Topicality Issues on the Detention and Search Topic

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The United States federal government should substantially decrease its authority either to detain without charge or to search without probable cause.

The federal government

The actor in this year's resolution is "the federal government." The likely central dispute in any topicality debate on this term will be whether or not that actor includes only the head of our central government and its agents that operate out of Washington, D.C. or whether that actor also includes the state governments, as the state governments are part of the federal system. Some definitions point to the central authority in Washington (A7) and others (A5) include the state governments. Upon consultation with a variety of dictionaries, it does not seem that the capitalization, or lack thereof, of the term has any significance, at least in terms of establishing what set of actors that the term refers to. The framers chose not to capitalize the term "federal government" because they believe that there is no such thing as "the Federal Government" – that it is not a proper noun.

It will be important on the negative for you to win that the "federal government" refers to the central government in Washington, D.C. This will be important for you to win links to your generic disadvantages and for you to be able to defend the competitiveness of your states counterplan. You should not have any difficulty doing this, as this is how the term "federal government" has traditionally been understood in debate. Given that you can probably win this topicality argument if you need to, many of the issues in this book have been framed from the perspective that this is how the term "federal government" will be understood.

On a related note, negative teams may also occasionally try to catch affirmatives off guard with atypical definitions of federal government, particularly ones involving foreign governments. For example, some teams have argued, "the federal government is the central government of Brazil." Hopefully, the presence of the term "United States" in the resolution should also suffice in distinguishing which federal government is the agent of the resolution. There are, however, some definitions that refer to the "United States of Brazil" and other evidence that says "United States" simply refers to the USA (A8).

Should

The term "should" in the resolution is typically interpreted to mean "ought" – expressing "obligation, duty, propriety, or desirability" (A18-20). Generally, it really does not have any significance in most topicality debates. It exists primarily to provide a contextual basis for flat the affirmative is arguing that the plan should be done, not necessarily that it would be done.

It can also be argued that "should" is the past tense of "shall" (A28), essentially meaning, that the federal government should have curtailed its authority to search without probable cause or detain without charge at some point in the past.

Substantially

In the resolution, "substantially" is an adverb modifying the word "decrease." The "decrease" in "authority" must be by a "substantial" amount.

It is difficult for the negative to use the word "substantial" to limit affirmative plans because there are no precise, generally agreed on, definitions of the term. Dr. Rich Edwards, the author of the yearly FORENSICS QUARTERLY, explains that the "legal encyclopedia Words and Phrases presents more than 500 pages of fine-print definitions of this term." He explains the origin of such different definitions:

The context for these definitions should be understood: each one involves the judgment of a court in a particular case concerning what the word meant in the context of that case. It is natural that judges will try to make use of these legal definitions, but it must always be done with a key question in mind: "Is the context for the court case similar to the way that the word 'substantially' is used in the debate resolution?" There is, for example, a major difference in the meaning of the word "substantially" in the phrase "substantially all" from the resolitional phrase of "substantially increase." Many of these definitions warn that the word is not a term of precision. In State v. Rose the court held that "the term 'substantially' is relative and must be considered within the context of the particular fact situation; in essence, it means less than totally or the whole, but more than imaginary" (Words and Phrases, Vol. 40, 1995, p. 458).

Often, negatives will read definitions of "substantial" that claims "substantial is "X percentage" (A40-48) and that the affirmative fails to meet "X percentage" so they are not topical. The problem with this interpretation is that these interpretations are arbitrary in different contexts.

Although tying the affirmative down to a specific number may be difficult, there are various definition of the word substantial that may be helpful to the negative without being unrealistic for the affirmative (A49-50).

Decrease

Decrease generally means "To grow or cause to grow gradually less or smaller, as in number, amount, or intensity" (http://dictionary.reference.com/search?q=decrease). Affirmative plans that directly lessen authority are not likely to encounter topicality problems. Nonetheless, there are two potential topicality problems that the affirmative could encounter. First, affirmatives that simply trigger a reduction in authority, but do not directly reduce authority, are likely to encounter topicality problems – effects topicality. Second, affirmatives that eliminate authority, rather than just decrease it, are vulnerable to a "decrease" topicality argument, although affirmatives could respond by arguing that they do not literally the entirety of the executive's search authority, but only authority in a particular area.

