### 2AC T

#### 1) Counter interpretation –

#### a) Indefinite detention is military custody without a clear time period of release

Physicians for Human Rights – June 2011, Punishment Before Justice: Indefinite Detention in the US, Executive Summary, http://www.judiciary.senate.gov/resources/transcripts/upload/022912RecordSubmission-Franken.pdf

Indefinite detention refers to a situation in which the government places individuals in custody without informing the detainee when—if ever—the detainee will be released. Indefinite detention therefore creates a situation of profound uncertainty that sets it apart from other types of governmental custody. The term encompasses other custody arrangements, including “preventive detention,” “executive custody,” “security detention,” “military detention,” “prolonged detention,” “administrative detention,” “conditional detention,” or, under the March 7 Executive Order, “continued law of war detention.” The US currently has approximately 170 individuals indefinitely detained at Guantánamo Bay. While only 15 of these individuals have been designated “high value detainees,”2 many of these detainees have already spent roughly 7-9 years3 in the harshest, most restrictive, and isolating conditions available4 and were subjected to torture.5 The US government also indefinitely detains thousands of refugee and nonrefugee immigrants, detentions whose purported justifications include national security, immigration, and foreign policy concerns.6 Many asylum seekers arrive on US soil traumatized by persecution in their home country as well as by the act of exile, while many non-refugee seekers have languished in detention for years vainly waiting for the day that they will finally be deported

#### b) War power is military action

David I. Lewittes - Winter 1992, Associate, Rogers & Wells, New York City; J.D., New York University School of Law, ARTICLE: CONSTITUTIONAL SEPARATION OF WAR POWERS: PROTECTING PUBLIC AND PRIVATE LIBERTY., 57 Brooklyn L. Rev. 1083, Brooklyn Law Review, LexisNexis

The next question should be: What is the executive war power?

 B. The Commander-in-Chief Power Justice Frankfurter once said: "The war power is the war power." n129 This fine explanation apparently did not help Justice Jackson who, four years later, expressed puzzlement over the meaning of the constitutional provision granting the President [\*1115] the commander-in-chief power: These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

#### c) This solves their limits claims – military detention only includes people who haven’t yet had habeas hearings, have lost their habeas hearings, or have won but haven’t been released. Their examples of immigration detention don’t apply because it’s not done by the military

#### 2) The aff is not an immigration issue:

#### a) Location - The aff definitionally cannot deal with immigration authority because all detainees who have won their habeas trial are in Gitmo which is in the US

Vaughn and Williams 13, Law Profs at Maryland

(2013, Katherine L. Vaughns B.A. (Political Science), J.D., University of California at Berkeley. Professor of Law, University of Maryland Francis King Carey School of Law, and Heather L. Williams, B.A. (French), B.A. (Political Science), University of Rochester, J.D., cum laude, University of Maryland Francis King Carey School of Law, “OF CIVIL WRONGS AND RIGHTS: 1 KIYEMBA V. OBAMA AND THE MEANING OF FREEDOM, SEPARATION OF POWERS, AND THE RULE OF LAW TEN YEARS AFTER 9/11”, Asian American Law Journal, Vol. 20, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2148404)

The district judge presiding over the Uighurs’ petitions was prepared to order their release, pending a hearing on the precise contours of that release. The release remedy certainly would have been conditional, as the Uighurs would have no immigration status. As a statutory matter, however, release would have been possible under the Executive’s parole power. The Immigration and Nationality Act226 gives the Executive the authority to exercise the parole power when a significant public interest or urgent humanitarian concern is implicated.227 Both factors are present in the Uighurs’ case. First, a strong argument can be made that the Uighurs’ situation presents a significant public interest: Their continued detention has been judicially declared unlawful. Consistent with adherence to the rule of law, they should have been released as soon as judiciallydetermined conditions were established.228 Second, as for the urgency of the humanitarian concern, it was the Executive’s action in prosecuting its “War on Terror” that created this situation—not the conduct of the Uighurs. Moreover, the duration of their detention, particularly in light of the fact that they are not now nor were they ever really enemy combatants, adds urgency to the humanitarian concern. Thus, an Executive grant of parole would have been a viable option in this case, if the Executive was ever serious about facilitating the Uighurs’ release through the immigration law mechanism. Moreover, the Supreme Court has stated previously that an individual paroled into the United States is not considered to have been admitted or gained immigration status. As such, the D.C. Circuit’s rationale about a judge’s inability to accord them immigration status simply does not figure into a judicially-ordered release remedy. In any event, though assignment of an immigration status is not required to facilitate the Uighurs’ release, the fact is that, in Boumediene, the Supreme Court determined that the Guantanamo Bay naval base is, as a functional matter, a part of the sovereign territory of the United States, such that the Suspension Clause must run there. Because Guantanamo Bay, the site of the Uighurs’ detention, has been deemed a part of the territory of the United States, the proverbial ship, to wit, the idea that the Uighurs’ release involves “admission” into U.S. territory, has already sailed

#### 3) Overlimiting - they exclude affirmative cases who argue that existing court interpretations which defer to the executive are wrong

#### a) Aff flex – too little affs left, debate gets stale and unfair. For example, there would be no armed forces into hostilities affs because the court has deferred to presidential interpretations of hostilities

#### b) Education – the most productive outcome of this topic is to train debaters to be legal advocates for change. Only defending that the court got it wrong provides that training.

