

January 29, 2005

VIA FACSIMILE ONLY

The Honorable Donald H. Rumsfeld
Secretary
Department of Defense
The Pentagon 3E880
Washington, DC 20301-3010

Dear Mr. Secretary:

Since I began investigating the tanker lease proposal as the former chairman of the Senate Commerce Committee and with the assistance of the Senate Armed Services Committee (SASC), the Department of Defense (DoD) has assured me that it wanted to cooperate. In particular, it has assured me that it will conduct a thorough search for, and will be prepared to produce, all responsive documents.¹ As you know, in the Commerce Committee, I first requested documents regarding the proposal in June 2003. Regrettably, since then the DoD's production of documents has been riddled by disruption, obfuscation and delay. Some documents that were produced were doctored²; others that should have been produced, were improperly withheld.³ To date, after months of assurances, partial production on only about 7 out of 36 request categories have been produced.

¹Internally, within the DoD, this commitment was reflected in an August 11, 2004, memorandum from the Deputy Secretary to DoD components, including the Secretary of the Air Force, regarding document production.

²*See, e.g.*, Letter from Commerce Committee Chairman John McCain to Air Force Secretary James G. Roche, February 13, 2004 (inquiring about doctoring of briefing slides prepared by Tinker AFB)

³*See, e.g.*, Letter from Commerce Committee Chairman John McCain to Defense Secretary Donald H. Rumsfeld, September 13, 2004 (inquiring about the Air Force's failure to produce a responsive e-mail between Air Force Secretary Roche and OMB senior staffer Robin Cleveland).

In the December 15, 2004, version of the DoD-OIG's "completeness review," the OIG preliminarily found that the OSD's and the Air Force's attempt to produce "available" documents was "reasonable." First, inasmuch as the characterization goes only to the DoD's and the Air Force's production to the SASC (not the Commerce Committee), it is an incomplete assessment. Second, given the OIG's findings regarding the OSD's and the Air Force's records management program and their failure to even recover, much less search, deleted e-mails, the characterization is meaningless. This is particularly true given that I have not been provided with an estimate as to what percentage of the entire universe of responsive documents, the pool of "available" documents comprises. In any case, I understand that the OIG is prepared to revisit this characterization

New facts that have only recently been brought to my attention continue to call into question whether the DoD is proceeding in good faith. As early as July 2003, I have noted that in the absence of a subpoena, the DoD will be expected to certify that it had completed its search for, and production of, all responsive documents. To that end, several months ago staff reminded the DoD's Deputy General Counsel of this expectation and specifically asked whether there was anything about how the Office of the Secretary of Defense (OSD) or the Air Force manage their records that I needed to know that might indicate that either may be unable to produce all responsive documents in their custody or control. The Deputy General Counsel answered, no. I now know that this is untrue.

Now, almost two years after the DoD was first asked to produce documents regarding the tanker proposal and despite assurances to the contrary, I have learned that the OSD and the Air Force cannot produce all responsive documents. Specifically, in a December 15, 2004 report, entitled "Completeness Review of Documents Gathered Relating to the Lease or Procurement of the KC-767A Tanker Aircraft," the DoD-Office of the Inspector General (OIG) found that "the existing e-mail record-keeping and retrieval systems do not ensure that all documents that were generated relating to the lease or procurement of KC-767A tanker aircraft from 'January 2001 through the present' were produced as requested." The report also found that "neither OSD nor Air Force currently has an adequate electronic e-mail record-keeping system nor effective retrieval system that captures 100 percent of the requested e-mails." Moreover, the report notes throughout that, since the search tasking did not require a search for deleted files (e-mails and documents), no attempt was made to identify and recover deleted records.

I am very concerned about these findings for several reasons. First and foremost, given that the DoD's inability to produce all responsive documents has been brought to my attention almost two years after my first request for production and months after my staff specifically asked the Deputy General Counsel about the issue, they suggest that the DoD is not proceeding in good faith. Second, the records management question raises serious questions regarding the integrity of the DoD's production of documents to date in the continuing congressional inquiry into the tanker lease proposal and related issues. Third, it appears that the DoD's inadequate records management capability may disable Congress from conducting meaningful DoD oversight generally. Fourth, given the little information the DoD has provided on this issue to date, it is unclear whether the OSD's and the Air Force's records management program is even legal—whether it comports with the requirements of the Federal Records Act (FRA).

