

SEP 11 2007

Elizabeth W. Adkins, CA
Society of American Archivists
527 South Wells Street, 5th Floor
Chicago, IL 60607-3922

Meredith Fuchs, General Counsel
National Security Archive
Suite 701, Gelman Library
The George Washington University
2130 H Street, NW
Washington, D.C., 20037

Patrice McDermott, Director
OpenTheGovernment.Org
1742 Connecticut Avenue, NW
3rd Floor
Washington, D.C. 20009

Re: Records relating to *In re Guantanamo Detainee Cases* (Nos. 02-CV-0299)
U.S. District Court for the District of Columbia

Dear Ms. Adkins, Ms. Fuchs, and Ms. McDermott:

Thank you for your letters concerning the destruction of documentary materials in the *In Guantanamo Detainee Cases*, Nos. 02-CV-0299. I apologize for the delay in responding to your letters, but it was important that my legal and archival staff thoroughly look into this matter before responding to your inquiries. Your letters express concern that the November 8, 2004, "Amended Protective Order and Procedures For Counsel Access to Detainees At The United States Naval Base in Guantanamo Bay, Cuba" (Amended Order), contains provisions that might authorize or direct the destruction of government records that should be permanently preserved.

Our understanding is that no Federal records will be destroyed or authorized for destruction because of the Amended Order. Let me also reassure you that relevant records in case files of the U.S. District Court, the U.S. Court of Appeals, and the Department of Justice are scheduled as permanent and will ultimately be transferred to the National Archives. Please see Attachment A for copies of applicable records control schedules.

Our inquiry into the matter has determined that the Amended Order requires destruction, after the final resolution of a case, only of those documents containing classified and protected information prepared, possessed, maintained, or provided to petitioner's counsel. These materials are not Federal records because they are either (i) copies of records turned over by the government to petitioner's counsel for their use; (ii) materials reflecting communications between detainee counsel and the detainee clients; and/or (iii) other materials created by petitioners' counsel.

The classified and protected nature of the information dictates that the disposition of the materials be governed by Court order. As a Department of Justice (DOJ) letter of June 8, 2007 (see Attachment B) to the Court of Appeals explains, destruction of the materials is required to protect the confidentiality of the petitioners, because the government can not maintain the records of petitioners' counsel and because the sensitive nature of the documents precludes petitioners' counsel from maintaining the records. The DOJ letter also states that the Amended Order does not apply to records filed in court, records of the government's counsel (DOJ), and Combatant Status Review Tribunal records of the Department of Defense. As noted above, the only unique materials that eventually are to be destroyed under the Amended Order are petitioners' counsel materials, such as interview notes and attorney notes. Petitioner attorney documents are not Federal records and cannot be preserved by the Federal government.

In addition, DOJ counsel has represented to us that DOJ does not intend to seek destruction of materials under the provisions of ¶¶ 34 or 45 of the Amended Order, absent some form of notice to plaintiffs' counsel in the affected Guantanamo detainee cases. Thus, over and above the fact that one or more complete sets of Federal records are continuing to be maintained elsewhere, counsel in these cases with materials subject to destruction presumably will have the opportunity to weigh in further with respect to such materials after receiving the contemplated notice from DOJ.

Your letter also inquires about the process and timeframes for declassification of any classified materials, as well as disclosure of 'protected information' that is not classified. A request for access to classified material will undergo the declassification process mandated by Executive Order 12958, as amended. Screening for protected information will take place in accordance with the Freedom of Information Act.

In sum, I can assure you that I am in complete agreement with the proposition that Federal records contained in the case files of proceedings regarding detainees at Guantanamo Bay should be preserved in accordance with applicable records retention schedules and records scheduling procedures.

I very much appreciate your concerns, and thank you for providing us with the opportunity to review this important matter.

