING THE STATUS QUO

Objective of Lesson 11:

Study the Status Quo chapter provided in your league-specific download and master the current status of the topic.

The tricky part in being 100% prepared for your first tournament is getting the required source texts for your training. *Blue Book* is a "sourcebook," meaning we deliver to you the necessary sources for preparation. Unit III discussed topics from previous years in various leagues. Unit IV models Unit III in this respect, but the August addendum provides topic materials for the current resolutions.

Revisit the Introduction for an explanation on how to download your supplemental materials for your league. A wealth of information lies within these foundational documents:

- History and Status Quo Lesson. This download is very similar to Unit II's chapters explaining the resolution. However, it is much broader to include more than just one case.
- Spotlight Cases. Three foundational cases are provided for each of the three leagues. These cases come in Word format for you to edit as you wish.
- Negative Briefs. These three foundational cases come with negative briefs, too.
- Invitation to join *Blue Membership.* The cases and briefs continue through the competitive season, should you choose to subscribe.

This week, use the lessons provided that cover the status quo of the current topic.

Worksheet for Lesson 11

The Worksheet for Lesson 11 will be part of the download resources in the August addendum to *Blue Book.*

ACTIVITY:
Take the time to register for Google News Alerts. This is an easy way for you to be notified of current events that happen surrounding the year's debate topic. Follow these steps:

a) Make sure you are logged into their Google account.
b) Go to http://www.google.com/alerts.
c) Type in search terms that are appropriate to the year's topic.
d) Select the criterion you would like to receive email notifications.

In the space below, list the search terms you used for the year's topic. Be ready to share these with class next week.

Extension for Lesson 11

The extension lesson for Lesson 11 will be part of the download resources in the August addendum to *Blue Book.*

LESSON 12: SPOTLIGHT CASES

Objective of Lesson 12:

Select one of the three Spotlight Cases to your league's specific resolution, as well as prepare a more diverse negative strategy.

Up until now you have been given model cases from which to debate, particularly just one per resolution. These models were examples for you to master the structure of policy debate. We're now ready to put some style into your debating and giving you a few more models from which to choose. These are your "Spotlight Cases" that are included in your August download.

Worksheet for Lesson 12

The Worksheet for Lesson 12 will be part of the download resources in the August addendum to *Blue Book.*

Extension for Lesson 12

The extension lesson for Lesson 12 will be part of the download resources in the August addendum to *Blue Book.*

Blue Membership

Unit IV comes with digital access to lessons that help you with competitive opportunities in your league. We suspect you will do well at your first tournament. But we want you to keep applying the lessons modeled here, so we want you to become part of our online community called the *"Blue Membership."*

Become a *Blue Member* and learn how to extend its downloads throughout the competitive season.

Consider *Blue Membership* a membership for the serious competitor—the one who wants to bring home trophy after trophy. Membership releases cases, briefs and other resources that will help you in your competitive success. Depending on the league you compete in, you will enjoy a release calendar that empowers you with more than just the Spotlight Cases and their briefs.

As a debate student, each one of the cases can become a lesson itself. You essentially have an immense amount of source material that you can drop into the Unit III template. In summary:

- A complete table of contents of all taglines. This wasn't included in the print version of this *Blue Book,* but a table of contents will be included in the Spotlight Article. Talk about handy when debating!

- The case with 2A evidence and negative brief. Every Monday we will release either a case or a negative brief. You will be able to pace yourself throughout the season with new material to prepare you for your tournaments.

- Community and connection. We both will be in the membership area helping students along where we can. You will be able to post questions to other members and get additional help you need during the competitive season.

- More resources to come. The bottom line for us is this: *we will take best care of our members.* You are the ones who are *all in,* and being a member will get you access to everything having to do with policy debate.

Visit MonumentPublishing.com/store/blue-membership to order your membership today.

Glossary

The *Blue Book* glossary covers basic debate terminology to serve the policy debaters with a quick reference to helpful terms.