### 2AC Condition CP

#### CP doesn’t solve either advantage—release is the only way for remedial powers to by effective—our evidence reflects the judicial consensus

Tirschwell 9

[2009, Eric A. Tirschwell is the first listed lawyer on the brief, “ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT”, <http://ccrjustice.org/files/2009-12-04%20kiyemba_FINAL%20merits%20brief_0.pdf>]

In Boumediene, the Court split over whether the petitioners had access, through the DTA, to an adequate substitute to the habeas remedy. But nine justices agreed about what habeas is: a remedial mechanism by which the Judiciary compels release. The Court acknowledged the importance of the writ as a “vital instrument for the protection of individual liberty.” Id. at 2246 (collecting cases). Because release is what the “instrument” achieves, the absence of an express release remedy in the DTA troubled the Court, id. at 2271, which saw in that absence one of the “constitutional infirmities” of the DTA regime, id. at 2272. The Chief Justice differed sharply with the majority— but not on the question of whether habeas requires release. His opinion (joined by all of the dissenting justices) argued that the MCA’s jurisdictional strip did not violate the Suspension Clause, in part, because the DTA did afford a release remedy. 128 S. Ct. at 2291- 92. The majority concluded that a “habeas court must have the power to order the conditional22 release of an individual unlawfully detained,” Boumediene, 128 S. Ct. at 2266, while the Chief Justice wrote similarly that “the writ requires most fundamentally an Article III court be able to hear the prisoner’s claims and, when necessary, order release,” id. at 2283 (emphasis added). Thus four dissenting justices, like five in the majority, agreed that release is fundamental to habeas and that the power to order it is of the essence of judicial power. This conclusion had been well established before. See, e.g., In re Medley, 134 U.S. 160, 173 (1890) (“under the writ of habeas corpus we cannot do anything else than discharge the prisoner from wrongful confinement”); Ex Parte Watkins, 28 U.S. (3 Pet.) at 202 (Marshall, C.J.); Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 136 (1807) (a habeas court that finds imprisonment unlawful “can only direct [the prisoner] to be discharged”); THE FEDERALIST NO. 84 at 629 (Alexander Hamilton) (John C. Hamilton ed. 1869) (habeas is “a remedy for [the] fatal evil” of “arbitrary imprisonments”).23 The government has never explained how it could be otherwise. A habeas writ that did not conclusively end unlawful Executive imprisonment would protect neither the separation of powers, because it would not judicially check the Executive; nor the prisoner, who would obtain nothing from judicial review; nor the Judiciary, whose function would be (and, since Boumediene, largely has been) reduced to cheerleading, if not outright irrelevance. The writ and the constitutional plan require more of the Judiciary than to accept assurances from Executive jailers. See Harris v. Nelson, 394 U.S. 286, 292 (1969) (no higher duty of a court than “the careful processing and adjudication of petitions for writs of habeas corpus”; writ must “be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected”); Bowen v. Johnston, 306 U.S. 19, 26 (1939) (habeas corpus the “precious safeguard of personal liberty”; “no higher duty than to maintain it unimpaired”).

#### Status quo relocation offers are not a meaningful remedy in practice even if it is in theory

Vaughn and Williams, Professors of Law, 13 [2013, Katherine L. Vaughns B.A. (Political Science), J.D., University of California at Berkeley. Professor of Law, University of Maryland Francis King Carey School of Law, and Heather L. Williams, B.A. (French), B.A. (Political Science), University of Rochester, J.D., cum laude, University of Maryland Francis King Carey School of Law, “OF CIVIL WRONGS AND RIGHTS: 1 KIYEMBA V. OBAMA AND THE MEANING OF FREEDOM, SEPARATION OF POWERS, AND THE RULE OF LAW TEN YEARS AFTER 9/11”, Asian American Law Journal, Vol. 20, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2148404]

Petitioners’ reasons for rejecting available relocation offers are varied, but not without cause. For example, Bahtiyar Mahnut refused to accept Palau’s offer of relocation because that country refused to accept his brother, Arkin Mahmud, who had developed severe mental health problems at Guantanamo after spending considerable time in solitary confinement, due to its purported inability to treat those problems within its borders.63 And as noted in petitioners’ letter brief to the Court, “[t]he consequences of solitary confinement are psychologically brutal,” and therefore likely to require significant treatment options.64 Other detainees rejected relocation offers because the proposed locations were not home to an established Uighur community.65 The group of Uighurs relocated to Albania shortly before the Supreme Court oral argument in the Kiyemba case, illustrate the problems that may arise from relocation to foreign lands. The Uighurs now living in Albania live in a refugee camp, monitored by armed guards, and surrounded by razor wire.66 There is no established Uighur community in Albania, and the Uighurs do not speak the language, making social integration difficult, if not impossible.67 Moreover, relocated Uighurs have often reported social and community alienation due to their political status, and the assumption that either their original designation as “enemy combatants” or their time spent at Guantanamo means that they are violent or dangerous. Apparently in the eyes of the Court, however, the Uighurs are “too picky” in their relocation wishes, refusing perfectly good resettlement offers.68 This undoubtedly is a problematic position. The government wasn’t “very discriminating when [it] scooped them up in Afghanistan, and carried them away,” ultimately detaining the Uighurs for nearly a decade.69 As one commentator has noted, “[i]s the idea that as long as they aren’t being tortured they should be pleased to find themselves wherever we might put them next? How about a research station in Antarctica?”70 I believe that habeas relief must be accompanied by a meaningful remedy, in this case, physical freedom, without the restrictions associated with life, albeit in the “least restrictive conditions” available, at the Guantanamo Bay naval base. It also must be accompanied by other rights that the detainees long have been denied, including the right to have some say in the ultimate location where they will live. The Uighurs’ detention has been found to be unlawful; their designation as “enemy combatants” was declared unjustified. They must be relocated from the site of their detention. Surely we cannot blame them for wanting some choice in where they end up. At the very least, pending permanent relocation to an “appropriate country,” mutually selected, the Uighurs could be resettled in an established Uighur community in the United States.71

### 2AC Terrorism DA

#### Err affirmative—their DA is from amicus briefs that represent unsubstantiated, exaggerated scare tactics—there is no substantive evidence of a major security threat from the plan

Tirschwell 8

[October 2008, Eric A. Tirschwell, “OPPOSITION TO EMERGENCY MOTION FOR STAY”, <http://ccrjustice.org/files/2008-10-08%20Uighur%20opposition%20to%20govt%20stay%20motion.pdf>]

At yesterday’s hearing, the district court invited the Government to point any alleged harm. The government could offer not a single fact. Pointedly asked by the court to identify “the security risk to the United States should these people be permitted to live here,” Hrg. Tr. 15, the government stammered, “I don’t have available to me today any particular specific analysis as to what the threats of—from a particular individual might be if a particular individual were let loose on the street,” Hrg. Tr. 18. The overnight hysteria of unsourced stay papers was far more congenial than evidence presented to a district judge. It now fails to articulate any harm other than theoretical legal harms of alleged impingement on Executive authority and the “clouding” of Appellees’ alien status, all of which will be addressed and resolved on appeal. So weak is the Government’s position on the merits that it resorts to scare tactics in the form of innuendo and unsubstantiated, exaggerated, and false rhetoric aimed at painting Appellees as dangerous men, including the astonishing assertion never before made in three years of litigation through all levels of the federal system, that these men were preparing to “wage terror on a sovereign government.” Mot. 4. Nothing in the record justifies that statement. The government had “seven years to study this issue,” Hrg. Tr. 15, three years notice of these habeas cases, three months’ notice of the release motion, and six weeks’ notice of the hearing. It offered nothing. The district court correctly found that the Government “has presented no reliable evidence that [Appellees] would pose a threat to U.S. interests, “ Hrg. Tr. 38, and the Government offers no argument for overturning that finding.

