No. 08-1234

IN THE
Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,

Petitioners,

v.

BARACK H. OBAMA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE PUBLIC INTERNATIONAL LAW & POLICY GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae, the Public International Law & Policy Group (PILPG), is a global *pro bono* law firm that provides legal assistance to foreign governments and international organizations on the negotiation and implementation of peace agreements, the drafting and implementation of post-conflict constitutions, and the creation and operation of war crimes tribunals. PILPG also assists states with the training of judges and the drafting of legislation.

PILPG is comprised of nearly 200 members, whose ranks include former lawyers for the U.S. Department of State; retired U.S. Ambassadors and other senior U.S. Foreign Service officers; retired senior Foreign Ministry officials from other states; and law professors from a number of U.S. law schools.

PILPG has provided *pro bono* legal assistance to over two dozen states and governments involved in the negotiation and implementation of peace agreements, including Afghanistan, Armenia, Bosnia and Herzegovina, Darfur, Georgia, Kosovo, Macedonia, Montenegro, Somalia, South Sudan, and Sri Lanka. PILPG sends members in-country to facilitate the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

provision of legal assistance, and its members often serve on client delegations during peace negotiations.

PILPG has advised the governments of Bosnia and Herzegovina, Iraq, Kosovo, Liberia, Montenegro, Nagorno-Karabakh, Nepal, Sri Lanka, and South Sudan, as well as the Burmese government-in-exile, on drafting, amending, and implementing their constitutions.

PILPG has maintained offices in Georgia, Iraq, Kosovo, Nepal, Somaliland, South Sudan, Sri Lanka, Tanzania, and Uganda to facilitate assistance to our clients.

PILPG has provided legal assistance to every international criminal tribunal: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Iraqi Special Tribunal, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the International Criminal Court. PILPG's members frequently advise on the creation and operation of tribunals. PILPG is currently advising the Ugandan government on the drafting and implementation of legislation establishing a war crimes tribunal, including training the judges of the new court.

PILPG, working in collaboration with partner organizations, has trained hundreds of judges in developing legal systems. In 2004 and 2005, PILPG members led a series of judicial training sessions in London and Stratford-upon-Avon for the 50 judges of

the Iraqi High Tribunal to prepare them for the trials of Saddam Hussein and other high level former leaders of the Ba'athist regime. In 2004 and 2005, PILPG members also conducted trainings in Dubai for over 300 Iraqi judges on due process and civil liberties. In 2006, PILPG members conducted trainings in Prague on due process and civil liberties for over 100 judges from former Soviet Bloc countries in Eastern Europe.

PILPG files this brief to underscore the import the Court's decision in the present case will have in promoting the respect for rule of law in other states in times of conflict.

SUMMARY OF ARGUMENT

The precedent of this Court has a significant impact on rule of law in foreign states. Foreign governments, in particular foreign judiciaries, notice and follow the example set by the U.S. in upholding the rule of law. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, U.S. leadership on the primacy of law during the war on terror is particularly important.

Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court's decisions, most notably *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), have established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in *Boumediene*, the Court of Appeals sought in

Kiyemba v. Obama to narrow *Boumediene* to such a degree as to render this Court's ruling hollow. 555 F.3d 1022 (D.C. Cir. 2009). The present case is thus a test of both the substance of the right granted in *Boumediene* and the role of this Court in ensuring faithful implementation of its prior decisions.

Although this Court's rulings only have the force of law in the U.S., foreign governments will take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict. PILPG has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals. Through providing *pro bono* legal assistance to foreign governments and judiciaries, PILPG has observed the important role this Court and U.S. precedent serve in promoting rule of law in foreign states.

In Uganda, for example, the precedent established by this Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene*, influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People's Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions in the

Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement.

Foreign judges also follow the work of this Court closely. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror.

A review of foreign precedent confirms how closely foreign judges follow this Court. In numerous foreign states, and in the international war crimes tribunals, judges regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems.

Given the significant influence of this Court on foreign governments and judiciaries, a decision in *Kiyemba* implementing *Boumediene* will reaffirm this Court's leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict.

ARGUMENT

I. *KIYEMBA v. OBAMA* IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT.

The precedent set by the Supreme Court in the present case will have a significant impact on the development of rule of law in foreign states. Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court's previous decisions related to the war on terror have shaped how foreign states uphold the rule of law in times of conflict. Foreign governments and judiciaries will review this Court's decision in the present case in light of those previous decisions. A decision in the present case implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict.

Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror. In particular, this Court's landmark decision in *Boumediene* highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the "indispensable" role of habeas corpus as a "time tested" safeguard of liberty. *Boumediene v. Bush*, 128 S.Ct. 2229, 2247, 2259 (2008). Around the globe, courts and governments took note of this Court's stirring words: "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty

that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives." *Id.* at 2277. In contrast to the maxim *silent enim leges inter arma* (in times of conflict the law must be silent), this Court affirmed in *Boumediene* that "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law." *Id.*

Boumediene held that the detainees in the military prison at Guantanamo Bay are "entitled to the privilege of habeas corpus to challenge the legality of their detentions." *Id.* at 2262. Inherent in that privilege is the right to a remedy if the detention is found to be unlawful. In the present case, the Petitioners, who had been found not to be enemy combatants, sought to exercise their privilege of habeas corpus. The Executive Branch conceded that there was no legal basis to continue to detain the Petitioners, that years of diligent effort to resettle them elsewhere had failed, and that there was no foreseeable path of release. The District Court implemented *Boumediene*, ordering that the Petitioners be brought to the courtroom to impose conditions of release. *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33, 42-43 (D.C. Cir. 2008). The Court of Appeals reversed, with the majority concluding that the judiciary had no "power to require anything more" than the Executive's representations that it was continuing efforts to find a foreign country willing to admit Petitioners. *Kiyemba v. Obama*, 555 F.3d 1022, 1029 (D.C. Cir. 2009). The Court of Appeals' decision effectively narrowed *Boumediene* to such a

degree that it rendered the ruling hollow. Circuit Judge Rogers recognized this in her dissent, opining that the majority's analysis "was not faithful to *Boumediene*." *Id*. at 1032 (Roberts, J., dissenting).

Given the Court of Appeals' attempt to narrow *Boumediene*, *Kiyemba v. Obama* is a test of this Court's role in upholding the primacy of law in times of conflict. A decision in favor of the Petitioners in *Kiyemba* will reaffirm this Court's leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict.

II. PILPG'S EXPERIENCE ADVISING FOREIGN GOVERNMENTS AND JUDICIARIES ILLUSTRATES THE IMPORTANCE OF SUPREME COURT PRECEDENT IN PROMOTING RULE OF LAW IN FOREIGN STATES DURING TIMES OF CONFLICT.

During PILPG's work providing *pro bono* legal assistance to foreign governments and judiciaries on the rule of law in conflict and post-conflict settings, clients frequently request guidance on U.S. laws and the role of the judiciary in the U.S. system of governance. In recent years, as states have watched the U.S. tackle the legal issues surrounding the war on terror, foreign governments and judiciaries have expressed keen interest in, and have demonstrated reliance on, the legal mechanisms the U.S. has adopted to address the challenges presented in this new form of conflict. The U.S. Government, under the guidance of this Court, has set a strong example for upholding the rule of law during times of conflict, and foreign governments have followed this lead.

When states follow the example set by the U.S. Government, the U.S. can benefit greatly. The U.S. Government recognizes that foreign states with strong and independent judicial systems and a commitment to the rule of law make the most stable allies and partners. Stable allies and partners in turn create the best environment for U.S. business investments and commerce and provide the most safety for Americans traveling abroad. Through PILPG's work with foreign governments, PILPG has observed that U.S. rule of law interests are best represented abroad when foreign governments view the U.S. as committed to the primacy of law. *See* Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate,* 31 Cardozo L. Rev. 45, 64-65 (2009).

A. Foreign Governments Rely on U.S. Precedent to Promote Rule of Law in Times of Conflict.

As noted above, PILPG has advised over two dozen states and governments on the negotiation and implementation of peace agreements and the drafting of post-conflict constitutions. PILPG has also advised all the international war crimes tribunals. PILPG frequently serves as *pro bono* counsel to foreign governments and judiciaries, advising those governments and judiciaries on important legal issues during times of transition. PILPG's unique relationship with its clients provides the organization's members with rare insight into the decision-making process of foreign governments and judiciaries and the influence that the U.S. and this Court have on promoting rule of law during times of conflict. The following examples, from Uganda, Nepal, Somaliland, and South Sudan, illustrate some of

the ways in which foreign governments and judiciaries rely on the leadership of the U.S. and this Court to promote rule of law in their home states.

i. Uganda

In Uganda, the precedent established by this Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In 2008 members of PILPG began working with the Government of Uganda to establish a War Crimes Chamber within the Ugandan High Court to prosecute members of the Lord's Resistance Army (LRA). The LRA is an insurgent group operating in Northern Uganda, which, over the past twenty-five years, has kidnapped over sixty thousand young Ugandan girls and boys, and forced them to be sex slaves and child soldiers. PILPG worked closely with the Ugandan government to establish a judicial mechanism to address this violence in accordance with international legal standards.

After discussing with PILPG this Court's holdings in *Hamdan* and *Boumediene,* the Ugandan government decided to include a provision in their bill establishing the War Crimes Chamber that provides for appeal to Uganda's highest court. Following the example of the U.S., the Ugandans felt that it was important that such high profile and controversial cases involving war crimes and terrorism should be subject to the highest level of judicial review in order to promote independence, fairness, and legitimacy. Provided that this Court issues

a robust interpretation of *Boumediene*, the Ugandan precedent is likely to be repeated by other countries, such as Liberia, which are also contemplating the establishment of judicial bodies to prosecute war crimes and terrorism.

ii. Nepal

This Court has also served as a model for the nascent Nepal judiciary. Nepal's 2006 Comprehensive Peace Agreement ended a decade-long civil conflict between Maoist insurgents and government forces. The Agreement provided for the election of a Constituent Assembly to serve as an interim government and to draft a new constitution for Nepal. Elected in May 2008, the Constituent Assembly is currently in the midst of the constitution drafting process. PILPG is advising the Assembly's drafting committees on a number of issues, among them the structure, composition, and role of the judiciary. Members of the Assembly have repeatedly expressed the view that the judiciary is a crucial component to fully and effectively implementing the constitution and ensuring the balance of power in the new government.