A

AC A common abbreviation for an affirmative constructive speech, often preceded with either a 1 or 2, depending on the speaker (i.e. 1AC, 2AC).

advantages The benefits of adopting the affirmative plan as compared with the Status Quo.

affirmative The side of the academic debate that defends, argues for, and promotes the resolution.

agency The part of the policy debate affirmative plan that is the instrument used to implement or administer the plan.

AR A common abbreviation for an affirmative constructive speech, often preceded with either a 1 or 2, depending on the speaker (i.e. 1AR, 2AR).

argument Reasoning used in debate based on evidence or proof.

attitudinal barrier A condition of the status quo that is a result of people's opinions or prejudices that is blocking changes or new policies from being adopted.

B

block Process of preparing evidence in advance for a debate in a brief to be used against anticipated arguments.

brainstorm Process of generating ideas without restrictions.

brink The second part of a structured disadvantage argument that proves that the amount of change carried out by the affirmative's plan is enough to trigger the occurrence of the disadvantage; claims that we are "on the brink" of the disadvantage taking place, and that the affirmative's changes will push us over that "brink."

burden of proof The responsibility of the affirmative, burden of proof is the responsibility to prove that the status quo should be changed. If it isn't met, the default assumption is that we stick with the status quo and vote negative. It can also refer in general to the responsibility to prove any factual claim anyone makes, affirmative or negative. One cannot simply assert something and challenge others to prove it wrong. Whoever is asserting facts has the burden of proof to support them with evidence.

C

case analysis The process of evaluating the arguments and delivery structure of the opposing debate team; sometimes refers only to the negative's efforts at refuting Topicality, Inherency and Harms stock issues. It can also refer to arguments that are directly responding to the issues the affirmative raised, as opposed to "off-case," or "generic," issues that could be run against almost any affirmative policy change.

citation The act or process of crediting another's ideas. Usually includes author, title of work, name of publication, and date.

classify To arrange evidence in an order which will allow the debater to retrieve easily.

common ground The appeal to the audience, usually found in the introduction to a speech, that attempts to join the audience's disposition with the topic of the speech.

comparative advantage case A case structured to compare advantages to the plan over the results being achieved by existing policies in the Status Quo. The affirmative need not solve harms; instead, they need to prove that their plan produces results that are better than the status quo.

constructive speech Taking place at the beginning of the debate round, one of two eight-minute speeches given by each side of the debate to introduce the arguments the debate will focus.

contentions Statement used as a heading for a major stock issue or value in the debate, sometimes also called "observations" or just "points."

criterion A standard by which a value is measured.

crystallization The process at the end of a debate of grouping arguments to make a final point.

counterplan A negative strategy where the negative in the 1NC gives an alternative (usually) non-topical plan that will solve the affirmative harms better than the affirmative case itself.

cross-examination Three-minute time allowed in a debate for one side of the round to ask questions of the other side. Following each constructive speech in the policy round, the opposing team asks questions, and the team that just gave the speech, answers.

CX A common abbreviation for cross-examination.

D

debate A process of inquiry and advocacy seeking reasoned judgment on a proposition. Debate allows for two or more sides advocating their positions on a given issue under some set of rules with some kind of judgment to follow from a judge or audience (*Basic Debate Terminology* by Steve Hunt, Lewis & Clark).

definitions The first observation of the traditional debate case that defines necessary terms of the resolution and any other pertinent terms the affirmative deems necessary.

delivery The act or manner of giving a speech.

disadvantage A strategy by the negative team showing unfavorable consequences of the affirmative plan. A disadvantage can be a voting issue in a policy debate round, for the negative may prove the disadvantage from the affirmative plan may be too great of a risk compared to the advantages.

drop When a team fails to or chooses not to respond to an argument in the debate round. The consequences of dropping an argument depend on what other arguments have not been dropped and how vital the dropped argument is to the overall position of the team that dropped it. Dropping one argument may or may not cause loss of the round, depending on its impact on the stock issues or the net benefits of voting for or against the plan.

E

enforcement The part of the policy debate affirmative plan that explains who will carry out the functioning of the proposed mandate.

extra-topicality A mandate in the affirmative's plan that enacts something not authorized in the resolution. This mandate can be labeled "extra-topical" by the negative team and stricken from the round, even if the rest of the plan is topical.