### 2AC PQD DA

#### No link – the aff only operates within established judicial authority

Chow 11, JD from Cardozo

(Samuel, THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS, www.cjicl.com/uploads/2/9/5/9/2959791/cjicl\_19.3\_chow\_note.pdf)

Additionally, there are ever-present concerns surrounding separation of powers. The degree to which the Court is concerning itself with foreign relations issues is unprecedented, which means any application of a balancing test would be usurping powers of the political branches that were traditionally exercised without the possibility of judicial participation. There is a general hesitation in potentially augmenting the courts authority in terrorist detentions. Yet, separation-of-powers concerns must be reconciled with the opposing, though equally compelling, counter-part—our government's system of checks and balances. Since the ideal of our tripartite government system is one where areas of authority are clearly defined, an augmentation of jurisdiction by the courts may seem suspicious. However, the idea of an unchecked Executive with the authority to indefinitely detain individuals (who the government itself has determined have no legal basis for detention) is equally, if not more so, disquieting. Moreover, the historical role of habeas courts as the final arbiter of a detention's legality provides a legitimate counter-argument that it is in fact the Executive that is intruding upon the judiciary's traditional authority. It does so by appropriating itself as the sole source of a functional remedy, thereby interfering with the courts habeas authority.

#### Terrorist networks are weak – Bin Laden’s death, Abbottabad intelligence, no safe haven

WILLIAM MCCANTS - Center for Strategic Studies / Johns Hopkins – Sept/Oct 2011, Al Qaeda's Challenge, Foreign Affairs, http://www.foreignaffairs.com/articles/68160/william-mccants/al-qaedas-challenge?page=show

Al Qaeda now stands at a precipice. The Arab Spring and the success of Islamist parliamentarians throughout the Middle East have challenged its core vision just as the group has lost its founder. Al Qaeda has also lost access to bin Laden's personal connections in Afghanistan, Pakistan, and the Persian Gulf, which had long provided it with resources and protection. Bin Laden's death has deprived al Qaeda of its most media-savvy icon; and most important, al Qaeda has lost its commander in chief. The raid that killed bin Laden revealed that he had not been reduced to a figurehead, as many Western analysts had suspected; he had continued to direct the operations of al Qaeda and its franchises. Yet the documents seized from bin Laden's home in Abbottabad, Pakistan, reveal how weak al Qaeda had become even under his ongoing leadership. Correspondence found in the raid shows bin Laden and his lieutenants lamenting al Qaeda's lack of funds and the constant casualties from U.S. drone strikes. These papers have made the organization even more vulnerable by exposing its general command structure, putting al Qaeda's leadership at greater risk of extinction than ever before. Al Qaeda has elected Zawahiri as its new chief, at least for now. But the transition will not be seamless. Some members of al Qaeda's old guard feel little loyalty to Zawahiri, whom they view as a relative newcomer. Al Qaeda's members from the Persian Gulf, for their part, may feel alienated by having an Egyptian at their helm, especially if Zawahiri chooses another Egyptian as his deputy. Despite these potential sources of friction, al Qaeda is not likely to split under Zawahiri's reign. Its senior leadership will still want to unite jihadist groups under its banner, and its franchises will have little reason to relinquish the recognition and resources that come with al Qaeda affiliation. Yet those affiliates cannot offer al Qaeda's senior commanders shelter. Indeed, should Pakistan become too dangerous a refuge for the organization's leaders, they will find themselves with few other options. The Islamic governments that previously protected and assisted al Qaeda, such as those in Afghanistan and Sudan in the 1990s, either no longer exist or are inhospitable (although Somalia might become a candidate if the militant group al Shabab consolidates its hold there). In the midst of grappling with all these challenges, al Qaeda must also decide how to respond to the uprisings in the Arab world. Thus far, its leaders have indicated that they want to support Islamist insurgents in unstable revolutionary countries and lay the groundwork for the creation of Islamic states once the existing regimes have fallen, similar to what they attempted in Iraq. But al Qaeda's true strategic dilemma lies in Egypt and Tunisia. In these countries, local tyrants have been ousted, but parliamentary elections will be held soon, and the United States remains influential. The outcome in Egypt is particularly personal for Zawahiri, who began his fight to depose the Egyptian government as a teenager. Zawahiri also understands that Egypt, given its geostrategic importance and its status as the leading Arab nation, is the grand prize in the contest between al Qaeda and the United States. In his recent six-part message to the Egyptian people and in his eulogy for bin Laden, Zawahiri suggested that absent outside interference, the Egyptians and the Tunisians would establish Islamic states that would be hostile to Western interests. But the United States, he said, will likely work to ensure that friendly political forces, including secularists and moderate Islamists, win Egypt's upcoming elections. And even if the Islamists succeed in establishing an Islamic state there, Zawahiri argued, the United States will retain enough leverage to keep it in line. To prevent such an outcome, Zawahiri called on Islamist activists in Egypt and Tunisia to start a popular (presumably nonviolent) campaign to implement sharia as the sole source of legislation and to pressure the transitional governments to end their cooperation with Washington. Yet Zawahiri's attempt to sway local Islamists is unlikely to succeed. Although some Islamists in the two countries rhetorically support al Qaeda, many, especially the Muslim Brotherhood, are now organizing for their countries' upcoming elections -- that is, they are becoming Islamist parliamentarians. Even Egyptian Salafists, who share Zawahiri's distaste for parliamentary politics, are forming their own political parties. Most ominous for Zawahiri's agenda, the Egyptian Islamist organization al-Gama'a al-Islamiyya (the Islamic Group), parts of which were once allied with al Qaeda, has forsworn violence and recently announced that it was creating a political party to compete in Egypt's parliamentary elections. Al Qaeda, then, is losing sway even among its natural allies. This dynamic limits Zawahiri's options. For fear of alienating the Egyptian people, he is not likely to end his efforts to reach out to Egypt's Islamist parliamentarians or to break with them by calling for attacks in the country before the elections. Instead, he will continue urging the Islamists to advocate for sharia and to try to limit U.S. influence. In the meantime, Zawahiri will continue trying to attack the United States and continue exploiting less stable postrevolutionary countries, such as Libya, Syria, and Yemen, which may prove more susceptible to al Qaeda's influence. Yet to operate in these countries, al Qaeda will need to subordinate its political agenda to those of the insurgents there or risk destroying itself, as Zarqawi's group did in Iraq. If those insurgents take power, they will likely refuse to offer al Qaeda safe haven for fear of alienating the United States or its allies in the region. Thanks to the continued predominance of the United States and the growing appeal of Islamist parliamentarians in the Muslim world, even supporters of al Qaeda now doubt that it will be able to replace existing regimes with Islamic states anytime soon. In a recent joint statement, several jihadist online forums expressed concern that if Muammar al-Qaddafi is defeated in Libya, the Islamists there will participate in U.S.-backed elections, ending any chance of establishing a true Islamic state. As a result of all these forces, al Qaeda is no longer the vanguard of the Islamist movement in the Arab world. Having defined the terms of Islamist politics for the last decade by raising fears about Islamic political parties and giving Arab rulers a pretext to limit their activity or shut them down, al Qaeda's goal of removing those rulers is now being fulfilled by others who are unlikely to share its political vision. Should these revolutions fail and al Qaeda survives, it will be ready to reclaim the mantle of Islamist resistance. But for now, the forces best positioned to capitalize on the Arab Spring are the Islamist parliamentarians, who, unlike al Qaeda, are willing and able to engage in the messy business of politics.

