

SUDDENLY, YOUR BRIEFCASE IS CLASSIFIED

Groom Lake Litigation Tests Government's Secrecy Standards

LEGAL TIMES, JUNE 26, 1995

By Benjamin Wittes

The press has copies. The Justice Department has copies. Even the public can obtain copies over the Internet of a thin U.S. Air Force manual dealing with security issues at a super -secret military facility in southern Nevada.

Yet the Air Force and the Justice Department are pulling out the stops to make sure that one man--the plaintiffs lawyer who wants to use the manual in court against the government--doesn't get to keep his copies.

Despite the manual's widespread availability, the government claims that the document, which bears no classified markings, contains secrets so sensitive that letting Jonathan Turley introduce it in court could cause "exceptionally grave damage to the national security."

The manual in question deals with security at the Groom Lake Air Force base in Nevada, a facility so sensitive that the government will not even confirm that it exists. Turley is suing the Pentagon and the Environmental Protection Agency in U.S. District Court in Nevada, claiming that his anonymous clients were injured by systematic environmental abuses when they worked at the base.

The manual has been circulating publicly for at least a year with no peep of protest from the government. It even recently appeared on the Internet, and can be downloaded with a few keystrokes.

But the Justice Department lawyers defending the government are suddenly claiming that the booklet is classified. In fact, the government now asserts--in a June 15 telephone notice to Turley's staff--that not only is the manual classified, but so are Turley's court filings that mention it.

What's more, Turley says, the government has requested that Turley and the court turn over to Justice for safekeeping all material in their possession that it claims is classified--including Turley's own briefs, notes, files, computer records, source names, and media contacts.

And on June 16, Justice lawyers asked U.S. District Judge Philip Pro for summary judgment, arguing that security concerns preclude litigating the matter further.

"It is apparent that plaintiffs will not be able to present evidence to prove any of their claims and defendants will not be

able to present evidence disproving those claims without causing serious risk to the nation's security," the department argued in its motion.

THE CLASSIFIED ZONE

The incident has Turley fuming that the government is classifying information simply as a litigation tactic in a case he claims proves criminal conduct on the part of government officials.

"The only element missing from this situation is a Rod Serling voice-over," says Turley, a professor at the George Washington University National Law Center and director of the school's Environmental Crimes Project. "This document was clearly viewed and treated as unclassified until June 14, when it was introduced as evidence of dilatory practices by the defendants."

The Air Force, meanwhile, denies that it classified the document in response to Turley's action. Officials there insist they are merely protecting legitimate state secrets. "The [document] has always been classified, and Mr. Turley's motions that were created using information in that classified document are therefore also classified," says Col. Thomas Boyd, a spokesman for the Air Force to whom the Justice Department referred questions. "Our position is that a secret is still a secret, even if it appears on the front page of The New York Times in a World War II-sized headline."

Boyd adds that the Air Force feels anyone in possession of the manual is obligated to return it. The Air Force "would appreciate if [anyone with copies] would turn those back over to us, and we will make any arrangements convenient . . . in doing that," he says.

But if the government claims it is merely engaged in standard efforts to protect sensitive information, national security litigators--including three former general counsel of federal security agencies--say the situation is hardly routine. And civil liberties advocates describe it as outrageous. "This appears to be a very disturbing effort by the government to attempt to use the courts to suppress information which . . . has now been widely circulated in the public domain," says Kate Martin, director of the Center for National Security Studies. Justice is "invoking the general supervisory powers of the federal courts to silence an attorney, when it would be constitutionally barred from taking such actions against other private individuals."

Stewart Baker, a former general counsel of the National Security Agency, describes such talk as "overheated rhetoric." While he agrees that the effort to keep public-domain material out of court is peculiar, Baker, now a partner at D.C.'s Steptoe & Johnson, says that "if someone reveals classified information in the brief, the government has the authority to try to secure the brief."

Professor Turley has long claimed that the government is using secrecy for tactical reasons to counter his claim of environmental abuses at Groom Lake. The existence of the base, which is believed to be used for testing of experimental and captured foreign aircraft, has been widely reported in news articles, and pictures of the facility have been published. But the government still refuses to admit the base exists, acknowledging only that there is an "operating location near Groom Lake."

Turley, however, insists not only that there is a base, but also that it is an environmental disaster. He claims that hazardous wastes were burned in open trenches on the site. Workers were not given protective clothing, he alleges, and they developed elevated risks of cancer and, in some instances, a rare and painful skin condition.