In technical discussions with members of the Committee on the Judicial System, PILPG discussed several aspects of the U.S. judicial model, including: the U.S. federal and state judicial structures; the types of cases the Supreme Court can adjudicate; the powers and functions of the U.S. judicial branch; the devolution of judicial power in the U.S.; the role of the Supreme Court in establishing precedent for all U.S. courts; and the mechanisms used by the Supreme Court to ensure

enforcement of its decisions in the lower courts. Members of the Committee on the Judicial System were particularly interested in how the U.S. federal court system operates at the national level, and how the U.S. model could be applied in Nepal as Nepal moves towards decentralizing its court system.

As the Constituent Assembly moves forward with developing constitutional and judicial structures for Nepal, members will continue to look to the functioning of this Court for guidance on the role of a high court in a federal system, particularly how this Court enforces key decisions in the lower courts.

iii. Somaliland

In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. In October 2008, Somaliland, an autonomous region inside the international borders of Somalia, experienced its first large-scale attack by terrorist-linked suicide bombers. The Somaliland government sought PILPG's assistance to develop a legal framework to combat terrorism based on U.S. terrorism legislation. The government believed that rule of law was the best means to combat terrorism and build international support for Somaliland's efforts towards that end.

The Somaliland government sought to address gaps in its legal regime that prevented law enforcement from accessing information necessary to properly combat future terrorist attacks, such as telecommunications records, financial transfer records, property rental

records, and vehicle records. The government requested PILPG's assistance in balancing new government authority with vital due process safeguards that the U.S. and other states use to protect the rights of citizens.

iv. South Sudan

In the South Sudan peace process, the Sudan People's Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of the enforceability of adjudicative decisions in deciding one of the most important and contentious issues in the ongoing peace process. In May 2008, large-scale violence in Abyei, South Sudan, resulted in the destruction of Abyei Town and the displacement of its residents. The violence further threatened to unravel the 2005 Comprehensive Peace Agreement between the Government of Sudan and the SPLM/A. The violence was a result of tension between the parties regarding the long-overdue establishment of boundaries of the Abyei Area, which straddles the North and South of Sudan and was the location of widespread violence during decades of civil war. The parties had agreed in the Comprehensive Peace Agreement to a specific process to determine the boundaries of the Abyei Area. When the Abyei Boundaries Commission issued its binding decision, however, the Government of Sudan refused to implement the ruling. Given the long and violent history between the parties, the unresolved status of Abyei threatened to re-ignite widespread conflict.

Rather than returning to hostilities, however, the parties elected to refer the Abyei question to an adjudicative body. On July 7, 2008, the parties signed the Abyei Arbitration Agreement. Under the terms of the Arbitration Agreement, the parties agreed to submit questions regarding the boundaries of the Abyei Area to an arbitration tribunal seated at the Permanent Court of Arbitration in The Hague. The leaders of the SPLM/A told PILPG that they sought recourse to an adjudicative body because they believed that the ruling would be enforceable and would be supported by the international community.

Based on the belief that the U.S. legal system promotes the primacy of law and affirms the critical role of adjudicative bodies in a system dedicated to the rule of law, the SPLM/A cited U.S. court decisions in its submissions to the Abyei Arbitration tribunal. The SPLM/A memorials specifically cited this Court, as well as U.S. district and circuit court decisions, to bolster the SPLM/A's position that the tribunal should respect the finality of the award of an adjudicative body, such as the Abyei Boundaries Commission.[2] When the Abyei

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[2] Memorial of the Sudan People's Liberation Movement/Army at 157 n.1165, Sudan v. SPLM/A (Perm. Ct. Arb. 2008), *available at* http://www.pca-cpa.org/showfile.asp?fil_id=1146 (citing *Hall Street Assoc., LLC v. Mattel, Inc.*, 128 S.Ct. 1396, 1405 (2008) (referring to the separately defined and exclusive grounds for vacatur which the Federal Arbitration Act provides and stating: "[They] substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and (Cont'd)

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evidentiary appeals that can render . . . arbitration merely a prelude to a more cumbersome . . . judicial review process . . . .")); *id.* at 181 n.1314 (citing *Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S.Ct. 1396, 1404-05 (2008) (reiterating that courts will not conduct a general review of arbitral awards for legal errors); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("Courts thus do not sit to hear claims of factual or legal error by an arbitrator . . . .")); *id.* at 196 n.1380 (citing *Jones Dairy Farm v. Local No. 8-1236, United Food and Commercial Workers Int'l, AFL-CIO*, 760 F.2d 173, 175 *et seq.* (7th Cir. 1985); *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983) ("a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result")); Counter-Memorial of the Sudan People's Liberation Movement/Army at 53 n.149, Sudan v. SPLM/A (Perm. Ct. Arb. 2009), *available at* http://www.pca-cpa.org/showfile.asp?fil_id=1150 (citing *Chicago, Burlington, & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 593 (1907)

> "Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. So, as to arbitrators. . . . All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law."

