

MAGISTRATE JUDGE CALLS "BULL" ON WAPO'S GLOSS-CALLS FOR MORE E-MAILS

The WaPo presented a very credulous view of the status of lost emails in a story many of you have emailed to me—suggesting that "all" of the lost White House emails have been found.

Missing White House E-Mails Traced, Justice Aide Says

A Justice Department lawyer told a federal judge yesterday that the Bush administration will meet its legal requirement to transfer e-mails to the National Archives after spending more than \$10 million to locate 14 million e-mails reported missing four years ago from White House computer files.

Civil division trial lawyer Helen H. Hong made the disclosure at a court hearing provoked by a 2007 lawsuit filed by outside groups to ensure that politically significant records created by the White House are not destroyed or removed before President Bush leaves office at noon on Tuesday. She said the department plans to argue in a court filing this week that the administration's successful recent search renders the lawsuit moot.

I knew that was optimistic because the National Security Archive told a totally different story:

At a hearing today concerning the risks posed by the presidential transition to the recovery of millions of missing e-mails from the Executive Office of the President (EOP) in the National Security Archive's lawsuit seeking restoration of

those e-mails, the White House acknowledged that it has done little to recover e-mail files from computer workstations and nothing to collect external media storage devices that could hold e-mails. These admissions came despite the issuance of a **report and recommendation in April 2008** by a federal magistrate judge calling for the White House to locate and preserve data from the workstations and external media storage devices. Earlier today the court **issued an order** requiring steps to be taken to secure files from individual computer workstations, memory sticks, zip drives, DVDs and CDs.

Now, Magistrate Judge Facciola, working in tandem with Judge Kennedy on this case, issued a new order after the hearing yesterday calling for a more thorough inventory. Here's NSA's version of what has happened.

The federal magistrate judge overseeing the White House e-mail litigation today described the issue as reaching "true emergency conditions" with only "two business days before the new President takes office," and that "the importance of preserving the e-mails cannot be exaggerated," according to the court's Memorandum Opinion issued this morning along with an Order and posted on the National Security Archive website, www.nsarchive.org. (see **attached PDFs**)

Magistrate Judge John Facciola formally ordered the White House to search all Executive Office of the President components' workstations and portable media for possibly missing e-mail – enforcing yesterday's order from U.S. District Judge Henry Kennedy (http://www.gwu.edu/~nsarchiv/new/s/20090114/order_20090114.pdf) – after government lawyers at a hearing

yesterday represented that they would only search those EOP components that create federal agency records and leave out offices that create presidential records.

Today's order also granted plaintiffs' requests that a full inventory of all backup tapes and portable media containing White House e-mail be delivered to the Archivist of the United States and filed with the court, and that the full administrative record and all other evidence related to the White House e-mail be preserved under the custody of the Archivist.

"From the outset, the White House has fought tooth and nail against having to preserve sources of missing email as well as other evidence relating to this case," said Sheila Shadmand of Jones Day, counsel for the Archive. "For the umpteenth time, this Court has commanded that they do so. We expect they will yet again object to the terms of these Orders, when instead they should be busy complying with it. The clock is running out."

The hearing yesterday before Magistrate Judge Facciola included representations from Justice Department attorney Helen Hong that the White House had spent \$10 million on an e-mail restoration project that had located some 14 million e-mail that had not been counted in a 2005 analysis by White House staff.

However, White House Chief Information Officer Theresa Payton told the staff of the House Oversight and Government Reform Committee on February 22 last year that her efforts had uncovered some 23 million e-mail that had not been found in the 2005 analysis. The government has provided no explanation for this discrepancy, or for the

contradiction between White House statements that “I wouldn’t rule out that there were a potential 5 million emails lost” (Dana Perino, April 13, 2007) and “no reason to believe that any e-mails are missing” (Tony Fratto, January 18, 2008).

“From the beginning, the White House has changed it’s story from ‘emails are missing’ to ‘23 million emails were found’ and back to ‘no emails are missing.’ The truth is, neither we nor the public knows what was going on, nor can we verify the White House’s efforts because they continue to conduct themselves under a veil of secrecy,” noted Archive General Counsel Meredith Fuchs.

White House components that are governed by the Federal Records Act include the Office of the Trade Representative, the Office of Management and Budget, the Office of Science and Technology Policy, the Council on Environmental Quality, and the Office of National Drug Control Policy. White House components governed by the Presidential Records Act include the National Security Council, the Council of Economic Advisers, and the President’s Foreign Intelligence Advisory Board.

The National Security Archive, thankfully, can calculate 23 million minus 14 million. Apparently the WaPo cannot.