Turley, with help from a watchdog group called the Project on Government Oversight, is representing five John Doe plaintiffs and a sixth who recently died of cancer. Turley is suing the EPA, alleging that it failed to monitor environmental conduct at Groom Lake as required under the Resource Conservation and Recovery Act. The John Does, all former workers at Groom Lake, are also suing the Pentagon for committing the environmental abuses. In the Pentagon suit, they are joined by Helen Frost, the widow of former Groom Lake sheet-metal worker Robert Frost. (See "Target of Suit Doesn't (Officially) Exist," Sept. 5, 1994, Page 1.)

The current dispute arose because of the Justice Department's repeated use in discovery of the rarely invoked, but extremely powerful, military and state secrets privilege. That common law privilege allows the government to withhold information from discovery with a sworn declaration by the head of a government agency that national security would be harmed if the information were made public.

For months, Turley's only discovery request was for the name of the base. Justice, whose team in the case was then headed by Lt. Col. Richard Sarver, claimed that the "operating location" had no name and refused to give more information, citing the state secrets privilege and a declaration from Air Force Secretary Sheila Widnall that the material requested could "reasonably be expected to cause exceptionally grave damage to the national security" if made public.

Sarver, whom the Air Force had detailed to the Environmental Defense Section of the Justice Department's Environment and Natural Resources Division, recently resigned from government work, leaving Russell Young, another attorney in the section, as counsel of record in the case.

After failing to secure the name of the base, Turley submitted further interrogatories, asking the government to confirm that items sure to be present at any air base are present at Groom Lake, which is also known by such other names as "Area 51" and

"Dreamland."

The government invoked the state secrets privilege in response to many of his inquiries. Using the privilege, the government claimed that it could not describe any firefighting units at Groom Lake. It also refused to specify whether any jet fuel is kept there or whether a single automobile battery has been disposed of at the facility. MANUAL KNOWLEDGE

In an attempt to prove that the government had invoked the privilege improperly, Turley submitted the Air Force manual, a version of which was provided to Legal Times by Steven Aftergood of the Federation of American Scientists, a group that opposes government secrecy. The version provided by FAS differs in small ways from the one submitted in court by Turley, but is substantially the same document, according to Aftergood and two other sources.

The document, entitled "DET3 SP JOBKNOWLEDGE," gives no indication that it is classified. Turley submitted it under seal, asking Judge Pro to certify that it contained no classified information, and then unseal it and place it in the court record. In a June 9 motion--which has since been classified--Turley argued that the fact that this unclassified document answered his interrogatories proved that the government had used the classification system not to protect secrets, but to stymie his case.

The manual clearly establishes the presence of firefighting units at Groom Lake--although nowhere in the document is the facility itself named. It also clearly establishes the presence of jet fuel, hazardous material personnel, and the contractor that employed Robert Frost, the sheet-metal worker. While the manual further indicates the presence of cars--and hence, presumably, the car batteries Turley asked about--it does not seem to indicate that any batteries have been disposed of at the facility.

"The manual establishes that this information is not classified, should have been disclosed to Plaintiffs' Counsel, and that these facts easily could have been confirmed by Defendants," Turley wrote in the June 9 brief, a copy of which was given to Legal Times before the government's classification action.

Turley says he notified the Justice Department that he intended to file the manual a week before doing so, and that he received no objection to its use. Col. Boyd claims Justice attorneys notified Turley that the document was classified, although Boyd says he does not know whether the notification predated Turley's submission of the manual.

But six days after Turley filed it, Justice notified his staff that both the document and all Turley's filings referring to it were classified. And the department obtained an order from Judge Pro forcing Turley to attempt to retrieve all copies of the brief that he had previously handed out.

"If [Turley's] brief asserts that the document was unclassified, his premise was wrong," says Boyd. "The manual, as you call it--I can't confirm that [it is a manual]--has always been classified."

However, if the manual was classified before Turley introduced it into evidence, that's not immediately apparent from looking at it. The document bears none of the telltale stamps of classified material, only the warning "DO NOT REMOVE FROM SITE--FOR OFFICIAL USE ONLY."

Asked how the document could be considered classified without being marked as such, Boyd notes that "in a facility where everything is classified, you can stamp it 'Do Not Remove,' and it is assumed to be classified." But Aftergood, FAS's point man on secrecy, ridicules this interpretation.