Rubens v. Mason, 387 F.3d 183, 191 (2d Cir. 2004) ("[It is] well-settled law that testimony revealing the deliberative thought processes of judges, juries or arbitrators is inadmissible."); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 67 (2d Cir. 2003) ("While arbitrators may be deposed regarding claims of bias or
(Cont'd)

Arbitration tribunal issued its binding decision in July 2009, the arbitration decision also cited this Court's precedent.[3] This Court thus played an important role in

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prejudice, cases are legion in which courts have refused to permit parties to depose arbitrators – or other judicial or quasi-judicial decisionmakers – regarding the thought process underlying their decisions."), *rev'd on other grounds, Hall Street Assocs. v. Mattel, Inc.*, 128 S.Ct. 1396, 1403-04 (2008)); *id.* at 74 n.258 (*citing ALS & Assoc. v. AGM Marine Constructors, Inc.*, 557 F.Supp.2d 180, 182 (D. Mass. 2008); *see also Halliburton Energy Sers., Inc., v. NL Indus.*, 553 F.Supp.2d 733, 752 (S.D.Tex. 2008) ("Judicial review of an arbitration award is exceedingly deferential. Vacatur is available only on very narrow grounds, and federal courts must defer to the arbitrator's decision when possible."); *see also id.* at 779 ("[C]ourts must give particular deference to the procedures used by arbitrators."); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749 (8th Cir. 1986) (courts must "accord even greater deference to the arbitrator's decisions on procedural matters than those bearing on substantive grounds."); *Indus. Risk Insurers v. MAN Gutehoffnungshütte GmbH* 141 F.3d 1434, 1442-1444 (11th Cir. 1998) (noting procedural discretion protected by Article V(1)(d)), Exhibit-LE 26/12; *Checkrite of San Jose, Inc. v. Checkrite Ltd.*, 640 F.Supp. 234, 236 (D. Colo. 1986) ("Federal courts are to give great deference to an arbitrators' decision on matters of procedure which arise from the dispute and bear on its final disposition. Basically, matters of procedure lie within the discretion of the arbitrators.")).

[3] Abyei Arbitration Final Award at 143 n.806, Sudan v. SPLM/A (Perm. Ct. Arb. 2009) *available at* http://www.pca-cpa.org/showfile.asp?fil_id=1240 (relying on *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), 843-44 (if Congress has expressly given the agency authority to elucidate a statutory provision through regulations, then such legislative regulations are given controlling weight "unless . . .
(Cont'd)

the peaceful resolution of one of the most contentious issues in the South Sudan peace process.

As the foregoing examples illustrate, foreign governments rely on the precedent set by the U.S. and this Court when addressing new and complex issues in times of conflict. Finding for the Petitioners in the present case will reaffirm this Court's leadership in promoting respect for rule of law in foreign states during times of conflict.

B. Foreign Judges Follow U.S. and Supreme Court Leadership in Times of Conflict.

In addition to its work advising foreign governments, PILPG has been and continues to be involved in a number of judicial training initiatives in foreign states. These initiatives aim to foster independent and fair judicial systems in transitional and post-conflict states throughout Central and Eastern Europe, Africa, and the Middle East. In these trainings, PILPG frequently relies on the work of this Court to illustrate and promote adherence to the rule of law.

In 2004, for example, PILPG led a week-long training session for Iraqi judges in Dubai on due process

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arbitrary, capricious, or manifestly contrary to the statute." If Congress' statute is silent or ambiguous with respect to the issue in question, then the court must simply ask whether the agency's interpretation is based on a "permissible construction of the statute."); and *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944), (noting that agencies formulate policy "based upon more specialized experience and broader investigation and information than is likely to come to a judge.")).

and civil liberties protections to institute in the new post-Saddam legal system. The training was seen as an important step toward the democratization of Iraq, and something that would hasten the ability of the U.S. to withdraw its troops from Iraq. On the second day of the training program, local and international media published the leaked photos of the abuses at Abu Ghraib. The Iraqi judges would not allow the training sessions to continue until PILPG answered to their satisfaction questions about whether the U.S. judicial system could ensure that the perpetrators would be brought to justice, that the victims would be able to bring suit for their injuries, and that the abuses would be halted. When PILPG returned for another training session several months later, the Iraqi judges had mixed reactions to the prosecutions of the Abu Ghraib perpetrators. Some judges perceived the U.S. prosecutions of the perpetrators as not aggressive enough, which left the Iraqi judges with the impression that the U.S. was not leading by example. Although other Iraqi judges appreciated and sought to follow the U.S. example to try those responsible for abuses before an independent tribunal, it was clear that Abu Ghraib temporarily set back U.S. efforts to establish rule of law in Iraq.