Its

"Its" is "The possessive form of it" (http://dictionary.reference.com/search?q=its) (A53-4). In the resolution, "its authority" refers to the authority possessed by the federal government. This is important because the states and the local governments also possess authority to detain without charge or search without probable cause. Unlike past domestic topics, it is arguably not topical to directly reduce state and/or local authority.

Although it is not topical to directly reduce the authority of state and local governments, affirmatives, looking for more solvency, and negatives, looking for more disadvantage links, could argue that the restriction on authority also applies to the states. For example, if the Supreme Court were to rule that searches of body cavities in prisons without probable cause were unconstitutional, that constitutional protection would also extend to state and local prisons.

Authority

"Authority" is generally defined as the power to do something – "Power assigned to another; authorization: Deputies were given
authority to make arrests” (http://dictionary.reference.com/search?q=authority). It is this power/authority that the resolution calls on the affirmative to restrict, not the mere exercise of that power. For example, an affirmative plan will need to remove authority for the police to conduct a search, not simply, the ability to conduct the search.

“Authority” generally comes from one of five places – the Constitution, legislation, executive resolutions, regulations issued by executive agencies, or the courts where they have interpreted the Constitution to provide such authority. Whether or not a government official has authority to detain without charge or search without probable cause matters of heated debate. The President, for example, may claim he has the authority to detain individuals based on the Authorization to Use Military Force in Afghanistan (AUMF) and civil libertarians may argue that the AUMF does not provide him with that authority. So, one important topicality issue will be whether or not the authority exists in the first place.

A second important issue is: What does it mean to lessen that authority? For example, although it is not stated explicitly in the Act, the President claimed the authority to detain a person without charge based on the AUMF in Afghanistan. Since there is no explicit authority in the Act to detain (as there is not in many pieces of legislation), can, or must, the affirmative repeal the entirety of the Act? If so, affirmatives will be able to repeal many broad pieces of legislation, and claim advantages that extend far beyond detention without charge. Although many will argue that this is extra topical, if lessening the authority inheres in removing the legislative authority, this may be the only topical plan approach.

Requiring the affirmative to remove the authority will set up a strong strategy for the negative. Negative’s can argue that the authority should be retained, but that the executive branch stop exercising that authority. For example, the executive could decide to stop detaining people without charge. The authority that they have to do so does not require them to detain individuals without charge. Net benefits to this counterplan include a President Powers disadvantage, politics, and Judicial Reference.

**Detain**

Detain generally means “To keep in custody or temporary confinement. The police detained several suspects for questioning” (http://dictionary.reference.com/search?q=detain). Detention generally includes physical detention, usually in a detention facility (A60-1).

**Without Charge**

Without generally means lacking. For example, “Not having: lacking: a family without a car” (http://dictionary.reference.com/search?q=without) (A62-3). Although it is not one of the words that stands out in the resolution, it will be important in topicality debates because it introduces important questions:

- **What about individuals who are already charged?** In other words, can the plan topically require charges of individuals who have already been charged with something. Almost everyone has been charged with something - usually a minor/technical immigration violation. What people write about when they are arguing that people should not be detained without charge is that they should be charged with the crime that the government is “really” holding people for. The resolution, however, just directs the affirmative to reduce detention “without charge.” It is probably the case that the affirmative cannot do anything with regard to most of the people who are detained indefinitely and charged with insignificant crimes.

  **Can the affirmative specify the charge?** Another important issue is whether or not the affirmative can specify the charge in their plan text. If the affirmative plan can only say, for example, that the federal government cannot detain without charge in a particular instance, but cannot require the government to make any particular charge, the government would probably just respond by charging the person with a civil immigration violation.

**Charge**

In the context of the resolution, “charge” means “To make a claim of wrongdoing against; accuse or blame: The police charged him with car theft” (http://dictionary.reference.com/search?q=charge) (A64-5). “Charging” someone with a crime is a formal legal process and not just an individual police officer’s opinion.