The document "is manifestly unclassified, because if it were classified, it wouldn't say, 'For Official Use Only,' " asserts Aftergood. "You don't say, 'Top Secret,' and, by the way, 'For Official Use Only.' "

Aftergood points to language in Executive Order No. 12356, which currently governs official secrecy. The order allows only the words "Top Secret," "Secret," and "Confidential" to be used to designate classified status. "Except as otherwise provided by statute, no other terms shall be used to identify classified information," the executive order says.

A PROTECTIVE HEARING

Regardless of whether the document was properly classified, the government persuaded Judge Pro to hold a sealed hearing to discuss Justice's request that Turley return his classified material.

Neither Boyd nor Turley will discuss the June 20 hearing, citing the court-ordered seal, but since the government had already asked Turley to turn over any additional notes, source names, and media contacts, it is likely that this request was also considered at the hearing. Boyd, in any case, denies Turley's pre-hearing claim that Justice was preparing to search his office for classified material.

"We never said we would seize the documents. But we said we would seek relief to prevent him from distributing them, and the court granted that," says Boyd.

Two Justice Department sources, however, do not deny that Justice might have asked Judge Pro to compel Turley to produce the documents. One says that the department "was trying to have the court craft what was needed to protect the government's secrets and then enforce its decision."

Responds Turley: "If the government is stating that it has only

asked for a guarantee of nondissemination, then the government is lying. . . . Counsel should keep in mind that a seal affixed today can be a seal lifted tomorrow." If the government did request a seizure at the closed hearing, the request apparently was not immediately granted, since no search of Turley's offices had taken place as of late last week. Turley, who says he spent the night of June 15 guarding his office with students, was confident enough after the hearing to sleep at home.

He insists that he will go to jail before complying with any court order to turn over his files.

"The suggested authority of the government to rifle through my files to extract objectionable materials is wholly foreign to this legal system," says Turley, noting that the files may contain the names of his clients as well as information covered by the attorney-client privilege. "I fully intend to protect the contents of my office and my personal contacts from government seizure or review."

Turley's case is not the first time the government has classified opposing counsel's court filings. National security litigators say that it happens occasionally in the criminal context, when a defendant with access to classified information--such as Iran-Contra figure Oliver North--needs to use that material to construct a defense.

Even in the civil context, the government has classified an opposing counsel's brief when nuclear secrets were involved. According to Mark Lynch, a partner at D.C.'s Covington & Burling who 16 years ago helped litigate *United States v. The Progressive Inc.*, the government sought to review some of his filings in that case. The 1979 case involved a government effort to stop *The Progressive* magazine's publication of an article on the construction of a nuclear bomb.

But the government has never indicated that the Groom Lake case could compromise nuclear secrets. And civil liberties lawyers upset with the government's conduct in the matter point out that the secrets surrounding Groom Lake do not seem all that well-concealed.

"To fight over the name just seems absurd to me," says Martin, the Center for National Security Studies director. Even national security specialists who defend the government's current action describe it as unusual.

"Oh, boy, what a mess!" exclaims Kathleen Buck, who served as general counsel at the Pentagon under President Ronald Reagan. "I find it disturbing that some process has not been established to handle classified filings. That's the first thing I would have done representing the government in this case." Buck, who is now a partner in the D.C. office of Chicago's Kirkland & Ellis, says that she can think of only two other civil cases in which the

government found opposing counsel in possession of classified information. But she says those matters were very different because they weren't in litigation and documents never became public.

Baker, the former NSA general counsel, also says that he knows of no other case like Turley's, but he adds that the government's action "doesn't sound inconceivable."

"One of the things one worries about in classification is the mosaic," says Baker, citing the government's longtime claim that individual items of unclassified information can, when taken together, make up a composite picture that is classified. "When someone as smart as Turley . . . gets some information from this unclassified source and some from this one, all of a sudden there are real secrets being revealed."

But if the purpose of the government's action was to protect the mosaic, the effect has been just the opposite. Within four days of Justice's notifying Turley that the manual was classified, copies appeared on an Internet-accessible newsgroup called "alt.conspiracy.area51" and later showed up on the World Wide Web.

How worried is the Air Force? Boyd will not confirm or deny that the document now available on the Internet is the manual at the heart of the current controversy, or even that it is classified. He does say that the Air Force will redact and return copies of Turley's motion that have been turned in. But when asked whether the military will similarly redact the security manual, he laughs: "If you were to redact the document, you wouldn't have much of it left."

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