A year later, in 2005, PILPG conducted training sessions for the Iraqi High Tribunal judges who would be presiding over the trial of Saddam Hussein and other former leaders of the Ba'athist regime. Even more than the human rights training of ordinary Iraqi judges discussed above, the successful operation of the Iraqi High Tribunal was seen as critical to suppressing the spread of sectarian violence and heading off a full-scale

civil war in Iraq. The objectives of the tribunal were twofold. First, the tribunal sought to bring those most responsible for the atrocities committed under the Ba'athist regime before an independent panel of judges to be tried under international standards of justice. Second, the tribunal sought to establish a model for upholding and implementing rule of law in Iraq and to demonstrate that the need for rule of law is greatest in response to the gravest atrocities.

During the training sessions, the Iraqi judges requested guidance on controlling disruptive defendants in the courtroom. Specifically, the judges asked whether they could bind and gag the defendants in the courtroom as they understood had been done to the defendants in the 1969 "Chicago Seven" trial in the U.S. PILPG explained that the U.S. Court of Appeals had ultimately overturned the convictions in that case, in part because of the mistreatment of the defendants in the courtroom. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). This information persuaded the Iraqi judges to seek less draconian means of control in the trial of Saddam Hussein, which was televised gavel to gavel in Iraq. *See generally* Michael Newton and Michael Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (2008).

Foreign judicial interest in U.S. respect for rule of law during the war on terror is not limited to Iraqi judges. In 2006, PILPG conducted sessions in a weeklong rule of law training program in Prague for fifty judges from former Soviet Bloc countries in Eastern Europe. At the start of the first session, one of the judges asked "*Sobriaetes' li vi goverit' o slone v*

komnate?," which translates to "Are you going to be addressing the elephant in the room?" Michael P. Scharf, *The Elephant in the Room: Torture and the War on Terror*, 37 Case W. Res. J. Int'l L. 145, 145 (2006). The question referred to the so-called "White House Torture Memos," released just before the training session began, which asserted that Common Article 3 of the 1949 Geneva Conventions was not applicable to detainees held at Guantanamo Bay and which provided justification for Military Commissions whose procedures would not meet the Geneva standards. *Id.* at 145-46. The group of judges asked PILPG to explain "how representatives of the United States could expect to be taken seriously in speaking about the importance of human rights law when the United States itself has recently done so much that is contrary to that body of law in the context of the so-called 'Global War on Terror.'" *Id.* at 145. PILPG addressed judges' concerns by explaining that the President's decision to establish Military Commissions via Executive Order, and whether those Commissions had to comport with the Geneva Conventions, was currently being reviewed by this Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and that the Executive Branch would be bound to follow the holding of this Court. Scharf, *supra*, at 148.

Foreign judges closely follow the work of this Court and the example set by the U.S. Government in upholding the rule of law during the war on terror. As these examples illustrate, when the U.S. upholds the rule of law, foreign judges are more likely to follow.

III. TRANSNATIONAL JUDICIAL DIALOGUE CONFIRMS THIS COURT'S LEADERSHIP IN PROMOTING ADHERENCE TO RULE OF LAW IN TIMES OF CONFLICT.

PILPG's on-the-ground experience demonstrating the leadership of this Court is confirmed by a study of transnational judicial dialogue. Over the past half-century, the world's constitutional courts have been engaged in a rich and growing transnational judicial dialogue on a wide range of constitutional law issues. *See, e.g.,* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487 (2005); Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 (2000). Courts around the world consider, discuss, and cite foreign judicial decisions not out of a sense of legal obligation, but out of a developing sense that foreign decisions are valuable resources in elucidating complex legal issues and suggesting new approaches to common problems. *See* Waters, *supra*, at 493-94.

In this transnational judicial dialogue, the decisions of this Court have exercised a profound — and profoundly positive — influence on the work of foreign and international courts. *See generally Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin & Albert J. Rosenthal eds., 1990); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88

Colum. L. Rev. 537 (1988). As Anthony Lester of the British House of Lords has noted,

> "there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C."

Id. at 541.

This Court's overseas influence is not limited to the Bill of Rights. From Australia to India to Israel to the United Kingdom, foreign courts have looked to the seminal decisions of this Court as support for their own rulings upholding judicial review, enforcing separation of powers, and providing a judicial check on the political branches.

