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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<i>In re</i> GUANTANAMO DETAINEE CASES) Civil Action Nos.:) 02-CV-0299 (CKK), 02-CV-0828 (CKK),) 04-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 (HKK), 04-CV-1227 (RBW)) 04-CV-1254 (HHK)))

**PETITIONERS' JOINT SUBMISSION
REGARDING HOW THESE CASES SHOULD PROCEED**

The Court¹ has nearly completed the task of resolving the principal common procedural and substantive issues in these cases, as assigned by the Calendar and Case Management Committee Order of August 17, 2004, and the Executive Session Resolution of September 15, 2004. In particular, the Court's Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law of January 31, 2005 ("Opinion") has paved the way for the fulfillment of the mandate of the Supreme Court in *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004), that this Court "consider in the first instance the merits of petitioners' claims," and gives petitioners hope that, after three long years, there will be an impartial and expeditious determination of their right to freedom from unlawful custody.

There remain three common issues for the Court to resolve: (i) whether petitioners should be granted leave to take discovery, (ii) whether the Fifth Amendment applies to the conditions of petitioners' confinement at Guantanamo, and (iii) whether the Court's counsel access procedures should be modified in limited respects. These common issues are appropriate for the Court to resolve, either because they already have been presented to the Court by motion and have been

¹ Petitioners' references in this submission to "the Court" generally refer to Senior Judge Joyce Hens Green.

fully briefed or because they have been discussed by the parties in accordance with LCvR 7.1(m) and shortly will be presented to the Court by motion. After the Court resolves these three issues, the cases should be returned to the individual Judges to whom they are assigned for (i) disposition by summary judgment in those cases that do not require further factual development and (ii) the adoption of case management orders to govern discovery and disposition in those cases that require further factual development.

A. Remaining Common Issues For Resolution By The Court

1. Petitioners' Pending Motion for Leave to Take Discovery

The Court should grant petitioners' pending motion for leave to take discovery. The motion raises an issue common to these cases, namely, whether petitioners are entitled to discover documents and information showing that statements they made or that were made by other detainees and relied upon by respondents' in their "factual returns" to justify petitioners' imprisonment were extracted by torture, severe mistreatment, or abuse. The motion has been fully briefed by the parties. Although petitioners requested oral argument on the motion, they waive that request in light of the Court's Opinion.

The Court devoted an entire section of the Opinion to respondents' reliance on statements possibly obtained through torture or other coercion to justify petitioners' imprisonment. Opinion at 55-59. As the Court noted, petitioners have introduced evidence into the public record indicating that abuse of detainees occurred during interrogations at Guantanamo "[n]otwithstanding the inability of counsel for petitioners to take formal discovery beyond interviewing their clients at Guantanamo Bay." *Id.* at 58. The Court emphasized that "due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture" and the veracity of this evidence "must be investigated before it can be

definitively relied upon.” *Id.* at 56, 59. The gravity of the allegations and their direct bearing on the admissibility and reliability of the evidence upon which respondents justify petitioners’ ongoing imprisonment warrant the prompt commencement of this discovery.

Moreover, the Court’s Opinion shows that petitioners should be granted leave to pursue general discovery regarding the habeas claims whose validity as a *prima facie* matter the Court has upheld. The Court’s Opinion includes numerous references to the importance of factual development in these cases. *See, e.g.*, Opinion at 53 (petitioners’ counsel must be able “to investigate and ensure the accuracy, reliability and relevance of [classified] evidence”) and 63 (“the detainee is entitled to fully litigate the factual basis for his detention in these proceedings and to have a fair opportunity to prove that he is being detained on improper grounds”). Accordingly, in granting petitioners’ motion for leave to take discovery regarding the alleged torture, severe mistreatment, and abuse of detainees now at Guantanamo, the Court also should rule that petitioners may pursue general discovery in support of their habeas claims under the supervision of the individual Judges to whom their cases are assigned.

2. Petitioners’ Forthcoming Motion Regarding Minimum Living Standards.

Petitioners in some or all of these cases intend shortly to file a motion regarding the application of the Fifth Amendment to the conditions of petitioners’ confinement at Guantanamo. The Fifth Amendment guarantees to every individual detained but not yet tried or convicted of a crime conditions of confinement no worse than those guaranteed to convicted prisoners under the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Jordan v. Doe*, 38 F.3d 1559, 1564-1565 (11th Cir. 1994). Thus, conditions of confinement that are inconsistent with “contemporary standards of decency,” *see Estelle v. Gamble*, 429 U.S. 97, 103 (1976) and deprive the detainee of the “minimum civilized measure of life’s necessities,” *see Rhodes v. Chapman*, 452

U.S. 337, 347 (1981), are unconstitutional. Based upon the observations of petitioners' counsel during visits to Guantanamo and petitioners' own classified declarations, petitioners maintain that their living conditions are inconsistent with contemporary standards of decency and deny them the minimum civilized measure of life's necessities, in violation of the Fifth Amendment.