Sincerely,
/signed/
ALLEN WEINSTEIN

ALLEN WEINSTEIN
Archivist of the United States

Attachments

cc: Gaillard T. Hunt
1409 Gleason Street
Silver Spring, Maryland 20902

Joseph Hunt, Director
Civil Division, Federal Programs Branch
U.S. Department of Justice

Official : NGC
Inco cc:
Reading: NGC
NGC:JLandou 9/4/07
File Code:

REQUEST FOR RECORDS DISPOSITION AUTHORITY
(See Instructions on reverse)

LEAVE BLANK

TO **GENERAL SERVICES ADMINISTRATION
NATIONAL ARCHIVES AND RECORDS SERVICE, WASHINGTON, DC 20408**

JOB NO
N1-21-86-1

DATE RECEIVED
10-11-85

1 FROM (Agency or establishment)

NOTIFICATION TO AGENCY

2 MAJOR SUBDIVISION
Federal Judiciary

In accordance with the provisions of 44 USC 3303a the disposal request, including amendments, is approved except for items that may be marked "disposition not approved" or "withdrawn" in column 10. If no records are proposed for disposal, the signature of the Archivist is not required.

3 MINOR SUBDIVISION
U.S. Circuit, District, Bank, & other Federal Courts

4 NAME OF PERSON WITH WHOM TO CONTACT

5. TELEPHONE EXT.

DATE

ARCHIVIST OF THE UNITED STATES

Charles Summers

633-6057

1-31-86

Frank S. Bunker

6 CERTIFICATE OF AGENCY REPRESENTATIVE

I hereby certify that I am authorized to act for this agency in matters pertaining to the disposal of the agency's records, that the records proposed for disposal in this Request of 22 page(s) are not now needed for the business of this agency or will not be needed after the retention periods specified, and that written concurrence from the General Accounting Office, if required under the provisions of Title 8 of the GAO Manual for Guidance of Federal Agencies, is attached.

A GAO concurrence ☐ is attached; or ☒ is unnecessary.

B DATE

C SIGNATURE OF AGENCY REPRESENTATIVE

D TITLE

10/8/85

Charles Summers

Records Management Officer

7 ITEM NO.	8 DESCRIPTION OF ITEM (With Inclusive Dates or Retention Periods)	9 GRS OR SUPERSEDED JOB CITATION	10 ACTION TAKEN (NARS USE ONLY)
	<p align="center">Records of the Federal Courts</p> <p>This request for records disposition authority covers the records of the U.S. Courts of Appeals, Court of Customs and Patent Appeals, Temporary Emergency Court of Appeals, U.S. and territorial district courts, Court of Claims, Court of International Trade, United States Claims Court, Special Court, Regional Civil Reorganization Act of 1973, circuit judicial councils, and circuit judicial conferences but excludes the personal files of Federal judges and the records of Federal public defenders. The attached schedules, as approved by the Judicial Conference of the United States, supersede all previously approved disposition schedules.</p> <p>NARS Job Nos.</p> <p>N1-21-83-1 N1-123-83-1 N1-276-83-1 N1-321-83-1</p>	See Below	

(2 items)

SCHEDULE FOR THE DISPOSITION OF THE RECORDS OF UNITED STATES DISTRICT COURTS, TERRITORIAL DISTRICT COURTS, COURT OF CLAIMS, COURT OF INTERNATIONAL TRADE, UNITED STATES CLAIMS COURT, SPECIAL COURT, AND THE REGIONAL RAIL REORGANIZATION ACT OF 1973, AND BANKRUPTCY COURTS.

INTRODUCTION:

This schedule covers the disposition of the records of the United States district courts, territorial district courts, Court of Claims, Court of International Trade, United States Claims Court, Special Court, and the Regional Rail Reorganization Act of 1973. ~~and the bankruptcy courts.~~ This schedule has been established by the Judicial Conference of the United States and is mandatory. It applies to all existing records of these courts, except the records of Federal public defenders and the personal files of judges and United States Magistrates. It does not supersede any provision of law requiring the retention of a document or record for a specified period. To the extent that the retention periods specified in this schedule vary from any statutory provision, the longer period of retention, whether in the statute or in the schedule, shall apply. Records of historical value are designated "Permanent" in this schedule.