#### The Zivotofsky case killed PQD

Skinner 8/23, Professor of Law at Willamette

(13, Gwynne, Misunderstood, Misconstrued, and Now Clearly Dead: The 'Political Question Doctrine' in Cases Arising in the Context of Foreign Affairs, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2315237)

In case there was any doubt, the Supreme Court in 2012 once and for sounded the death knell for the “political question doctrine” as a nonjusticiability doctrine - even in cases involving foreign policy – in Zivotofsky v. Clinton. In Zivotofsky, the Court adopted the analysis articulated in this article – finding that the question was justiciable, and that the proper analysis was whether Congress or the President acted within their powers. In an 8-1 decision, the Supreme Court in reversed the lower courts’ dismissal based on political question grounds of the Zivotofsky’s lawsuit requesting that because he was born in Jerusalem, Israel be listed as his place of birth on his passport. The Court found that the “political question doctrine” did not bar the lawsuit. In so finding, the Court called into question the continued existence of the “political question doctrine” as a nonjusticiability doctrine in individual rights claims, even in the area of foreign policy. Moreover, the case serves as a model for how courts should approach the “political question doctrine” in the future – deciding which branch of government has the authority and discretion to act under the Constitution in the area of contention. In 2002, Congress enacted a statute that part of the Foreign Relations Authorization Act of 2003 providing that “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” 308 When President Bush signed the Act into law, he protested that § 214 “impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch.” Zivotofsky was born shortly after that, and when his parents requested that Jerusalem, Israel be listed as his place of birth, the State Department, citing State Department long-standing policy that prohibits recording “Israel” as the place of birth for those born in Jerusalem, refused to do.310 The parents sued for declaratory judgment and a permanent injunction.311 The Secretary of State moved to dismiss the case, arguing that it presented a nonjusticiable political question.312 Both lower courts dismissed the case under the “political question doctrine”.313 The District Court explained that “[r]esolving [Zivotofsky's] claim on the merits would necessarily require the Court to decide the political status of Jerusalem.”314 Concluding that the claim therefore presented a political question, the District Court dismissed the case for lack of subject matter jurisdiction. 315 The D. C. Court of Appeals, also dismissing the case on political question grounds, reasoned that the Constitution gives the Executive the exclusive power to recognize foreign sovereigns, and that the exercise of that power cannot be reviewed by the courts.316 It rejected the argument that Congress’ attempt to take a position on the matter did not change the analysis.317 Judge Edwards, however, in a notable opinion concurring in judgment, found that the “political question doctrine” did not preclude determination of the case since it involved “commonplace issues of statutory and constitutional interpretation” plainly within the constitutional authority of the Judiciary to decide.”318 Judge Edwards then opined that the Act unconstitutionally infringed on the power of the President’s recognition power, and that the plaintiff had no viable cause of action.319 The Supreme Court rejected the argument that the case required it to define U.S. policy, and criticized the court of appeals for finding that because the executive had the exclusive authority over the issue, the claim presented a nonjusticiable judicial question.320 Rather, the Court found, the suit simply required that the Court adjudicate whether Zivotofsky “can vindicate his statutory right under § 214(d) to choose to have Israel recorded as his place of birth on his passport,” by determining whether the statute was constitutional.321 The Court noted that “this is a familiar judicial exercise,” and further noted that it is the province and duty of the Court to determine the constitutionality of a statute – the only real issue in the case – something the court has the province and duty to do. 322 The Court noted it cannot refrain from this simply because the determination has political implications. The Court reasoned that if the statute impermissibly intruded upon the President’s constitutional powers, then the claim would need to be dismissed for “failure to state a claim” – not as a nonjusticiable question or for lack of standing.324 If the statute is constitutional, then the Secretary of State must be ordered to comply with the statute and issue the passport with Israel listed.325 Either way, the Court noted that no political question is involved.326 The Court then remanded the case for determination on the Constitutional question. In reaching its decision, the Court framed the “political question doctrine” quite narrowly. First, it began its analysis by citing Cohens v. Virginia328 for the proposition that “the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid,’” and noting that the Court has created a “very narrow exception” to the “political question doctrine.”329 Interestingly, rather than reiterate the six factors outlined in Baker, it suggested a narrowing test, looking at two basic factors: whether there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’330 The Court rejected the argument that there was a constitutional commitment of the question about recognition of governments to the Executive, finding instead that question was one of constitutional interpretation of a statute and, thus, belonged with the Court. 331 The Court noted that it was its role to determine the powers of Congress and the Executive under the Constitution. The Court also rejected the argument that it lacked judicially manageable standards in reaching any such decision by outlining all the various arguments and principals available in order for a court to adjudicate the matter. At the end of the day, Court’s opinion reaffirmed the judiciary’s role over certain foreign affairs issues. Thus, it is fair to say that this case indicates that the Court is signaling a serious retreat in the use of the “political question doctrine” to find that individual rights cases are off-limits to the judiciary, even where those cases affect national security or foreign policy.