Indeed, for foreign courts, this Court's rulings in seminal cases such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803),[4] *Brown v. Board of Education*,

[4] *See, e.g., Victoria v. Commonwealth* (1975) 134 C.L.R. 338, ¶ 14 (Austl.) ("It has long been established that this Court has the power and the duty to decide whether legislation . . . is in accordance with the provisions of the Constitution which is, to use the words of Marshall C.J. in *Marbury v. Madison* . . . 'the fundamental and paramount law of the nation.'"); (Cont'd)

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Commonwealth v. Mewett (1997) 191 C.L.R. 471 (Austl.) (opinion of Dawson, J.) (". . . where the principle in *Marbury v. Madison* is invoked to ensure that the constitutional allocation of powers is observed by the legislature or the executive . . . the Commonwealth, and where relevant the States, do not enjoy immunity from suit."); *Corporation of the City of Enfield v. Development Assessment Commission* (2000) 199 C.L.R. 135, ¶ 43 (Austl.) (relying on *Marbury v. Madison* to support the assertion that "an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers." (citing *Attorney-General (NSW) v. Quin* (citation omitted))); *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, ¶¶ 12-13 (Can.) (recognizing that in Canada's constitutional interpretation process, Canadian courts frequently study the seminal decisions of the Supreme Court, including *Marbury v. Madison*, to determine the role of the court in evaluating the conformity of proposed legislation with the constitution.); *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, ¶ 187 (Can.) (Wilson, J., dissenting) (invoking *Marbury v. Madison's* recognition that "a constitutional system is a 'government of laws, and not men'" in contesting the majority's holding); *Rantuba and Others v. Commanded of LDF* (CIV/APN/418/98) [1998] LSCA 110 at 13 (Lesotho) ("Since the case of *Marbury v. Madison* . . . the constitution is regarded as a 'superior paramount law.' Consequently any law is to be reconciled with the constitution by the courts."); *Lekotholi v. Attorney-General* (CIV/APN/391/93) [1994] LSCA 153 at 5-6 (Lesotho)

> ("For guidance in respect of laws that collide with the Constitution reference should be made to cases of the U.S.A. in *Marbury v Madison* . . . Marshall C.J. called the constitution the supreme law of the Land to which other laws should yield. He further held that the Constitution like other laws should be interpreted by the courts of law.")

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347 U.S. 436 (1954),[5] *United States v. Nixon*, 418 U.S. 683 (1974),[6] and *Roper v. Simmons*, 543 U.S. 551

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African Personnel Services v. Government of Namibia and Others (Case No.: A 4/2008) [2008] NAHC 148, ¶ 17 (Namib.) (citing *Marbury v. Madison* in addressing the procedure for determining what laws may be voided for failing to meet the requirements of the Namibian constitution); *Certification of the Kwazulu-Natal Constitution* 1996 (4) SA 1098 (CC) at 13-14 (S. Afr.) (recognizing *Marbury v. Madison* as the "best known example" of a court "striking down or invalidating . . . legislation and administrative action even when such power of review is not expressly granted in the constitution"); *Rwanyarare v. Attorney General* (Constitutional Petition No. 5 of 1999) [2000] UGCC 2 at 16 (Uganda) (citing *Marbury v. Madison* to support the proposition that the court's jurisdiction "can only be restricted, reduced, or enlarged through an amendment to the constitution").

[5] *See, e.g., The Queen v. Drybones*, [1970] S.C.R. 282 at 299-300 (Can.) (Hall, J., concurring) (using the rationale outlined in *Brown v. Board of Education*, 347 U.S. 436 (1954) to evaluate the application of the Canadian Bill of Rights. "The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when . . . it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms . . . in s. 1 in whatever way that discrimination may manifest itself."); *The Queen v. Jones*, [1986] 2 S.C.R. 284 ¶ 22 (Can.) (underscoring the state's interest in education by referring to *Brown*'s assertion that "education is perhaps the most important function of state and local governments").

[6] *See, e.g., Sankey v. Whitlam* (1978) 142 C.L.R. 1, ¶ 47 (Austl.)

("In *United States v. Nixon* . . . the Supreme Court refused, in the absence of a need to protect military, diplomatic or sensitive national security secrets, to

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> accept the argument that the very important interest in confidentiality of presidential communications is significantly diminished by the production of such material for in camera inspection and went on to hold that this interest must give way to the superior public interest requiring that justice be done in criminal cases. The decision proceeded upon a consideration of constitutional provisions and principles which differ from ours. But it is significant that an issue which was broadly similar in character was decided in favour of the public interest in the administration of justice.");

Commonwealth v. Northern Land Council (1993) 176 C.L.R. 604, ¶ 17 (Austl.) (citing *United States v. Nixon* as an example of the principle that "there is no absolute public interest immunity with respect to Cabinet documents"); *Victoria v. Commonwealth* (1975) 134 C.L.R. 338, ¶ 14 (Austl.) (recognizing the Court's unanimous decision in *United States v. Nixon* as a reaffirmation of the principle espoused in *Marbury v. Madison* that it is the responsibility of the court to interpret the law); *Carey v. Ontario*, [1986] 2 S.C.R. 637, ¶ 51 (Can.)

> ("The idea that Cabinet documents should be absolutely protected from disclosure has in recent years shown considerable signs of erosion. This development began in the United States in the famous case of *United States v. Nixon* . . . where a subpoena was directed to the former President of that country. . . . The President, claiming executive privilege, filed a motion to have the subpoena quashed, but the Supreme Court of the United States, affirming the courts below, rejected the President's claim.")