**Or**

“Or” is used to indicate an alternative, usually only before the last term of a series: hot or cold; this, that, or the other. So, the affirmative can either reduce authority to detain without charge or search without probable cause. There is one definition of “or” that says that “or can be construed to mean and.” Negatives will argue that the affirmatives have to do both - reduce authority to detain without charge and search without probable cause.

**Search**

Generally, to “search” is “To examine the person or personal effects of in order to find something lost or concealed” (http://dictionary.reference.com/search?q=search). But, in a legal sense, a “search” is a very technical term. Although you may generally consider a “search” to be simply the act of looking for anything, the courts, particularly the Supreme Court, have defined a search in much more specific way. According to the courts, a “search” occurs when a search for evidence in occurs in a way that threatens a person’s privacy. A person’s privacy is determined both by A) their subjective determination of that privacy and B) and whether or not society is likely to agree that that expectation of privacy is reasonable. This standard for assessing whether or not an invasion of privacy, and hence a search, occurred was established in U.S. v. Katz (389 U.S. 347 (1967))

Since a search is defined based on a subjective expectation of privacy, whether or not a search has occurred in a particular place is obviously a subject of heated debates. The government is usually in the position of trying to convince the courts that a search did not occur, and hence a warrant based on probable cause was not needed, and the defendant is usually in the position of arguing that a search in fact did occur and that the police should have obtained a warrant.

The way the courts have defined a search invites continual controversy over whether or not one has taken place. This will not only make for perpetual topicality debates where the affirmative reads evidence that says the government has undertaken a “search” and the negative reads evidence saying that in fact a “search” did not take place, leaving the issue essentially irresolvable, but it also makes it difficult to outline a set of affirmatives where a “factual” search has occurred without probable cause.

**Without Probable Cause**

Definitions of “without” were discussed in the previous section. The term “without” in this portion of the topic creates at least one potential topicality dispute - can the affirmative require probable cause to exist for a particular purpose when it already exists for another? For example, as explained in the FISA section, the feuds must currently demonstrate probable cause that someone is an “agent of a foreign power, but they are not required to demonstrate probable cause to believe that a “crime has been committed or is about to be committed.” Is it topical to require the latter, as some articles propose? Or is it non-topical since probable cause is already required – you can’t literally do a search without establishing that the entity searched is an “agent of a foreign power.”
Probable Cause

Although probable cause is a central element of the Fourth Amendment, it is not defined anywhere in the Fourth Amendment. Definitions of what constitutes "probable cause" can be ascertained only by looking at how the courts have defined it through various decisions. According to the Supreme Court in Dumbra vs. U.S. (268 U.S. 435 (1925)), "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched, and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant. The reputable legal site FINDLAW explains in more detail:

Probable cause is to be determined according to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). Warrants are favored in the law and utilization of them will not be thwarted by a hypertechnical reading of the supporting affidavit and supporting testimony, United States v. Ventrresca, 380 U.S. 102, 108-09 (1965). For the same reason, reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." Jones v. United States, 362 U.S. 257, 270-71 (1960). Courts will sustain the determination of probable cause so long as "there was substantial basis for [the magistrate] to conclude that" there was probable cause. Aguilar v. Texas, 378 U.S. 108, 111 (1964). Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough. Byars v. United States, 273 U.S. 28 (1927) In United States v. Ventrresca, however, an affidavit by a law enforcement officer asserting his belief that an illegal distillery was being operated in a certain place, explaining that the belief was based upon his own observations and upon those of fellow investigators, and detailing a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. "Recital of some of the underlying circumstances in the affidavit is essential," the Court said, observing that "where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause," the reliance on the warrant process should not be deterred by insistence on too stringent a showing. United States v. Ventrresca, 380 U.S. 102 (1965).

One thing that is important to understand is that while a warrant can only be obtained if probable cause is demonstrated, the police do not necessarily have to have a warrant to conduct a search based on probable cause. There are certain instances, such as a fleeting suspect, that may require the police to conduct a search without probable cause:

Craig S. Lerner, Assistant Professor, George Mason University School of Law explains:

Consider again the case of United States v. Winsor, which involved an armed robber chased by police into a residential hotel. Ninth Circui held that "hot pursuit may excuse police from the Fourth Amendment's warrant requirement, but never does it excuse the absence of the requisite degree of suspicion before effecting a search." Accordingly, police were required to have probable cause, and not simply reasonable suspicion, to search the rooms of the hotel. At least to the dissenting judges in Winsor, a lesser evidentiary predicate should have sufficed given the robust societal interest in the immediate capture of the armed robber. Nonetheless, the Winsor majority correctly stated the law as it is now understood: Existent circumstances authorize police to act without a warrant, but they do not authorize searches or seizures with less than probable cause. (TEXAS LAW REVIEW, March 2003, pp. 1011-13.)

