

Richard Vuernick: When an unclassified document is stamped 'top secret'

Richard Vuernick is the legal-policy director for Citizen Action, a consumer organization in Washington. These views are his own.

WHEN the government uses national security to legitimately protect the public, it should be viewed as a guardian of the American people. When the government utilizes national-security concerns to cover up information relating to potentially criminal, taxpayer-funded activities, it becomes an enemy of government accountability.

Ironically, the Clinton administration is publicly declassifying arcane documents at the same time it is covering up documents relating to embarrassing domestic activities. Two current cases, complete with retroactive "classified" status and a presidential exemption from compliance with environmental laws, are symptomatic of this national-security defense gone awry.

Several former workers at the Groom Lake Air Force Base in Nevada are suing the Defense Department and the Environmental Protection Agency (EPA) for criminal violations of environmental law. The workers first told their stories to investigators with the Project on Government Oversight (POGO), a government-watchdog group.

Groom Lake turned out to be the most covert base in the US military network and has served as a laboratory for such top-secret aircraft as the Blackbird spy plane and the F-117A stealth fighter. POGO investigated and documented the burning of toxic waste associated with open-air pits at the base - pits that are approximately the length of a football field and are 15 feet deep.

The burning process has allegedly caused the death of at least one worker and severe injuries to others. Due to the secrecy surrounding the base, Groom Lake became the site where other government facilities could dispose of their environmental waste - in violation of environmental laws - without ramification. The federal government, with a Nevada district court judge's acquiescence, has fought the public's right to information regarding the base's existence and environmental activities. The government initially refused to admit the base even existed, despite the fact that Russian satellite photographs of the base are available for purchase from a French company located in northern Virginia.

Forced admission

The military was forced to admit the base existed after the suits were filed and a Groom Lake employee security manual appeared. In seeking retroactive classification for the manual, the government has argued that the document is top secret, despite the lack of any such designation. (Only the warning "Do not remove from the site - For Official Use Only" appears on the manual; the usual phrases "Top Secret," "Secret," or "Confidential" - as specified by Executive Order No. 12356 - are noticeably absent.)

Copies of the manual have already circulated among interested parties, and a third-hand copy was placed on the Internet. A few congressional staff members requested and received copies. Nonetheless, Col. Thomas Boyd, an Air Force spokesman, says, "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."

The workers' lawyer, Jonathan Turley, informed the Air Force of his intention to introduce the security manual as an exhibit two weeks prior to filing it with the district court. A few days after Mr. Turley filed the manual, the Pentagon classified it, along with Turley's accompanying brief, as top secret. After a closed hearing, Nevada District Court Judge

Phillip Pro told Turley that he could not share with anyone else files that had been declared classified. This hearing was held over the telephone on a nonsecure line - in violation of government secrecy rules.

Citing the workers' cases, the military agreed to try to bring the facility into compliance with the Resource Conservation and Recovery Act (RCRA) by permitting EPA to conduct an inspection and inventory of the hazardous wastes at the site. Once the inspection was completed, however, EPA received a presidential exemption to avoid publicly disclosing the results. EPA was subsequently dismissed from the lawsuit.

Question of accountability

National-security experts argue that secret military programs - "black" programs - do not permit citizens to hold military officials accountable for their nonmilitary actions. However, the environmental law in question here does not contain a national-security exception. EPA is required to inspect federal facilities biannually and to report its findings. Without a compelling security reason, the government must comply with domestic laws, even at its "black" facilities.

Judge Pro's ruling on the manual, combined with the secrecy of the proceedings and the presidential exemption, has set a dangerous precedent. The government can now successfully assert the security defense to protect materials introduced at trial that might prove criminal activity. The government's position that something is a secret when it is publicly available is problematic, if not ridiculous.

Retroactive classification is a government "Oops!" defense. Suppression of documents that could serve as evidence of criminality, incompetence, or foolhardiness, should send a chill up the spine of anyone who has received publicly available government information.

If Judge Pro's rulings in these cases become precedent, the door swings open to permit government coverups. Now that Judge Pro has closed the discovery process, it is doubtful the plaintiffs will have the opportunity to examine pertinent documents relating to the base - the government claims they are all classified.

This case deserves more attention than it has received. The government is seeking to hide information from its citizens under the guise of protecting "secrets" from foreign nations, but its legal maneuvering demonstrates a blatant abuse of what should be a very limited exception.

"Sunshine" laws are an integral part of our democracy and have enabled citizens to view their government at work by making government documents and proceedings public. But in the black hole at Groom Lake, Nev., there is no "sunshine."

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