#### Their DA relies on an outmoded theory of IR—prefer the turn

Knowles 9 [Spring, 2009, Robert Knowles is a Acting Assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution”, ARIZONA STATE LAW JOURNAL, 41 Ariz. St. L.J. 87]

How should the balance of power in the world affect the separation of powers under the U.S. Constitution? The conventional approaches to this question rely on an outmoded view of geopolitics. This Article offers a new model for assessing the courts' appropriate role in foreign affairs. American courts treat foreign affairs issues as unique and requiring very strong, sometimes absolute, deference to the Executive. n1 These "special deference" doctrines are a swamp of under-justification and inconsistent application. n2 But when courts and scholars do seek to justify special deference in foreign affairs, they usually resort to received wisdom about superior executive branch competence - attributes such as speed, flexibility, secrecy, and uniformity - contrasted with judicial incompetence. n3 In the [\*90] years since 9/11, in particular, these pragmatic arguments have been the weapon of choice for defenders of special deference. n4 The courts are, apparently, bringing a knife to a gunfight. n5 Why do foreign affairs demand that the executive branch enjoy vast discretion? The courts' view of their own competence has been shaped by America's role in the world. There is a deep, if usually unarticulated, connection between the assumed need for special deference and a popular theory of international relations known as realism. Realism depicts an anarchic international realm, populated only by nation-states, and dominated by roughly co-equal great powers carefully balancing one another. n6 Executive competences are required to handle this dangerous and unstable external environment. n7 This classic realist model of comparative institutional competence seemed appropriate when America was one of several, or even two, great powers. But even then, importing international relations ("IR") realism into constitutional foreign affairs doctrine was a recipe for chaos. Realpolitik teaches that the state must do whatever is necessary to protect itself. n8 But how can courts successfully balance this overriding principle against other constitutional values such as the protection of liberty? Moreover, the post-Cold War world has provoked a crisis in realism. n9 The United States is a global hegemon. It is unrivaled in its ability to deploy force throughout the globe, and it provides "public goods" for the world - such as the protection of sea lanes - in exchange for broad acceptance of [\*91] U.S. leadership. n10 Although realism predicts counter-balancing, no great power or coalition has yet emerged to challenge America's predominance. And despite a new round of predictions about American decline, the U.S. is still projected to have by far the largest economy and the largest military for decades. n11 Political scientists have struggled to define this American-led system, but courts and scholars of constitutional law have largely ignored it. n12 Instead, most debates about special deference have simply accepted outmoded classic realist assumptions that became conventional wisdom in the 1930s and 40s. This Article offers a new model for assessing appropriate judicial deference in foreign affairs that takes account of American-led order. By maintaining consistent interpretation of U.S. and international law over time and providing virtual representation for other nations and non-citizens, U.S. courts bestow legitimacy on the acts of the political branches, provide public goods for the world, and increase America's soft power - all of which assist in maintaining the stability and legitimacy of the American-led hegemonic order. This "hegemonic" model substantially eliminates the problematic deference gap between foreign and domestic cases and enables courts to appropriately balance foreign affairs needs against other separation-of-powers goals by "domesticating" foreign affairs deference. The hegemonic model also has explanatory and predictive value. In four recent cases addressing habeas claims by alleged enemy combatants, the Supreme Court rejected special deference. n13 It refused to defer to the executive branch [\*92] interpretations of foreign affairs statutes and international law, and even asserted military exigencies. The hegemonic model justifies this recent rejection of special deference and explains why it could augur increased judicial involvement in foreign affairs. The interpretive scope here is limited. The hegemonic model is functional but concerns overall governmental effectiveness in foreign affairs, not the appropriate allocation of power with respect to any particular policy. Nor do I analyze the appropriate allocation of foreign affairs powers between the President and Congress, although the hegemonic model has many implications for this relationship as well. Finally, I do not address formalist - e.g., originalist - arguments for or against special deference. The hegemonic model provides insights that should be considered in conjunction with the teachings of text, structure, and history. n14 This Article proceeds in four parts. In Part I, a background section, I explain functionalism's centrality to debates about the separation of powers in foreign affairs. I then describe the major special deference doctrines. I conclude by briefly recounting the Supreme Court's refusal to apply special deference in the enemy combatant cases. Part II explains the origins of the functional justifications for special deference. It limns the major tenets of international relations realism as it had been traditionally understood prior to the post-Cold War era. Realists describe the international realm as inherently de-centralized and unstable. n15 Nation-states, rather than individuals or institutions, are the only viable units. States are identical in terms of their function - like "billiard balls colliding" n16 - and the only salient difference among them is their relative power. n17 Great powers determine the structure of the system, and enforceable international law merely reflects their interests. n18 A lay version [\*93] of realism became incorporated into constitutional foreign relations law largely through the landmark 1936 decision, Curtiss-Wright. n19 This completed the transformation to an executive-centered understanding of the foreign affairs Constitution driven by America's acquisition of an empire and rise to great power status. Part III comprehensively maps the functional justifications to corresponding realist tenets, and explains how these realist assumptions create more problems than they solve. First, this classic realist model does not accurately depict the actual functioning of the branches in foreign affairs. For example, although foreign relations is said to require that the United States "speak with one voice," Congress and the President often conflict on foreign policy. Second, as a descriptive matter, the realist model encounters boundary problems because globalization will continue to blur the distinction between domestic and foreign affairs issues. Third, as a normative matter, the realist model, if accepted in full, would require total deference: it tells us very little about how best to balance foreign policy needs against other constitutional values. Part IV describes the current international order and introduces the hegemonic model, which I construct using insights from three mainstream preeminent-power theories: unipolarity, hegemony, and empire. n20 The hegemonic model assumes that (1) the hegemon plays a major role in determining enforceable international norms; (2) the system is durable and stable; and that (3) the stability of the system depends not only on the hegemon's military predominance, but also on its provision of "public goods" for the system as a whole and the perceived legitimacy of the order. The hegemonic model aligns the assessment of institutional competences more closely with the positive reality of the international system. It brings more coherence to the courts' treatment of foreign affairs by largely "domesticating" it. And the hegemonic model reveals additional functional justifications for greater judicial involvement in foreign affairs controversies. Part IV concludes by using the hegemonic model to explain and justify the results in the enemy combatant cases. In the Post-9/11 Era, the United States faces serious threats from transnational terrorist groups such as al-Qaeda, rogue states, and the proliferation of WMDs, but these phenomena will not themselves alter the hegemonic structure of the international system. When they are properly viewed as problems of hegemonic [\*94] management rather than as some new form of realist balancing, they cannot, in most situations, justify special deference.

