IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

***In re* Guantanámo Detainee Cases**	)	**Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), 04-CV-2046 (CKK)**

PETITIONERS' SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO MOTION TO DISMISS

Petitioners in *Abdah v. Bush*, 04-CV-1254 (HHK) and *Anam v. Bush*, 04-CV-1194 (HHK) respectfully submit this supplemental memorandum to address the implications of Judge Robertson's November 8, 2004, memorandum opinion in *Hamdan*. In his opinion, Judge Robertson ruled that the Geneva Conventions apply to al Qaeda-linked Guantanamo detainees and are judicially enforceable by those detainees. *See* Mem. 14-26. Judge Robertson's ruling on each of these issues supports Petitioners' assertion of claims under the Geneva Conventions. Because Judge Robertson has ruled against the Government on these issues, the Government is barred from relitigating them in the above cases.

ARGUMENT

I. Petitioners Have Alleged or Can Allege Violations of the Geneva Conventions.

Petitioners have alleged and can allege extensive violations of their rights under the Geneva Conventions, allegations that have been reinforced by news reports and findings of other investigators. On information and belief, the Government has violated and continues to violate Petitioners' rights under the Geneva Conventions in, *inter alia*, the following ways:

- By failing as a general matter to treat Petitioners in a humane fashion in violation of Article 13. *See Abdah* Pet'n at 15, ¶ 64 (alleging cruel, unusual and degrading treatment); *see also* Paisley Dodds, *More Guantanamo Abuse Claims*, Sunday Telegraph, Nov. 12, 2004 (reporting reprimands of guard's commanding officer and of guard who threw cleaning solvent on detainee) (available at http://www.sundaytelegraph.news.com.au/story/0,9353,11363676-1702,00.html); Daily Herald, *General: Guantanamo Facility is Humane*, Aug. 9, 2004, at A2 (reporting reprimand of female interrogator who took off her uniform blouse, sat in detainee's lap, and ran her fingers through his hair during interrogation).

- By subjecting Petitioners to physical or mental torture or other forms of coercion in order to secure information from them in violation of Article 17. *See Abdah* Pet'n at 15, ¶¶ 63, 64 (alleging forced provision of coerced statements); *see also* Human Rights Watch, *Guantanamo: Detainee Accounts* (2004) (describing threats of death and electrocution, beatings, shackling during interrogation, denial of access to toilets, and detainees' psychiatric deterioration); Associated Press, *Rumsfeld Says Terror Outweighs Jail Abuses*, Wash. Post, Sept. 11, 2004, at A4 (Pentagon acknowledges approximately 300 allegations of detainees "killed, raped, [and] beaten" in Iraq, Afghanistan, and Guantanamo); Jackson Deal, Editorial, *How Torture Came Down From the Top*, Wash. Post. Aug. 27, 2004, at A21 (Army report details use at Guantanamo of "stress positions, isolation for up to thirty days, removal of clothing and use of detainees' phobias (such as the use of dogs)"); *Ex-Guantanamo Inmate Says He Was Tortured*, L.A. Times, July 15, 2004, at A4 (Swedish former detainee at Guantanamo alleges "exposure to freezing cold, noise and bright lights" and shackling during interrogation); Neil A. Lewis, N.Y. Times, *Broad Use Cited of Harsh Tactics at Base in Cuba*, Oct. 17, 2004, at A1 (reporting that a "regular procedure" at Guantanamo involves "making uncooperative prisoners strip to their underpants, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air conditioning was turned up to maximum levels" for up to fourteen hours).

- By holding Petitioners under cruel, unusual, unhealthful and degrading conditions in violation of Articles 25 and 29. *See Abdah* Pet'n at 15, ¶ 64 (alleging detention in accommodations that fail to satisfy domestic or internationally accepted standards); Human Rights Watch, *Guantanamo: Detainee Accounts* (2004) (describing initial accommodations as open air cells, 0.8 meters by 2.4 meters, containing two buckets, one for excrement and one for water).

- By failing to provide adequate or ethical medical care in violation of Article 30. *See* Mem. in Support of Mot. to Compel Medical Evaluation, *O.K. v. Bush*, No. 04-CV-1136 (JDB) at 4 (citing testimony of released detainees that juvenile Petitioner was denied medical treatment on instruction from U.S. interrogators); *see also* Herald Sun, *Guantanamo Doctors Give Evidence*, Aug. 24, 2004 (reporting

that there have been thirty-four suicide attempts by detainees, that fifteen percent arrived at the prison camp suffering from psychiatric disorder, that only eight percent are being treated, and that the camp's chief physician acknowledges that "there is some anxiety about what the future might hold") (available at http://www.heraldsun.news.com.au/common/story_page/0,5478,10550711%255E1702,00.html); Associated Press, *Frenchmen Released From Guantanamo Ordered to Stay Behind Bars in France*, Aug. 1, 2004 (former detainees alleging that U.S. authorities forced some detainees to take medication to make them sleep); Robert J. Lifton, M.D., New England Journal of Medicine, *Doctors and Torture*, 415, 415 (July 29, 2004) (noting Red Cross complaints about long-standing policy at Guantanamo whereby military investigators were given access to medical records of individual prisoners in order to develop interrogation plans).

