
RE: DoD Response

15 messages

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To: "Pool, Jeff Maj OSD PA" [REDACTED]

Good afternoon, GTMO Press Corps colleagues.

As you are no doubt aware, this latest motion filed by the defense - and the government's response - in the USS Cole and 9/11 cases has taken on a sort of life of its own. And, while some of the more breathless members of the press have reported on the issue relying on factually uniformed, third-party opinion and in some cases, reaching their own conclusions, you have not. So, I'd like to provide a statement from which you may quote me, by name, as a Defense Department spokesman, in whole or in part, should you chose to (further) report on this matter. [Also - I know you are receiving this late and that some of your deadlines are past or nearing, but I wanted to make sure from as many of my folks as possible that I was sending you accurate information].

You may quote me, beginning here:

Perhaps the biggest myth in the current reporting is that US government prosecutors saw defense e-mails.

I can tell you unequivocally that NO prosecutor and no member of the privilege review team saw the content of any privileged communications. Only one prosecutor and only one member of the privilege review team each actually saw a single defense communication. To be clear: there were a series of searches for a particular piece of information in which both prosecution and defense took part. One prosecutor saw the email when reviewing results generated from the first search. The privilege-review attorney saw the email when reviewing the results generated from the second search. However, in both cases, they only saw the "To," "From," and "CC" lines, and the one prosecutor saw the opening salutation of the email (it was "team," or some similar word) and saw NOTHING ELSE. As soon as that prosecutor realized the search results included privileged material, the searches completely ceased, and, upon agreement of defense counsel in Qosi, the IT department deleted all the search results from the two searches.

But more generally - though terrifically more importantly - the attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law, and we take this seriously. The fact that this arose from a defense-initiated petition, was promptly dealt with due to a PROSECUTION report, and that it is receiving appropriate focus to identify corrective measures, confirms that. All attorneys, including both our professional corps of defense and prosecuting attorneys, are duty-bound to safeguard privileged material. Attorneys are obligated to scrupulously avoid reviewing the other side's privileged material. Specifically, the attorneys in the office of the chief prosecutor have demonstrated their respect for the attorney-client privilege and they diligently work to protect it.

In any complex litigation, privileged material sometimes accidentally ends up in the wrong place - from both 'sides.' For example, just last week, a member of the defense counsel mistakenly sent to a number of prosecutors an ex parte filing that was meant to be sent only to the court. Defense counsel notified the prosecution, and actions were immediately taken to protect the confidentiality of the filing. This sort of human error is unfortunate but not out of the ordinary in complex litigation in both civilian and military systems, and both sides work together to resolve any issues that arise.

Meanwhile, encryption--which is the recommended means of communication--would have precluded even this inadvertent and fully contained disclosure that involved no content.

So, if you'll indulge me, I'd like to offer some point-for-point responses to some of the growing myths that are out there.

"[I]t was revealed that hundreds of thousands of defense e-mails were turned over to the prosecution."
"In the latest controversy, the prosecution gained access to about 540,000 emails from defense teams."

-- This is patently FALSE. First, no one knows from where this "540k" number comes and I would direct you to the defense counsel who allege this number. The Enterprise Information Technology Services Directorate (EITSD) did not turn over any of the those emails to any attorneys—prosecution or otherwise. IT has maintained possession of these emails and the prosecution attorneys do not have access to them. Because no one has reviewed these emails, we simply do not know whether any of the emails included any defense emails.

"Defense attorneys said military IT personnel unsuccessfully tried to refine their search parameters two more times—and in each case discovered more confidential material."

-- The court wanted communications between the prosecution and the defense regarding waiver of appellate review. The office of the Chief Prosecutor (OMC-P) asked their IT professional, he relayed to them that they had to go through OMC Security Department (now part of Washington Headquarters Services), and OMC Security relayed that they would have to contact the search technicians with OMC-P's search request. OMC-P gave the search parameters to OMC Security (including the names of the relevant prosecutors and defense attorneys, identifying who was a prosecutor and who was a defense attorney), and OMC Security was supposed to properly communicate them to the search technicians. The representative from OMC-Security miscommunicated the search parameters, which we asses is the likely reason it caused OMC-P to receive the privileged communications which, again, were never read by the prosecutors.

-- The IT search that generated 540,000 emails was the third search. Again: no one has reviewed these emails, so we do not know if they include confidential material. After the first search, prosecutors directed IT to deliver any search results to a privilege review team composed of attorneys from the DOD OGC who had no involvement in the Qosi case before the United States Court of Military Commission Review or the Cole and 9/11 trials. IT has deleted the search results from the first two searches.

-- Finally, the Office of Military Commissions (OMC), in toto - including both defense and prosecution - suffered from a nearly catastrophic server 'crash,' that affected not only the main server, but both of its back-up servers. The server 'crash,' coupled with the satellite latency issues that exist between computers here in the US and those at Guantanamo Bay, have caused losses of indiscriminate data across the OMC spectrum. Of the nearly 400 gb of data originally 'lost,' there remain some 7 gb yet to be accounted for. To be sure, this data loss - which affects the whole of OMC - is indeed indiscriminate and appears to be mostly affecting updates to pre-existing documents and new documents that were saved to the server and not e-mailed.

If you have any follow-up questions, I'm happy to answer what I can.

Best regards,

Todd

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