Since magistrates are judicial officers of the district court, case files, tapes, and other records of proceedings conducted by United States magistrates are to be retained in accordance with times provided for district court records, unless otherwise specified in this schedule.

~~The Federal Archives and Records Centers National Archives Centers~~ will review all records previously transferred to determine which of those records have historical value and should be retained permanently.

Type of Record

Disposition

7. Civil case files,
including transcripts
and minutes.

a. Domestic relations,
adoption, mental
incompetency, and
probate files of
the District of
Columbia which
are not the
responsibility of
the Superior Court
of the District of
Columbia as defined
in P.L. 891-358.

Disposal Not
Authorized.

b. Other civil case
files.

(1) Case files
dated 1969 or
earlier.

Permanent.

(2) Case files
dated 1970 or later
which were termi-
nated during or
after trial.

Permanent.

(3) Any civil case file
which NARS NARA
has determined in
consultation with
court officials to
have historical
value.

Permanent.

(4) All other case
files not
included above.

Dispose 20 years
after transfer to
an FARG NAC.

SCHEDULE FOR THE DISPOSITION OF THE RECORDS OF THE
UNITED STATES COURTS OF APPEALS, COURT OF CUSTOMS AND
PATENT APPEALS, TEMPORARY EMERGENCY COURT OF APPEALS,
CIRCUIT JUDICIAL COUNCILS AND CIRCUIT JUDICIAL
CONFERENCES

Introduction:

This schedule covers the disposition of the records of the United States Courts of Appeals, including the Court of Appeals for the Federal Circuit, Court of Customs and Patent Appeals, Temporary Emergency Court of Appeals, circuit judicial councils, and circuit judicial conferences. This schedule has been established by the Judicial Conference of the United States and is mandatory. It applies to all existing records of these courts, councils, and conferences, except the personal files of judges. It does not supersede any provision of law requiring the retention of a document or record for a specified period. To the extent that the retention periods specified in this schedule vary from any statutory provision, the longer period of retention, whether in the statute or in the schedule, shall apply. Records of historical value are designated "Permanent" in this schedule.

The National Archives will obtain the approval of the courts prior to the disposal of records previously transferred which are no longer considered to have historical value.

DISPOSITION SCHEDULE

<u>Type of Record</u>	<u>Disposition</u>
A. <u>Case Records</u>	
1. Case index.	Permanent.
2. Docket sheets.	Permanent.
3. Briefs and appendices.	Permanent.

Type of Record

Disposition

4. Case files, mandate, opinions, and dispositive orders.

Permanent.

5. Case correspondence files containing transmittals and miscellaneous correspondence relating to attorneys, calendar, filing of papers, and other administrative matters of the case, if maintained outside the case file.

Dispose 2 years after case closing.

6. Minutes of the court, journals, or order books if any.

Permanent.

B. Case-Associated Records

1. Calendars.

Dispose 1 year after calendar period unless otherwise needed.

2. Attorney admission records.

- a. Rolls of attorneys admitted to practice.

Disposal Not Authorized.

- b. Records relative to disciplinary actions.

Disposal Not Authorized.

- c. Other records, including applications and certificates.

Dispose when 5 years old.

REQUEST FOR RECORDS DISPOSITION AUTHORITY

(See Instructions on reverse)

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JOB NO.