With respect to continuing tanker investigation, the DoD's failure to search deleted records may perhaps be even more troubling. Needless to say, e-mails that, in particular, tend to be most valuable from an oversight perspective, are usually deleted contemporaneously. But, according to the OIG, the DoD and the Air Force failed to even recover, much less search,

deleted documents.⁴ Indeed, under the circumstances, the decision made by certain individuals not to do so may amount to an obstruction of the congressional investigation.

Given the foregoing, I ask that you provide the following by Tuesday, February 8, 2005:

1. A complete copy of the former and updated versions of DOD Directive 5015.2, “DoD Records Management Program,” and Air Force Instruction 33-119, “Electronic Mail (E-Mail) Management and Use.” This will assist in determining whether the OSD’s and the Air Force’s records management process comports with the requirements of the FRA.
2. The identity of who ordered that no attempt be made to recover, identify or search deleted records in the DoD’s custody and control. As I noted above, the Deputy Secretary’s August 11, 2004, memorandum to DoD components instructs that they “direct a search to identify and produce any documents responsive.” So, I am interested in who effectively countermanded the Deputy Secretary’s instructions.
3. An explanation as to why an order was given that no attempt be made to recover, identify or search deleted records otherwise in the DoD’s custody and control that were responsive to congressional requests.
4. The identity of the person in former Air Force Secretary James Roche’s office who made the decision to improperly withhold the May 2003 e-mails between Secretary Roche and senior OMB official Robin Cleveland, from Congress. I have raised this issue before. Suffice it to say that, on September 13, 2004, White House Counsel Judge Alberto Gonzales told me that “someone in Secretary Roche’s office” concluded that the May 2003 e-mails “did not reflect negotiations on the tanker lease program” and, therefore, did not need to be produced. It appears that this rationale may have been used to withhold other responsive documents.
5. The identity of who intentionally deleted information from placards that were shown to SASC staff at Tinker AFB in October 2003. I have raised this issue before, too. Here, I note only that the placards that SASC staff asked for were altered before they were produced. The originals cast serious doubt about the Air Force’s claims that the current fleet of tankers suffered from a systemic corrosion problem. Ultimately, Secretary Roche conceded that the information the SASC requested was intentionally deleted.
6. A commitment that the current protocol governing the OIG’s screening of the

⁴Regarding the records management issue and the DoD’s failure to even try recovering deleted e-mails, I wonder if the Justice Department is aware of the DoD’s limited ability to produce documents potentially responsive to grand jury subpoenas issued in related cases.

documents that the DoD is producing to the SASC be simplified to facilitate the production of these records to the SASC. Given the overwhelming volume of documents at issue (about 400,000 records), the OIG's vetting for content is proving to be overly burdensome. Other, less burdensome, arrangements regarding access for example, will achieve the same goal as the current protocol but will actually help, rather than disrupt, the DoD's production to the SASC.

7. A statement that the DoD has completed its search for, and production of, all responsive documents of Secretary Roche, Assistant Secretary Sambur, and Acting Undersecretary Wynne. As you may know, the requests for documents as to Secretary Roche and Acting Undersecretary Wynne are about 18 months old.
8. At the conclusion of the DoD's production as to any request category, a log of all responsive records that are being withheld for whatever reason. This log should set forth the basis for withholding each of those documents and fully identify each in detail sufficient for the requestor to determine the legitimacy of the basis cited.

With these, and my past, requests in the tanker matter, I have tried to help move the DoD's production of documents along. However, it is growing increasingly clear that some in the DoD or the Air Force may be trying to stymie this effort. Accordingly, your prompt attention to my concerns is appreciated.

If you have any questions, please have your staff contact my Military Legislative Assistant Christopher Paul, at (202) 224-2235.

Sincerely,

John McCain

cc: The Honorable John Warner, Chairman, Senate Armed Services Committee
The Honorable Carl Levin, Ranking Member, Senate Armed Services Committee
The Honorable Alberto Gonzales, Counsel to the President, the White House
The Honorable Joseph Schmitz, Inspector General, Department of Defense
The Honorable Paul McNulty, United States Attorney, US Attorneys Office, Eastern District of Virginia, Department of Justice