- By failing to provide Petitioners with the full panoply of rights to religious observance guaranteed by Articles 34 through 37. *See Abdah* Pet'n at 15, ¶ 64 (alleging Petitioners have not been provided with opportunity to fully exercise their religious beliefs and that they have been humiliated in the exercise of their religion).

- By failing to inform Petitioners of their Geneva Convention rights in violation of Article 41. *See Abdah* Pet'n at 14, ¶ 63.

- By failing to allow Petitioners to send and receive communications from their family and others in violation of Articles 71, 72 and 76. *See Abdah* Pet'n at 15, ¶ 64 (alleging Petitioners have been denied meaningful access to their families).

- By failing to repatriate Petitioners "without delay" now that the hostilities in Afghanistan have been concluded, in violation of Article 118.

This non-inclusive list includes only those violations of the Geneva Convention that have already been asserted in Court papers or that have surfaced in recent months in news reports about the conditions of confinement at Guantanamo Bay. Further violations of the Geneva Conventions may become apparent once Petitioners are thoroughly interviewed by counsel.

II. The Government is Barred from Relitigating the Geneva Conventions Issues on Which Judge Robertson Ruled.

The doctrine of offensive collateral estoppel or issue preclusion is "firmly fixed in the firmament of federal jurisprudence." *Jack Faucett Assocs., Inc. v. AT&T*, 744 F.2d 118, 125 (D.C. Cir. 1984). Under this doctrine,

> once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. Collateral estoppel . . . serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."

Id. at 118, 124-25 (quoting *United States v. Mendoza,* 464 U.S. 154, 125 (1984) (in turn quoting *Allen v. McCurry,* 449 U.S. 90, 94 (1980))). Trial courts have "broad discretion" to determine when the doctrine should be offensively applied. *Id.* at 124 (quoting *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 331 (1979)).

The two issues that Judge Robertson decided – that the protections of the Geneva Conventions apply to the Guantanamo detainees and may be vindicated by the detainees in court – were "actually and necessarily decided in the prior suit." *IAM Nat'l Pension Fund v. Ind. Gear Mfg. Co.*, 723 F.2d 944, 949 (D.C. Cir. 1983). Judge Robertson's resolution of those issues was the underpinning of his judgment that the military commission procedure challenged by Hamdan violates Hamdan's rights under the Geneva Conventions. Moreover, the principle recognized by the Supreme Court in *Mendoza* – that nonmutual offensive collateral estoppel generally may not be asserted against the Government – does not come into play because Hamdan and Petitioners for all practical purposes are the same party; and even if they were not considered the same party for collateral estoppel purposes, the *Mendoza* principle would not apply because the considerations supporting its application are not present. The fact that the Government has appealed Judge Robertson's decision does negate its preclusive effect. *See Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 n.6 (D.C. Cir. 1988).

A. The Government is Barred From Relitigating the Applicability and Enforceability Issues Because There is Mutuality.

As noted, collateral estoppel bars relitigation of issues "actually litigated and necessary to the outcome" in an earlier action. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.5 (1979). In general, both parties to the earlier action need not be identical to those in the later suit in order for collateral estoppel to apply. *Id.* Collateral estoppel as applied to the Government, however, operates differently: Where the parties are not identical – where they are "nonmutual" – collateral estoppel generally may not be asserted against the Government. *See United States v. Mendoza*, 464 U.S. 154, 163-64 (1984). But where the parties are identical, collateral estoppel operates against the Government just as it does against private parties. *See Montana v. United States*, 440 U.S. 147 (1979).

"Mutuality" in the collateral estoppel context has never required a strict identity of parties between the two suits. Thus, collateral estoppel applies with equal force against the parties to the earlier suit and those in privity with the earlier parties. *Parklane Hosiery*, 439 U.S. at 326-27 & n.7. Privity is an "elusive concept, without any precise definition of general applicability," *Jefferson Sch. of Soc. Sci. v. SACB*, 331 F.2d 76, 83 (D.C. Cir. 1963), and today encompasses "various relationships which would not have come within [its] traditional definition," *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

Whether parties are in privity depends on whether the parties and issues are close enough such that preclusion would be "fair" or "proper." Wright & Miller, *Federal Practice & Procedure* § 4449 (privity "simply expresses a conclusion that preclusion is proper"). Where the party to the earlier suit and the party to the subsequent suit are "so identified in interest that [they] represent[ ] precisely the same legal right to the subject matter involved," the parties are in

privity. *Jefferson Sch.*, 331 F.2d at 82; *S.W. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 94 (5th Cir. 1977).