N1-60-88-10

DATE RECEIVED

7/13/89

GENERAL SERVICES ADMINISTRATION
NATIONAL ARCHIVES AND RECORDS SERVICE, WASHINGTON, DC 20408

1. FROM (Agency or establishment)

Department of Justice

2. MAJOR SUBDIVISION

Justice Management Division

3. MINOR SUBDIVISION

Records Management Section

4. NAME OF PERSON WITH WHOM TO CONFER

Bernard W. Berglund

5. TELEPHONE EXT.

272-6126

DATE

10/31/89

ARCHIVIST OF THE UNITED STATES

[Signature]

6. CERTIFICATE OF AGENCY REPRESENTATIVE

I hereby certify that I am authorized to act for this agency in matters pertaining to the disposal of the agency's records; that the records proposed for disposal in this Request of 76 page(s) are not now needed for the business of this agency or will not be needed after the retention periods specified; and that written concurrence from the General Accounting Office, if required under the provisions of Title 8 of the GAO Manual for Guidance of Federal Agencies, is attached.

A. GAO concurrence. ☐ is attached; or ☒ is unnecessary.

B. DATE

07-13-89

C. SIGNATURE OF AGENCY REPRESENTATIVE

Bernard W. Berglund
Bernard W. Berglund

D. TITLE

Assistant Chief, Records Management
Section, Justice Management Division

7.
ITEM
NO.

8. DESCRIPTION OF ITEM
(With Inclusive Dates or Retention Periods)

9. GRS OR
SUPERSEDED
JOB
CITATION

10. ACTION
TAKEN
(NARS USE
ONLY)

DUPLEX-NUMERIC FILES

This schedule for duplex-numeric files supersedes the following schedules in their entirety: Job Nos. IT-NNA-3122, IT-NNA-3185, NN-167-129, NN-167-135, and NN-172-22.

Item entries in this schedule reference classifications 1-194 of DOJ's duplex numeric system. However, actual disposition standards for files maintained under classifications 90 (Land Matters) and 146 (World War II Matters) are provided in separate schedules (Job Nos. N1-60-88-12 and -13, respectively), given the complexity of the classifications. No disposition standards are provided for files maintained under classification 5 (Tax Matters), as NARA and DOJ's Tax Division were unable to reach agreement on access to the records, given the presence of confidential tax return information in the files.

*Copies sent to NCF
DIA, MNT 11/30/89*

CASE FILES

The case files maintained by the various legal divisions and the Office of Legal Counsel of the Department of Justice (DOJ) consist of (1) records created or accumulated by these components in carrying out DOJ's responsibilities in matters arising under the laws of the United States in which legal action may be taken or considered, and (2) records created or accumulated by DOJ in connection with administrative matters relating to the department, its various components, and offices of United States attorneys.

The files are arranged by a subject-numeric system, formally known as the duplex-numeric system, that is based on a standard set of numerical codes. The primary numbers, now numbering some 194, are usually identified with Federal laws or administrative or other subjects. The secondary numbers usually identify particular judicial districts, although this sequence sometimes varied to include certain statutory sub-parts, certain subjects or commodities, or other specific subjects. A third sequence of numbers is used to identify each file which usually contains documents pertaining to a particular case arising within a given district. Hence, using the example of case file 5-51-836, the number "5" refers to the violation or subject (income and inheritance taxes), "51" represents the judicial district (Southern New York), and "836" identifies a particular case.

NOTE: Disposition instructions for the GENERAL FILES ("0" subs) under each of the following classifications are provided by Item 195 of this schedule.

1. Class 1 - Insecticide, Fungicide, and Hazardous Substances

This classification covers violations of the Federal Insecticide, Fungicide, and Rodenticide Act; Comprehensive Environmental Response, Compensation & Liability Act; Toxic Substances Control Act; and Resources Conservation and Recovery Act. These statutes regulate the registration, labeling, distribution and use of pesticides or poisons in interstate commerce and the handling, cleanup and disposal of hazardous substances.

discrimination on interstate common carriers, and allegations of brutality by local police officials against blacks and members of other ethnic minorities.

Disposition: PERMANENT. Transfer to WNRC one year after close of case. Transfer to the National Archives in five-year blocks 30 years after close of case.