#### Judicial intervention into detention is inevitable – a wave of lawsuits is on the way

Chesney 13, Law Prof at UT

(November, Robert, BEYOND THE BATTLEFIELD, BEYOND AL QAEDA: THE DESTABILIZING LEGAL ARCHITECTURE OF COUNTERTERRORISM, 112 Mich. L. Rev. 163)

The government will not be able to simply ride out the legal friction generated by the fragmentation of al Qaeda and the shift toward shadow war. Those trends do not merely shift unsettled questions of substantive law to the forefront of the debate; they also greatly increase the prospects for a new round of judicial intervention focusing on those substantive questions. 1. Military Detention Consider military detention first. Fresh judicial intervention regarding the substantive law of detention is a virtual certainty. It will come in connection with the lingering Guantanamo population, and it will come as well in connection with any future detainees taken into custody on a long-term basis, regardless of where they might be held. a. Existing Guantanamo Detainees Most of the existing Guantanamo detainees have already had a shot at habeas relief, and many lost on both the facts and the law. But some of them can and will pursue a second shot, should changing conditions call into question the legal foundation for the earlier rulings against them. n202 The first round of Guantanamo habeas decisions depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in Afghanistan, as did the Supreme Court's 2004 decision in Hamdi. Indeed, Justice O'Connor in Hamdi was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel. n203 The declining U.S. role in combat operations in Afghanistan goes directly to that point. This decline will open the door to a second wave of Guantanamo litigation, with detainees arguing that neither LOAC nor the relevant statutory authorities continues to apply. This argument may or may not succeed on the merits. At first blush, the NDAA FY12 would seem to present a substantial obstacle to the detainees. That statute expressly codifies detention authority as to members (and supporters) of al Qaeda, the Afghan Taliban, and "associated forces," n204 thus grounding detention authority directly in domestic law rather than requiring courts to impute such authority into the 2001 AUMF by implication from LOAC (as the Supreme Court had to do in [\*214] Hamdi itself). But it is not quite so simple. The same section of the NDAA FY12 relinks the question of detention authority to LOAC after all. It specifies that statutory detention authority as an initial matter exists solely "pending disposition under the law of war." n205 And although it then lists long-term military detention as a possible disposition option, the statute specifically defines this authority as "detention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." n206 A court confronted with this language might interpret it in a manner consistent with the government's borderless-conflict position, such that the drawdown in Afghanistan would not matter. But it might not. The repeated references to the "law of war" in the statute--that is to LOAC--might lead at least some judges to conduct a fresh field-of-application analysis regarding the extent to which LOAC remains applicable in light of the drawdown, and judges might then read the results back into the NDAA FY12. I am not saying that this is the likely outcome or that any such analysis would necessarily reject the government's borderless-conflict position. I am just saying that judges eventually will decide these matters without real guidance from Congress (unless Congress clarifies its intentions in the interim). Note, too, that any such judicial interpretations may well have far broader implications than just the fate of the particular detainee in question; a ruling that LOAC has no application in a given situation would cast a long shadow over any other LOAC-based actions the U.S. government might undertake in the same or similar contexts (including targeting measures). Regardless of what occurs in Afghanistan, the existing Guantanamo detainee population might also find occasion to come back to court should the decline of the core al Qaeda organization continue to the point where it can plausibly be described as defunct. In such a case, it is likely that at least some current al Qaeda detainees would revive their habeas petitions in order to contend that the demise of the organization also means the demise of detention authority over members of the defunct group. This argument would be particularly likely to come from those who were held on the ground of membership in al Qaeda but who the government had not shown to have been otherwise involved in hostile acts. This would be a challenging argument to make; the government would surely respond that al Qaeda would no longer be defunct if some of its members were set free. But setting that possible response aside, such a petition could compel the government to litigate the question of whether the continuing existence of various "franchises," like AQAP or al-Shabaab, suffices to preserve detention authority over al Qaeda members. That is, such a challenge could lead a judge to weigh in on the organizational boundary question.

### 2AC XO CP

#### Plenary powers authority over detention issue is a myth—immigration authority is under congress in the status quo and has been disproven for centuries

Tirschwell 9

[2009, Eric A. Tirschwell is the first listed lawyer on the brief, “ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT”, <http://ccrjustice.org/files/2009-12-04%20kiyemba_FINAL%20merits%20brief_0.pdf>]