F

fiat The right of the affirmative to enact a plan without worrying about the possibility of it not being enacted because of today's political environment. The affirmative can assume a law change or court decision will be adopted when the Judge votes affirmative regardless of how difficult it would be to do in the real world. This power is granted so debaters will stick with the issue of "should the plan be adopted" rather than "would" it be adopted.

flowing The system of note-taking used by debaters and judges that documents in writing how all the arguments of the round "flow" together.

flowsheet A template or sheet of paper with rows or columns used to keep track of the "flow" of arguments.

funding The part of the policy debate affirmative plan that is the means of paying for the plan.

G

generic disadvantages A disadvantage designed to be run by the negative against lots of potential affirmative cases and not specific to one policy change. Example: A negative might have a prepared brief with evidence showing how "Trade Sanctions Fail," which could be used regardless of what country is being sanctioned in the affirmative's plan.

goals-criteria case A non-traditional case that states the goals and criteria that should steer a favored policy.

H

harms The observation of a traditional debate case that shows the problems and bad impacts occurring in the status quo.

I

impact (1) the final part of a structured disadvantage argument which shows the harm or disadvantage of the proposed affirmative plan. Impacts are used to conclude a negative's disadvantage (showing how the disadvantage to the plan hurts people in the real world). (2) the harm caused by an agent in the status quo. Impacts are used to conclude the affirmative's harms (showing how the harm impacts the world). In general, "impact" answers questions like "So what? Who cares? Why does it matter?" to any argument.

inherency One of the stock issues, inherency is the claim that the problems with the status quo will not go away without the proposed plan and/or that the Status Quo is not already doing what the affirmative team is proposing (or something similar or equally effective). The affirmative will claim that the harms in their case will stay and get worse without adopting their plan, and that their plan is not already enacted in the Status Quo.

L

link The first part of a structured disadvantage argument that connects the disadvantage's claim to the specific area of the affirmative case.

M

mandates The part of the policy debate affirmative plan that is the actual policy to be adopted.

minor repair A small change (smaller than a counterplan) given as a negative argument to solve some harms in the status quo without sacrificing the status quo altogether and without adopting the affirmative plan.

N

NC A common abbreviation for a negative constructive speech, often preceded with either a 1 or 2, depending on the speaker (i.e. 1NC, 2NC).

negative The side of the academic debate that attacks and argues against the affirmative side of the resolution.

non-topical Any affirmative policy change that fails to remain within the boundaries of the resolution.

NR A common abbreviation for a negative rebuttal speech, often preceded with either a 1 or 2, depending on the speaker (i.e. 1NR, 2NR).

O

observations Contentions, broad argument outlines, goals or stock issues given in the affirmative constructive case. For example: Definitions, Harms, Plan, Advantages.

on-case arguments Arguments in a policy debate which attack the specifics of the affirmative case.

organization An administrative and functional structure (Merriam-Webster Online Dict., 2006, www.m-w.com)

organization A group of people who work together in a structured way for a shared purpose (Cambridge Advanced Learner's Dictionary, Cambridge Univ. Press, 2006, http://dictionary.cambridge.org)

P

plan The section of the traditional debate case that provides the strategy for solving the harms. Plans traditionally need to include agency, funding, mandates, and enforcement.

policy "A definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions" (Merriam-Webster Online Dict. 2007, www.m-w.com/dictionary/policy)

presumption The default position of the negative, presumption assumes the status quo should be kept unless the burden of proof is met that shows adequate reason for change.

prima facie An affirmative case that has covered the stock issues and is one a judge believes to have completely upheld all elements of the resolution within the first affirmative constructive speech.

R

reasoning The process by which we come to logical conclusions.

rebuttal speech Taking place at the end of the debate round, one of two five-minute speeches given by each side of the debate to answer the arguments initiated in the constructive speeches. It is important to note that no new arguments can be brought up in the rebuttals, but only new evidence and responses on existing arguments.

resolution The proposition adopted by a specific debate league giving the subject matter of which all debaters will debate in league tournaments.