By that measure, Hamdan and Petitioners are in privity; indeed, for all practical purposes, they are the same party. Their cases present the same threshold legal issues – whether the protections of the Third Geneva Convention apply to al Qaeda-linked aliens imprisoned at Guantanamo; and whether such aliens may enlist the courts to enforce those protections. They present those issues to the same court, under the same habeas statute, and against the same party. The Government itself contends that the Guantanamo detainees are acting in league with one another as members or supporters of al Qaeda. That contention is sufficient to establish the privity required to find mutuality; this Court has found privity for res judicata purposes under similar circumstances. *See Rudder v. District of Columbia*, Civ. No. 92-2881, 1994 WL 495767 (D.D.C. Sept. 6, 1994) (finding privity where plaintiffs in subsequent suit challenged the same practices, named the same defendants, and were represented by the same counsel as the plaintiffs in the earlier suit). To deny collateral estoppel effect to Judge Robertson's rulings in Hamdan for lack of "mutuality" in these circumstance would be a triumph of form over substance.

B. The Government is Barred From Relitigating the Applicability and Enforceability Issues Even if Mutuality is Deemed To Be Lacking.

"[T]he doctrine of nonmutual collateral estoppel is generally unavailable in litigation against the United States." *United States v. Alaska*, 521 U.S. 1, 13 (1997) (citing *Mendoza*). As this qualified statement indicates, *Mendoza* does not absolutely foreclose application of the doctrine against the United States. *Mendoza* held only that the doctrine should not be applied against the Government "in such a way as to preclude relitigation of issues such as those involved in this case." 464 U.S. at 574.

As Judge Richie noted – in a decision allowing the doctrine to be asserted against the Government, albeit on facts that make the case distinguishable – the limitation recognized in *Mendoza* on applying the doctrine against the Government serves three purposes:

> First, in circumstances of intercircuit conflicts it allows the Supreme Court the benefits of "percolation" before certiorari is granted. Second, it permits the Solicitor General tactical discretion in determining which adverse decisions to appeal. The result is conservation of judicial resources. Third, it allows for changes in administration policy.

Stormont-Vail Regional Med. Ctr. v. Bowen, 645 F. Supp. 1182, 1192 (D.D.C. 1986) (citations omitted). As Judge Richie recognized, in considering whether to apply the doctrine of nonmutal offensive collateral estoppel against the Government, a court should consider whether applying the doctrine would defeat the purposes of the limitation recognized in *Mendoza*. *See id.*; *see also NLRB v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 38 (1st Cir. 1987) (declining to apply *Mendoza* where none of the considerations justifying its application obtained); *Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 666 F. Supp. 1475, 1478-79 (D. Colo. 1987), *appeal dismissed*, 848 F.2d 200 (10th Cir. 1988).[1]

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[1] In *Colorado Springs*, the district court, finding *Mendoza* inapplicable, held the Government bound by the adverse decision of another district court in a different circuit:

> The issue in this case involves a discrete question of administrative law, with no fact variation between it and the prior case in the federal district court in Massachusetts. The parties to the prior adjudication and those to this case are not in privity with each other but are closely related, represent the same substantial interests and operate under the exact same statutory framework. The instant situation is accordingly immediately distinguishable from that arising in *Mendoza,* which involved a question of constitutional law, with two cases brought by distinct and unrelated individuals and resultant fact variations.

666 F. Supp. at 1478-79 (footnotes omitted); *cf. Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir. 1997) (applying law of the case and issue preclusion doctrines to bar EPA from relitigating an issue decided against it in a prior action brought by different parties).

Applying the doctrine of nonmutual offensive collateral estoppel against the Government here would defeat none of the purposes served by the *Mendoza* limitation: Because *Hamdan* and these cases are in the same Circuit, there is no question of "percolation" among the circuits. Because the Government has already appealed Judge Robertson's decision, there is no question of constraining the Solicitor General's discretion in determining which adverse decisions to appeal. Finally, no "changes in administration policy" appear to be in the offing that applying the doctrine in these cases would affect.

Applying the doctrine against the Government here also would avoid the spectacle of differing or inconsistent rulings by *three* different Judges of this Court with respect to the enforceability and applicability of the Geneva Conventions to identically situated individuals. *Cf. In re Fourth Class Postage Regulations*, 298 F. Supp. 1326, 1327 (J.P.M.L. 1969) ("While there is nothing strikingly novel about inconsistent decisions in United States District Courts, the interests of justice are not ordinarily served by such disparities.").

CONCLUSION

For the foregoing reasons, in ruling on the Government's pending motion to dismiss, the Court should hold the Government barred from relitigating the enforceability and applicability of the Geneva Conventions to Petitioners.

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Respectfully submitted,

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