The core theory of the Kiyemba panel majority was that detention power could be located in plenary Ex-ecutive control of the border—that is, in an immanent power separate from the Constitution or statute. Pet.App.4a-7a. The panel majority traced this power to Chae Chan Ping v. United States (“The Chinese Exclusion Case”), 130 U.S. 581 (1889).39 Pet.App.6a. The precarious foundations of that decision eroded more than a century ago, see Wong Wing v. United States, 163 U.S. 228, 237 (1896) (invalidating law authorizing imprisonment of any Chinese citizen in the U.S. illegally), and today have collapsed where detention power is claimed. As the Court explained in Martinez, “the security of our borders” is for Congress to attend to, consistent with the requirements of habeas and the Due Process Clause. 543 U.S. at 386 (emphasis added); see also Zadvydas, 533 U.S. at 696 (no detention power incident to border prerogative without express congressional grant, which is subject to constitutional limits); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (“[T]he executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”); Pet.App.29a (collecting cases). The “whole volume” of history, to which the government refers, Cert. Opp’n at 14, actually describes “the power of Congress” over regulating admission and deportation, see Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added). The border gives the Executive no plenary power to detain. If an extra-constitutional Executive border power existed, one might have expected some treatment of it in United States v. Libellants of Amistad, 40 U.S. 518 (1841), the last of many cases argued before this Court by John Quincy Adams. Aboard a schooner that arrived off Montauk, Long Island in August, 1839 were Africans. Kidnapped by Spanish slavers, they had killed the crew and seized control of the ship. At Spain’s request, President Van Buren prosecuted treaty-based salvage claims for the vessel and, on the theory that the latter were slaves of Spaniards, the Africans themselves. The Executive asserted significant Article II interests grounded in foreign relations with Spain. Yet neither diplomatic concerns (no less urgent to the Executive of the day than the control-of-theborder interest asserted here) nor a vague notion of security (the Africans had committed homicides) dissuaded Justice Story from ordering the Africans released into Connecticut, thence to travel where they liked. 40 U.S. at 592-97.40 Nor did any notion of plenary power over immigration, which received no mention at all.

### 2AC Court DA

#### Supreme court action on NSA war powers inevitable—triggers the link

Fitzgerald 12/28

[12/28/13, Sandy Fitzgerald, “Supreme Court May Have to Break NSA Surveillance Stalemate”, <http://www.newsmax.com/Newsfront/nsa-surveillance-contradictory-supreme/2013/12/28/id/544180#ixzz2pI4aAjrN>]

It may be up to the U.S. Supreme Court to decide whether the National Security Agency's collection of Americans' phone data is constitutional, after two federal judges issued contradictory landmark rulings on the matter. The American Civil Liberties Union already plans to appeal Friday's decision by U.S. District Judge William Pauley III in New York that said the agency's bulk telephone metadata is not only legal but necessary, reports cruxialcio.com. Pauley said the metadata, which includes records of the numbers that were called and how long calls last while not recording the content of the calls is a vital tool for capturing terrorists. "The bulk telephony metadata collection program represents the government's counter-punch: connecting fragmented and fleeting communications to reconstruct and eliminate al-Qaeda's terror network," Pauley said. But his ruling came less than two weeks after another federal judge, U.S. District Court Judge Richard Leon in Washington, D.C., said the metadata collection was a likely violation of citizens' rights to privacy. The American Civil Liberties Union, which claimed the program is unconstitutional and sued the government, said it would appeal the ruling. "We are extremely disappointed with this decision, which misinterprets the relevant statutes, understates the privacy implications of the government’s surveillance and misapplies a narrow and outdated precedent to read away core constitutional protections," said Jameel Jaffer, ACLU deputy legal director. The appeals would be filed in courts in New York and Washington on either case, and if the split remains, will likely head to the Supreme Court after that, The New York Times reports. Even Pauley, while making his ruling, admitted that the NSA's data collection, revealed by whistleblower Edward Snowden, "imperils the civil liberties of every citizen," but still might have captured the terrorists before the 9-11 attacks on the Pentagon and World Trade Center. But he said it is up to the president and Congress to end the NSA's activities, not the courts. Pauley also said that it is not up to him to say if the law will be appealed at the Supreme Court level. "The Supreme Court has instructed lower courts not to predict whether it would overrule a precedent even if its reasoning has been supplanted by later cases," noted Pauley.

#### Interbranch conflicts don’t spill over—individual court cases are decided on specific issues

Redish and Drizen 87, Professor of Law and Law Clerk

[April, 1987, Martin H. Redish (Professor of Law, Northwestern University) and Karen L. Drizin (Law Clerk to the Honorable Seymour Simon, Illinois Supreme Court) “CONSTITUTIONAL FEDERALISM AND JUDICIAL REVIEW: THE ROLE OF TEXTUAL ANALYSIS”. NEW YORK UNIVERSITY LAW REVIEW V. 62]

Dean Choper's fundamental assumption, then, is that Supreme Court abstention on issues of constitutional federalism would somehow increase, or at least curtail loss of, limited capital for the more vital area of individual liberty. However, even if one were to concede that judicial review is more fundamental to our constitutional scheme in the area of individual liberty than in matters of federalism, acceptance of Dean Choper's proposal would not necessarily follow. The problem is that it is neither intuitively nor empirically clear that the Court's so-called capital is transferable from one area of constitutional law to another. As one of the current authors has previously argued: It is difficult to imagine . . . that the widespread negative public reactions to Miranda v. Arizona, Engle v. Vitale, or Roe v. Wade would [\*37] have been affected at all by the Court's practices on issues of separation of powers and federalism. Rather, public reaction in each seems to have focused on the specific, highly charged issues of rights for criminals, prayer in public schools, and abortions. It is doubtful that the Court would have had an easier time if it had chosen to stay out of interbranch and intersystemic conflicts. 146

#### Curtailing executive authority causes greater Judicial activism—war powers specific

Paulsen 02, Professor of Law

[Michael, Prof of Law @ Minnesota, Spring, 19 Const. Commentary 215]

Judicial triumphs tend to beget more judicial triumphs - and sometimes judicial triumphalism and hubris. It is probably only a slight exaggeration to say that if there had been no Youngstown there would have been no Brown v. Board of Education, 10 no Cooper v. Aaron, 11 no Warren Court criminal procedure and civil rights revolution, no United States v. Nixon, 12 no Roe v. Wade 13 and Planned Parenthood v. Casey. 14 Still more, had Youngstown played out differently in the end - had Truman resisted or evaded the Court's judgment against his seizure of the steel industry - the aftermath of the Nixon Tapes case might have played out differently, too. Had Truman successfully held on to the steel mills in the face of an adverse decision, Nixon probably would have held on to the tapes, too, no matter what the Court said. And perhaps the Court would not even have tried to order Nixon to produce the tapes in the first place. Finally, if Youngstown had been decided the other way, The Pentagon Papers Case 15 probably would have played out differently, too. The federal government probably would have won in court the power to enjoin a newspaper's publication of materials the government deems detrimental to national security (or affirmance of an executive order banning such publication). 16 Or, had Youngstown been decided as it was but Truman successfully defied the judgment, Nixon might have seized the printing [\*220] presses of The New York Times and The Washington Post and ignored any judicial decrees to the contrary. 17