S

significance One of the stock issues, significance is the claim that the magnitude of the problems with the status quo, or the size of the advantages, are big enough to justify the change called by the resolution and the time we will spend debating them.

solvency One of the stock issues, solvency is the claim that the problems will go away (or be "solved") if the affirmative plan is adopted.

specify The first required step of a topicality argument, selects the word or part of the resolution the affirmative violated.

standard The second required step of a topicality argument, the correct interpretation of the resolution as interpreted by the negative team.

status quo The term used to represent the present state of affairs, the way things are now.

stock issues The issues the affirmative needs to prove to make and sustain a prima facie case. Four stock issues are significance, inherency, solvency, and topicality.

substantial Considerable in quantity: significantly great (Merriam-Webster Online Dict., 2006, www.m-w.com/dictionary/substantial)

T

tag The use of a word or phrase at the top of a piece of evidence to serve as a quick reference.

topicality A stock issue introduced by the 1NC that questions whether the 1AC's plan remained within the definitional borders of the resolution. A typical topicality argument will follow the structure of specificity, standard, violation, and impact.

TP A common abbreviation for "team-policy" debate.

traditional case A harms/solvency case format.

turn The attempt of one team to use the argument of their opponent to their advantage by showing that the alleged bad impact is actually good, or that the argument actually causes more of what it is trying to prevent, for example.

V

violation The third required step of a topicality argument, the negative's claim that the affirmative team is non-topical.

voting impact The final required step of a topicality argument, the negative's showing how the affirmative's non-topical case is a voting issue for the round.

voting issues Sometimes used synonymously with stock issues, these are the issues a judge typically "votes" on: significance, inherency, solvency, and topicality.

X

x-apply A common abbreviation for “cross-apply.”

Answer Keys

Lesson 1

1. Topic, Rules of Engagement, Flow, Learn
2. Domestic Surveillance, Federal Court Reform, Trade Policy With China.
3. Answers may vary.
4. a) F
   b) T
   c) F
   d) T
   e) F
5. Listen to whoever is presenting
   Record the arguments
   Prepare for their next speech
6. Communicate
   Competition
   Moral and ethical behavior
   Competition

Lesson 2

1. Answers may vary.
2. a) 1A
   b) 1N
   c) 2A
   d) 1N
   e) 2A
   f) 1A
   g) 1N
   h) 2N
   i) 2A
   j) 1A
   k) 2N
   l) 2A
   m) 1N
   n) 2N
   o) 1A
   p) 2N
3. The Affirmative gets the first and last word in a debate round because they have the tougher agenda in the round: the "burden of proof." This means they are tasked with promoting a change, a much more difficult position to take.

4. The negative block is the 13 minutes of speeches in the middle of the round with a 3-minute cross-examination between the two speeches. The 2NC should run off-case arguments like disadvantages, and the 1NR should rebut all arguments in the 2AC.
5. Answers may vary.

Lesson 3A

1. Flowing is the process of writing down a well-organized, legible summary of all the arguments made by all the debaters in the constructives and rebuttals, including your own.
2. Answers may vary.
3. All should be circled.
4. Debaters may assume that other debaters will define their terms with credentialed dictionaries. However, it is appropriate to challenge definitions that attempt to bring the debate outside the boundaries of the resolution.
5. Much of the plan is typically not debatable points. The one specific that is always written down is/are the mandate/mandates.
6. The concept pre-flowing is the process of outlining your arguments before going to the lectern to give your next speech. It is never appropriate to approach the lectern without your speech pre-flowed (thought sometimes the timer will run out and you will need to anyway).
7. Cross-examinations do not need to be flowed because nothing in the CX is weighed in the round until it is referenced in a speech.
8. a) Disadvantages
   b) Solvency
9. Only "The Judge" should be circled.