145. Class 145 - Federal Service Classification

This classification covers suits seeking judicial review of decisions of or actions taken by federal agencies and cases charging that statutes, regulations, or presidential initiatives are invalid under the Constitution or other laws. The classification is used only for cases that cannot be covered by another classification. Before the creation of this classification, such cases were given straight numerical file designations.

A. Multi-section case files and related enclosures and single-section case files and related enclosures having the designation 145-1-NS.

(1) Privileged attorney-client documents.

Disposition: Disposition not authorized

(2) All other documentation.

Disposition: PERMANENT. Transfer to WNRC one year after close of case. Transfer to the National Archives in five-year blocks 30 years after close of case.

B. All other single-section case files and related enclosures.

Disposition: Transfer to WNRC one year after close of case. Destroy 15 years after close of case.

146. Class 146 - World War II Classification

Records under this classification are covered by a separate schedule, Job No. N1-60-88-13.



DNL:RML:AFIentje

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm. 7236
Washington, D.C. 20530-0001

Tel: (202) 514-3469
Fax: (202) 514-7964

[ORAL ARGUMENT HELD MAY 15, 2007]

June 8, 2007

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W., Room 5423
Washington, D.C. 20001

Re: Bismullah v. Gates, No. 06-1197; Parhat v. Gates, No. 06-1397

Dear Mr. Langer:

At oral argument in the captioned matter, Judge Rogers asked about whether the protective order provides for the retention after the termination of these cases of "all notes of counsel, et cetera, that would make any reference to classified or protected information." Tr. at 63. Judge Ginsburg asked for a supplemental response addressing that narrow issue. A response to that inquiry follows.

The government's proposed protective order provides that:

All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and served on counsel for the Government), shall remain at all times in the control of the Court Security Officer for the duration of this case. Upon final resolution of this case, including all appeals, all such documents shall be destroyed by the Court Security Officer.

App. 90. The district court habeas protective order included a similar requirement. App. 44. The proposed protective order also requires the destruction of "all protected documents or information, and any copies thereof, provided to petitioner's counsel." App. 94. The habeas order also required the destruction of protected information and that provision was also intended to apply to materials provided by the government to petitioner's counsel. See App. 46-47.

Those provisions require the destruction of counsel notes and other materials generated by counsel for petitioners to the extent they consist of classified or protected information provided by the government, other than materials filed in court and served upon government

counsel. Thus, the counsel notes referred to by Judge Rogers, *i e* , material consisting of classified or protected information, will be destroyed after the conclusion of the case under the proposed protective order, as would also be the case under the habeas protective order. Of course, destruction of materials in a concluded district court case covered by the habeas protective order is not being sought where a DTA petition has been brought in this Court.

The proposed destruction provisions will in no way affect the destruction of unique federal records. First, material filed in court and served on counsel for the government will be retained as part of government litigation and court files under the normal federal record retention requirements. Second, the protective order provision concerning document destruction does not apply at all to Department of Defense records, including records generated during the CSRT process, regardless of whether such records are used in court filings. Third, any unique materials subject to destruction under the order consist exclusively of materials reflecting communications between detainee counsel and the detainee clients or other detainee counsel materials; those documents are presumptively not federal records and are therefore not subject to federal record retention requirements. Destruction of such documents, that is, to the extent they contain classified or protected information, is warranted because the government cannot preserve such files after the conclusion of a case while protecting the confidentiality of those non-governmental communications, and detainee counsel cannot preserve them due to the sensitive nature of the information. Exec. Order 12,958, as amended by Exec. Order 13,292, § 5.1(a)(2), 68 Fed. Reg. 15,315 (2003); 32 C.F.R. 2001.40 *et seq.*

We hope that this response answers the Court's question.

Sincerely,



August E. Flentje
Attorney, Appellate Staff
Civil Division

Enclosure

cc: Sabin Willett
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