MacKeigan v. Hickman, [1989] 2 S.C.R. 796 at 51 (Can.) (relying on *Nixon* to conclude that "[t]he qualified privilege of judges on administrative matters will clearly apply in most situations. However, there are exceptional cases such as this one where

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(2005)[7] take on a special significance. Reliance on the moral authority of this Court can provide invaluable support for those foreign courts struggling to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own national legal systems.

This Court's potential to positively influence the international rule of law is particularly important in the nascent transnational judicial dialogue surrounding the war on terrorism and the primacy of rule of law in times of conflict. As the world's courts begin to grapple with the novel, complex, and delicate legal issues surrounding the modern-day war on terrorism, and as states seek to

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the qualified privilege of immunity from testifying must give way; this will occur when it is necessary to reaffirm public confidence in the administration of justice." (citing *Carey v. Ontario* (citation omitted))).

[7] *See, e.g., Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame* (2005) 222 C.L.R. 439, ¶ 121 (Austl.) (recognizing *Roper v. Simmons*' reference to international courts in applying U.S. law); *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 C.L.R. 322, ¶ 356 (Austl.) (citing *Roper* as supporting the assertion that "a high level of unrestricted communication [is] essential to the operations of the government as envisaged in the Constitution from the central place that freedom of expression holds in the international law of human rights and fundamental freedoms"); *Dutta v. State of West Bengal* [2006] I.N.S.C. 945, ¶ 25 (India) (recognizing the prohibition on imposing the death penalty on individuals under the age of eighteen set forth in *Roper*).

develop judicial mechanisms to address domestic conflicts, foreign governments and judiciaries are confronting similar challenges. In particular, foreign governments and judiciaries must consider how to accommodate the legitimate needs of the executive branch in times of war within the framework of the law.

Although foreign courts are just beginning to address these issues, it is already clear that they are looking to the experience of the U.S., and to the precedent of this Court, for guidance on upholding the rule of law in times of conflict. In recent years, courts in Israel, the United Kingdom, Canada, and Australia have relied on the precedent of this Court in decisions addressing the rights of detainees.[8] In short,

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[8] *See, e.g.*, *Thomas v. Mowbray* (2007) 233 C.L.R. 1 ¶ 378 (Austl.) (recognizing that the rights afforded detainees at Guantanamo Bay under *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), in particular "the right of an accused to be present at their trial and to be privy to all evidence against them," were not available to detainees in Australia under Australia's Anti-Terrorism Act (No. 2), 2005); *White v. Director of Military Prosecutions* (2007) 235 A.L.R. 455 n.336 (Austl.) (referencing the assertion in *Hamdan* that "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive."); *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28 (Can.) (recognizing the majority holding that the deviations from standard military procedure in *Hamdan* "were sufficiently significant to deprive the military commissions of the status of 'a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by

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as a result of this Court's robust influence on transnational judicial dialogue, its decisions have proved extraordinarily important to the development of the rule of law around the world.

International courts have similarly relied on the precedent of this Court in influential decisions. For example, in the important and developing area of international criminal law, the international war crimes tribunals for Yugoslavia and Rwanda both relied heavily on the precedent of this Court in their early opinions. In the first five years of the Yugoslav Tribunal, the first in the modern iteration of the war crimes tribunals, the justices cited this Court at least seventeen times in decisions establishing the fundamental legal principles under which the Tribunal would function.[9] The

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civilized peoples,' as required by Common Article 3 of the *Geneva Conventions*."); HJC 796/02 *The Public Committee Against Torture in Israel v. Government of Israel* [2006] IsrSC 57(6) 285 ¶ 21 (using *Hamdan* to underscore the application of international humanitarian law and international human rights law to "the armed conflict between Israel and the terrorist organizations"); *Ruddock v. Taylor* (2005) 222 C.L.R. 612 ¶ 178 (Austl.) (relying on *Rasul v. Bush*, 542 U.S. 466 (2004)to conclude that "this Court should not enlarge the scope of protected official detention, any more than it already has in its recent decisions."); *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, ¶ 90 (Can.) (recognizing the principle of that "foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law.").

[9] *See Prosecutor v. Blaskic*, Case No. IT-95-14-AR108, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber 11 of 18 July 1997, ¶ 22, n.25 (Cont'd)