Lesson 3B

1. With the 1NR, rebuttals begin and arguments get shorter and simpler because no new arguments are being introduced—the debaters are only responding in a short period of time to material already in the round.
2. Look What I Said. It is a useful strategy to signify that an opponent merely repeated what he/she said in a previous speech rather than replying to your argument.
3. Because it is important to label these separately because if 1AR does not notice that he gave two responses, and only replies to one of them, the 2NR will pounce on that mistake, tell the judge about the other response, and claim victory on that argument.
4. He has only five minutes to cover 13 minutes of negative speaking. But thankfully, a good 1A has a clear flowsheet to keep him on track!
5. "Cross-apply" (abbreviated "x-apply" on the flow) means to use the same response for two different arguments because the same evidence or logical reply will equally apply to both.
6. Debaters should not spend too much time showing a dropped argument.
7. The flow represents the entire debate round. These are extremely valuable in preparing briefs against the arguments and cases presented.

Lesson 4

1. The most traditional case format is called the harms-solvency case because the format lists "harms" and then proceeds to "solve" the harms.
2. a) Definitions explain key terms in the resolution, and sometimes additional words that are used in your plan.
   b) Inherency is the part of the affirmative case that explains what law or policy the status quo is doing that is different from what their plan does.
   c) Harms are reasons for change that are based on bad things happening in the status quo.
   d) The Plan is your solution to fixing the harms.
   e) Solvency is the evidence that shows the ways your plan is solving the problems.

Lesson 5

1. "Topicality" is a stock issue introduced by the 1NC that questions whether the 1AC's plan remained within the definitional borders of the resolution. A typical topicality argument will follow the structure of specificity, standard, violation, and impact.
2. "Significance" is one of the stock issues, significance is the claim that the magnitude of the problems with the status quo, or the size of the advantages, are big enough to justify the change called by the resolution and the time we will spend debating them.
3. "Inherency" is one of the stock issues, inherency is the claim that the problems with the status quo will not go away without the proposed plan and/or that the Status Quo is not already doing what the affirmative team is proposing (or something similar or equally effective). The affirmative will claim that the harms in their case will stay and get worse without adopting their plan, and that their plan is not already enacted in the Status Quo.
4. "Solvency" is one of the stock issues, solvency is the claim that the problems will go away (or be "solved") if the affirmative plan is adopted.
5. A "disadvantage" is a strategy by the negative team showing unfavorable consequences of the affirmative plan. A disadvantage can be a voting issue in a policy debate round, for the negative may prove the disadvantage from the affirmative plan may be too great of a risk compared to the advantages.
6. A "minor repair" is a small change (smaller than a counterplan) given as a negative argument to solve some harms in the status quo without sacrificing the status quo altogether and without adopting the affirmative plan.
7. "Fiat" is the right of the affirmative to enact a plan without worrying about the possibility of it not being enacted because of today's political environment. The affirmative can assume a law change or court decision will be adopted when the Judge votes affirmative regardless of how difficult it would be to do in the real world. This power is granted so debaters will stick with the issue of "should the plan be adopted" rather than "would" it be adopted.
8. A "counterplan" is a negative strategy where the negative in the 1NC gives an alternative (usually) non-topical plan that will solve the affirmative harms better than the affirmative case itself.

Lesson 6

1. a) Answer: A. Such modification of evidence is fraud regardless of whether or not it is true or false.
   b) Answer: A. Because this is a verbal speech activity, there is no way a judge would be able to tell this is modified with bracketed phrase. This is considered fraudulent tampering.
   c) Answer: A. There is no way debaters would be expected to have the data in between the two parts, and an ellipses is not a way to cover for this. The student will either need to add a piece of speech that says, "Later in the same chapter..." or split the piece into two separate pieces. "C" may be a common answer for this. Make sure the student knows that ellipses are never very reliable ways of cutting a card and should always be avoided. When they are part of the actual article, make sure "ellipses in original" is in the citation.
   d) Answer: A. You may not use the date you accessed the card as the date of publishing, even if there is no date on the website. Instead, mark the card "no date provided" with "accessed 'today's date'". Advice: search for the same card to perhaps find a site with a date on it. Sites with no dates are questionable.
   e) Answer: A. This is an analysis of the data found, not a quote from the website. Analysis needs to be cited as such: in the speech section of a case or a brief. Advice: search for a credible source you made the same analysis and quote that source quoting the statistic.
   f) Answer: A. Yes. Fraud is fraud, no matter who writes it. Every debater is responsible for their own evidence, and all evidence traded should be checked to validation.
2. Is it possible to *unintentionally* run fraudulent evidence? *Yes*. Can I be penalized in a tournament even though my fraudulent evidence was not intentional? *Yes*. Whose responsibility is it to make sure my evidence is legitimate? *Mine*.