#### Judges don’t consider capital when deciding.

Landau, JD Harvard and clerk to US CoA judge, 2005

(David Landau, JD Harvard Law, clerk to Honorable Sandra L. Lynch, U.S. Court of Appeals for the First Circuit, 2005, “THE TWO DISCOURSES IN COLOMBIAN CONSTITUTIONAL JURISPRUDENCE: A NEW APPROACH TO MODELING JUDICIAL BEHAVIOR IN LATIN AMERICA” 37 Geo. Wash. Int'l L. Rev. 687)

Theoretically, attitudinalists could argue that judges rule in accordance with their own ideological preferences honestly, rather than strategically, because for some reason judges simply are not capable of, or prefer not to, act strategically. In practice, however, this is not what they say. Attitudinalists instead say that the factual environment renders strategic action unnecessary, at least for U.S. Supreme Court justices, because, for example, federal judges have life tenure, U.S. Supreme Court justices have no real ambition for higher office, and congressional overrides are rarely a realistic danger. [n25](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n25) "The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured justices  [\*696]  enormous latitude to reach decisions based on their personal policy preferences." [n26](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n26) In other words, both strategic and attitudinal models, in practice, assume that judges are willing and able to act strategically. Where the two theories differ is in their factual assumptions: Strategic models support the belief that judges face various types of constraints that force them to support decisions that differ from their preferred policy points, while attitudinalists believe that the institutional environment leaves at least those judges that they study - generally U.S. Supreme Court justices - free to make decisions that are exactly in accord with their preferred policies. Similarly, followers of strategic theory could theoretically believe that judges act strategically to maximize achievement of some set of goals other than their ideological policy preferences. For example, perhaps judges could prefer "legalistic" goals like adherence to precedent, but would have to defect strategically from absolute adherence to those goals given the presence of other institutions with some clout, like the U.S. Congress. In practice, however, this is not what happens. Instead, strategic theorists virtually always model judges as strategically furthering sets of ideological policy goals, which are the exact same goals modeled by the attitudinal theorists. [n27](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n27) What we have, then, are two theories that in practice tend to collapse into one. In both theories, actors are assumed: (1) to have preferences; and (2) to act strategically for the maximization of those preferences. [n28](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n28) In addition, attitudinalists and strategic theorists both believe in a particular kind of rational choice theory: Specifically, the actors' preferences are assumed to be solely ideological, policy-based goals derived from the political realm. It is important to emphasize that both theories also believe that the  [\*697]  proper way to test judicial behavior is to look at what judges actually do, not at what they say: Thus, what matters is the outcome, not the reasoning of the case.

#### Even when relations are low– mutual self-interest drives cooperation

Rojansky ’8

(Matthew, former fellow at Stanford’s Center for International Security and Cooperation. “Better Days Ahead for the US-Russia Relationship” http://blog.psaonline.org/2008/10/24/better-days-ahead-for-the-us-russia-relationship/)

In a recent talk at the Woodrow Wilson Center, SAIS professor Michael Mandelbaum described the US-Russia relationship in gloomy terms: “We are in a bad place. Relations are worse, and more dangerous, than at any time since the beginning of the 1980s. Each side regards the other with suspicion and growing hostility.” Mandelbaum attributes the current dismal state of US-Russia relations to a number of factors, including the perception on the part of many Russians that US-backed “shock therapy” in the 1990’s destroyed Russia’s economy, society and influence in the world. NATO expansion to Russia’s borders over the past two decades, plus plans to base missile defense facilities in Poland and the Czech Republic, combined with US indifference to Russian opinion on Kosovo and Iraq, have made things even worse. It has come to the point, says Mandelbaum, that Russian policy smacks of a “reflexive opposition to any initiative sponsored by the United States, and of a general policy of trying to weaken the American position in the world however and whenever possible.” But all is not lost. I have been consistently reassured by those involved that robust US-Russia cooperation continues in many important arenas, including nuclear non-proliferation and counter-terrorism. So while the rhetoric is certainly grim, it is not clear that the core of the US-Russia relationship has suffered. Here are just a few examples of ongoing engagement between Moscow and Washington, which seem to reveal both sides’ recognition that close cooperation is still a win-win scenario: 1. High-level Security Dialogue: Earlier this week, Adm. Michael Mullen, Chairman of the US Joint Chiefs of Staff, traveled to Helsinki for a meeting with his Russian counterpart, General Makarov, at the Russian’s request. While Mullen was clear that full NATO-Russia cooperation remained limited after the Georgia invasion, he said, “It wasn’t a meeting about disagreements (so much) as it was a dialogue and a commitment to continue the dialogue - in particular between him and me.” On the agenda, according to a senior US official, was the Iranian nuclear program. 2. Crisis Management: The ongoing standoff between the pirate-held ship Faina and an international naval flotilla has become the setting for another ray of light in the US-Russia relationship. In the same week that the US imposed sanctions on Russia’s state arms export concern, Rosoboronexport, for selling weapons to Iran’s Revolutionary Guards, the US, Russia, and Ukraine have been coordinating closely on efforts to end the standoff, and free the Belize-flagged ship’s Russian, Ukrainian and Latvian crew. Ironically, the ship is carrying Soviet-designed military hardware possibly intended for illegal sale in African war zones. 3. Securing Loose Nuclear Material: Since 2005, the US and Russia have cooperated to recover US and Russian-origin nuclear material from countries around the world. The program hasn’t been even close to derailed by the latest tensions between Moscow and Washington. In fact, the National Nuclear Security Administration reported this week that a joint US-Russian team completed a two-year effort to remove 341 pounds of spent fuel from a nuclear reactor in Hungary and ship it to Russia for reprocessing.