As required by LCvR 7.1(m), petitioners' counsel and respondents' counsel have had a face-to-face meeting and exchanged correspondence regarding the common issue of petitioners' conditions of confinement and have not been able to resolve it. The fundamental difference between the parties is purely legal. Petitioners contend that the Fifth Amendment applies to petitioners' conditions of confinement at Guantanamo. Respondents contend it does not. Now that the Court has held the Fifth Amendment applies to the process by which it is determined whether petitioners should be confined, it should resolve the common issue of whether the Fifth Amendment also applies to the conditions of petitioners' confinement.²

3. Petitioners' Forthcoming Motion to Modify Counsel Access Procedures.

Finally, petitioners in some or all of these cases intend shortly to file a motion seeking several modifications in the present counsel access procedures. Some actions by respondents that are not addressed by those procedures or that are inconsistent with them have seriously impeded the ability of petitioners' counsel adequately to represent petitioners and develop their claims.

For example, § VI.B of the current procedures (*see In re Guantanamo Detainee Cases*, 344 F.Supp.2d 174, 188 (D.D.C. 2004)) provides that interview notes taken by counsel during their visits to Guantanamo must be mailed from Guantanamo to the secure facility in Virginia within

² Petitioners' motion will not ask the Court to address the specific minimum living standards that should apply in Guantanamo. Such standards are prescribed by the U.S. Army in the Military Police Manual on Enemy Prisoners of War, Civilian Internees and Detained Persons. Respondents refuse to apply those standards or any existing standards – such as the Standard Minimum International Rules for the Treatment of Prisoners, the Detention Operations Manual of the Department of Homeland Security, and the standards of the federal Bureau of Prisons – to petitioners because they contend they are under no legal compulsion to do so.

two business days following the completion of counsel's visit. In practice, these notes have not arrived at the secure facility for as long as a month after the completion of counsel's visits and in one case the notes were lost altogether.³ In accordance with LCvR 7.1(m), petitioners' counsel had a face-to-face meeting and exchanged correspondence with respondents' counsel on several of these issues. Petitioners' counsel requested that, as authorized by Defense Department regulations, they be permitted to hand-deliver their sealed notes to the secure facility. Alternatively, petitioners requested that respondents scan and electronically transmit the notes from Guantanamo to the secure facility over the Defense Department's Secret Internet Protocol Router Network ("SIPERnet"). Respondents denied the first request without giving a reason and have not responded to the alternative request.

Petitioners' forthcoming motion to modify counsel access procedures will raise common issues that affect all petitioners. It is appropriate for the Court to resolve these issues.

B. Issues To Be Determined By The Individual Judges

Once the Court resolves the three remaining common issues described above, these cases should be returned to the individual Judges to whom they are assigned.⁴ Petitioners contemplate the application of two procedures for resolving the pending claims.

First, in light of the Court's decision concerning the definition of "enemy combatant" and the applicability to some petitioners of the Third Geneva Convention (*see* Opinion at 59-73), the habeas claims of many petitioners will be susceptible of resolution by summary judgment. In

³ Petitioners in *Almurbati v. Bush*, Civil Action No. 04-CV-1227 (RBW) have filed a motion to compel regarding these lost notes that has been fully briefed and awaits decision by the Court.

⁴ There are a number of fully briefed motions pending before the Court. Petitioners assume those will be resolved by the Court to the extent they raise common issues of substance or procedure or otherwise will be returned to the individual Judges to whom the cases are assigned. Furthermore, although the Court's prior orders may not "technically" apply to the Guantanamo cases filed after the Court heard oral argument on respondents' motion to dismiss (*see* Opinion at 15), petitioners assume respondents will adhere to them in those cases and, for example, will continue to file "factual returns" in response to the petitions in those cases.

those cases, no further factual development will be necessary. Instead, petitioners and respondents will submit briefs and declarations or other materials in accordance with Fed. R. Civ. P. 56.

Second, the habeas claims of the remaining petitioners will require further factual development. Petitioners contemplate that the cases of those petitioners will proceed with discovery and, if necessary, evidentiary hearings,⁵ followed by the submission of briefs.

Petitioners have annexed a proposed order based on this submission.

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⁵ The location and supervision of those evidentiary hearings are matters that can be addressed in the future.

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