Lesson 7

1. *"The right of the people to be secure in <u>their</u> <u>persons, houses, papers, and effects</u>, against <u>unreasonable searches</u> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*
2. A <u>subpoena</u> is an order that demands someone to hand over something because it has relevance to an investigation. A <u>warrant</u> is an order asserting that there is probable cause to believe evidence of a crime will be found.
   A warrant is more difficult for an agency to make.
3. Email did not exist in 1986 as it does today. A warrant is not needed to retrieve personal emails from a web server.
4. Negatives will argue that requiring warrants for emails and online data unnecessarily slows down investigations of terrorism and crime. The public should know that emails stored on other people's computers are not private, and they shouldn't have any expectation of privacy in them.

Lesson 8

1. The federal jurisdiction of bankruptcy court is established in Article I, Section 8 of the US Constitution: "The Congress shall have power…To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States…"

2. "Forum shopping" is a firm's attempt to shop around for a court that would be more likely to give it a favorable judgment. This could lead to some unjust outcomes that might be fertile grounds for reform.
3. A business would want to file for bankruptcy in Delaware of Manhattan to dissuade its creditors from seeking reimbursement.
4. This plan enacts the Bankruptcy Venue Reform Act, removing the "place of incorporation" as a venue for bankruptcy court filing, thus requiring corporations to file near their headquarters or where they have substantial business assets and presence.
5. Negatives will argue (1) that "magnet courts" are a good thing, not a bad thing and (2) removing the state of incorporation as a venue for bankruptcy court jurisdiction would slow things down and also create needless litigation, as lawyers fight over where a business has substantial assets or operations.

Lesson 9

1. Merriam-Webster defines trade as "the activity or process of buying, selling, or exchanging goods or services."
2. The government of China does not really collect up raw materials, send them to the government of the US, and then the government of the US in exchange send a boat load of computers to China. Instead, the raw materials would be produced by mining companies run by private individuals and perhaps owned by stockholders.
3. Governments tend to view trade is a right they allow, while some philosophers view it as a right that governments restrict.
4. "Fiat" is a policy debate principle that assumes the right of the affirmative to enact a plan upon an affirmative ballot without worrying about the real-world political environment. Affirmative teams can fiat that Congress does some trade policy even if it violates WTO rules.
5. Corporations expend vast sums on highly trained employees and research facilities in order to develop new technologies. Why bother to do all that work if it's just going to be pirated by someone else and you will never profit from it?
6. Negatives will argue that Chinese cyber hacking really doesn't have much impact. It's hard to argue that the United States is an innocent victim of other countries' electronic espionage. WTO mechanism is the wrong forum to resolve issues of espionage. It probably would take too long, if it even worked at all. Meanwhile, the damage to US-China relations would cause much bigger problems.

Lesson 10

1. Answers may be NSDA, NCFCA or Stoa, depending on the league the student participates.
2. Answers may vary depending on the league chosen.
3. Answers may vary depending on the data found on the website.

Lessons 11 and 12

Answers for Lesson 11 and 12 are found on the digital addendum released in August.

1AC 1st Affirmative Constructive 8 min., 3 min. CX	1NC 1st Negative Constructive 8 min., 3 min. CX	2AC 2nd Affirmative Constructive 8 min., 3 min. CX
1A Name:	1N Name:	2A Name:

Date: ________________ Tournament: ____ City, St: ________________ Round: ______

Aff Topic: ______________________ Judge: ____________________________________ Decision: Aff / Neg

2NC 2nd Negative Constructive 8 min., 3 min. CX	1NR 1st Negative Rebuttal 5 min.	1AR 1st Affirmative Rebuttal 5 min.	2NR 2nd Negative Rebuttal 5 min.	2AR 2nd Affirmative Rebuttal 5 min.
2N Name:				