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(Oct. 29, 2007) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (ripeness doctrine)); *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgment, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 10 (Oct. 7, 1997) (citing *Brady v. United States*, 397 U.S. 742 (1970) (a guilty plea "must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence.")); *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgment, Separate and Dissenting Opinion of Judge Stephen, ¶ 20 (Oct. 7, 1997) (citing *North Carolina v. Alford*, 400 U.S. 25 (1970) (an accused has the right to have his guilty plea accepted despite claiming innocence)); *Prosecutor v. Blaskic*, Case No. IT-95-14-AR108, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, ¶ 31, n.230 (Jul. 18, 1997) (citing *United States v. Nixon*, 418 U.S. 683 (1974) (compulsory process must be available to prosecution and defense)); *id.* at n.164 (citing *New York Times v. Jascalevich*, 439 U.S. 1331, 1335 (1978) ("evidence sought by subpoena must meet a threshold level of materiality, relevancy and necessity.")); *id.* at ¶ 125, n.200 (citing *United States v. Reynolds*, 345 U.S. 1 (1953) (military secrets privilege), *Totten v. United States*, 92 U.S. 105 (1875) (military secrets privilege)); *id.* at n.230 (citing *Powell v. McCormack*, 395 U.S. 486 (1969) ("[O]ur system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.")); *Prosecutor v. Mucic*, Case No. IT-96-21-T, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through to "M", ¶¶ 34, 55, 65 (Apr. 28 1997) (citing *Estes v. Texas*, 381 U.S. 532, 583 (1965) (discussing the benefit of public trials), *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (discussing the requirements of the Sixth Amendment Confrontation Clause), *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (providing that face to face confrontation is essential to a fair trial), *Florida Star v. BJF*,
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International Criminal Tribunal for Rwanda similarly relied on this Court's precedent, citing this Court at least twelve times in its first five years.[10] The precedent

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491 U.S. 524 (1989) (discussing court imposed sanctions on media for "disclosing the identities of sexual assault victims"), *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (addressing the media's responsibility not to disclose the identity of sexual assault victims), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)); *Prosecutor v. Mucic*, Case No. IT-96-21-T, Judgment ¶¶ 338, 426, n.351 (Nov. 16, 1998) (citing *In re Yamashita*, 327 U.S. 1, 14-16 (1946) (military commanders have duty under laws of war to take appropriate measures to prevent violations of laws of war), *Morissette v. United States*, 342 U.S. 246 (1952) (discussing the elements of the crime of murder)); *Prosecutor v. Kovacevic*, Case No. IT-97-24-AR73, Decisions Stating Reasons for Appeals Chamber's Order of 29 May 1998, Separate Opinion of Judge Mohamed Shahabuddeen, 5 (Jul. 2, 1998) (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("[T]he Due Process Clause does not permit courts to abort criminal proceedings simply because they disagree with a prosecutor's judgment as to when to seek an indictment.")).

[10] *See, e.g., Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, ¶ 56 (Nov. 3, 1999) (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973) (when a state files a "detainer" against a person in the custody of another state, the state holding the prisoner acts as agent for the demanding state, and thus the prisoner is in custody for the purposes of filing a *writ of habeas corpus*)); *id.* ¶ 76 (citing *McNabb v. United States*, 318 U.S. 332, 340 (1943) ("Courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process.")); *id.* n.199 (citing *United States v. Hasting*, 461 U.S. 499, 505 (1983) ("[G]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate
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of this Court has provided a crucial foundation for international criminal law. The reliance on the precedent of this Court speaks to the Court's international leadership on the promotion of respect for the rule of law in times of conflict.

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procedural rules not specifically required by the Constitution or the Congress."); *id.* ¶ 93 (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.")); *id.* ¶ 94 (citing *United States v. Scott*, 437 U.S. 82 (1978) (Brennan, J. dissenting) (calling into question the reasonableness of the permissible delay in *Lovasco*)); *Barayagwiza*, Case No. ICTR-97-19-AR72, Decision ¶ 96 (citing *Smith v. Hooey*, 393 U.S. 374 (1969) ("The Government has a 'constitutional duty to make a diligent, good-faith effort to bring [the defendant] before the court for trial.")); *id.* ¶ 111 (citing *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J. dissenting) ("To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.")); *id.* n.268 (citing *Barker v. Wingo*, 407 U.S. 514 (1972) (factors to consider in speedy trial cases include: "length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant")); *id.* n.275 (citing *Strunk v. United States*, 412 U.S. 434 (1973) (setting aside a defendant's conviction, sentence, and indictment when his right to a speedy trial had been violated)); *Prosecutor v. Kabiligi*, Case No. ICTR-97-34-I, ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, ¶ 48 (Oct. 8 1999) (citing *Barker v. Wingo*, 407 U.S. 514 (1972) (underscoring that a "balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis")); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment ¶ 627 (May 20, 1999) (citing *Blockburger v. United States*, 284 U.S. 299 (1932) (addressing concurrence of crimes)).

By ruling in favor of the Petitioners, this Court will reaffirm the precedent established in its prior decisions granting habeas rights to Guantanamo detainees and, in doing so, demonstrate to these foreign courts, and to other courts who will be addressing these issues in the future, that all branches of government must be bound by the rule of law, even in the most challenging of times.

CONCLUSION

For the aforementioned reasons, this Court should reverse the decision of the Court of Appeals, thereby reaffirming this Court's leadership in upholding the rule of law and promoting respect for rule of law in foreign states during times of conflict.

Respectfully submitted,

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APPENDIX

PILPG, a global *pro bono* law firm, is comprised of nearly 200 members, whose ranks include former lawyers for the U.S. Department of State; retired U.S. Ambassadors and other senior U.S. Foreign Service officers; retired senior Foreign Ministry officials from other states; and law professors from a number of U.S. law schools. PILPG members that contributed to the drafting of the present document include:

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