Topicality Outline

I. Resolved
   A. Resolved means settled or fixed (A1)
   B. Resolved means determined, explained or answered (A2)

II. The United States
   A. The is definite (A3)
   B. Those places subject to US jurisdiction (A4)
   C. A federation of states (A5)
   D. United States means U.S. of America (A6)
   E. The most common meaning is the federal government in DC (A7)
   F. United States means United States of America (A8)
   G. "U.S." is an appropriate abbreviation for United States of America (A9)
   H. "United States" doesn’t include territories (A10)
   I. It means only the 50 states & DC (A11)
   J. United States includes territories (A12)
   K. United States includes territories (A13)
   L. United States includes Indian reservations (A14)

III. federal government
   A. USFG is the legislative, executive and judicial branches (A15)
   B. Federal Government means central government rather than the states (A16)
   C. Federal government is the United States government (A17)

IV. Should
   A. Should means "ought to" (A18)
   B. Should means "ought" (A19)
   C. Should expresses obligation (A20)
   D. Past tense shall refers to the present (A21)
   E. Should recommends a course of action (A22)
   F. Should expresses desirability (A23)
   G. Should is not exclusively in the past tense (A24)
   H. Should expresses duty or obligation (A25)
   I. Should denotes an obligation (A26)
   J. Should implies mandatory action (A27)
   K. Should is the past tense of shall (A28)

V. Substantially
   A. Substantial means large (A29)
   B. Substantial is a considerable amount (A30)
   C. Substantial means "in the main" (A31)
   D. Substantial means material or essentially (A32)
   E. Substantial means material or essentially (A33)
   F. Substantially doesn't mean essentially (A34)
   G. Substantial means real (A35)
H. Substantial means real (A36)
I. Substantially can't be numerically quantified (A37)
J. Substantial Must Be Determined by Context (A38)
K. Substantial Must Be Determined by Context (A39)
L. Substantial is 20 percent or more (A40)
M. Substantial is 25 percent or more (A41)
N. Substantial is 25 percent or more (A42)
O. Substantial is 33 to 50 percent (A43)
P. Substantial is 90 percent (A44)
Q. Substantial is 74 percent (A45)
R. Substantial is 50 percent is too high (A46)
S. Substantial is at least 20 percent (A47)
T. Substantial is 20 percent (A48)
U. Substantial is more than 15 percent (A49)
V. Substantial is 1/48th (A50)

VI. Decrease
A. Decrease means to lesson (A51)
B. Synonyms of decrease (A52)

VII. Its
A. Possessive form of it (A53)
B. It's, not it's (A54)

VIII. Authority
A. Authority is delegated power (A55)
B. Authority can be implied (A56)
C. Authority is more than what is believed to be (A57)
D. Authority is the power to implement and enforce laws (A58)
E. Authority is discretion for enforcing laws (A59)

IX. Detain
A. To keep in custody (A60)
B. Three types of detention (A61)

X. Without
A. Without is lacking (A62)
B. Without is not having (A63)

XI. Charge
A. Charge is an accusation (A64)
B. Charge is a formal obligation (A65)

XII. Search
A. Search is based on privacy expectations (A66)
B. The Supreme Court says a search occurs when privacy is violated (A67)
C. Searches deemed unreasonable by the Court are still searches (A68)

XIII. Probable Cause
A. Probable cause can be defined in many ways (A69)
B. Probable cause can be defined in many ways (A70)
C. Probable cause means "sufficient to warrant arrest" (A71)
D. Proper legal and use definitions vary (A72)
E. Probable is no more than bare suspicion (A73)
F. Probable cause to search defined (A74)
G. Probable cause to search and detain are the same (A75)