2000

Through a Looking Glass Darkly: National Security and Statutory Interpretation

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Jonathan Turley*

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I. INTRODUCTION

In the last three decades, the legal academy has experienced an explosion of interest in legisprudence and the rivaling theories of statutory interpretation. Once largely ignored by academics in favor of constitutional interpretation or common law development, statutory interpretation has become some of the most heavily trodden ground for legal theorists and leading jurists. Despite this broad review of every aspect of statutory interpretation, one area has remained largely terra incognita: statutory interpretation and national security. While statutes touching on labor, environmental, or economic interests are eagerly analyzed from a variety of legisprudential viewpoints, statutory questions occurring in the national security area are treated as virtually sui generis by both courts and academics.

There are various possible reasons for the absence of legisprudential influence and writings in this area. First, national security is an area far removed from the core interest of most legisprudence scholars. Much of the work in this area has focused on public choice issues and interest group dynamics, including work by the Author. Statutory interpretation

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1. See William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 240 (1988) (defining legisprudence as “the systematic analysis of statutes within the framework of jurisprudential philosophies about the role and nature of law.”).

2. The area of statutory interpretation, however, can be traced back as far as the sixteenth century in Heydon’s Case. See Heydon’s Case, 76 Eng. Rep. 637 (K.B. 1584); see also William S. Blatt, The History of Statutory Interpretation: A Study in Form and Substance, 6 Cardozo L. Rev. 799 (1985).

3. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 1 (1994) (describing statutory interpretation as “the Cinderella of legal scholarship.”).

4. The number of academics in this field are now too numerous to mention. The scholarship of legisprudence, however, now includes a wide array of provocative views of statutory interpretation and the role of the courts in a tripartite system. Bill Eskridge and Philip Frickey have produced a leading textbook on the various theories, including their own substantial contributions to this field. See Eskridge & Frickey, supra note 1.

5. Legisprudence has benefited from a troika of jurists who have shaped parts of this debate. Associate Justice Antonin Scalia has become a virtual personification of new textualism and, more than any other Supreme Court Justice, has made statutory interpretation a focus of his writings. Judge Richard Posner has written the most on this subject and can rightfully claim to be one of the founding fathers of the public choice schools and legisprudential theory. See, e.g., Richard A. Posner, Statutory Interpretation - in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800 (1983). Finally, Judge Frank Easterbrook has helped shape this debate with his views of dealism and contractual models of legislation. See, e.g., Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol’y 61 (1994) [hereinafter Easterbrook, Text History and Structure]; Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol’y 59 (1988); Frank H. Easterbrook, The Supreme Court, 1983 Term: Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4 (1984). Regardless of one’s political or legal views, the academy owes these three jurists a great debt for the enrichment of judicial opinions with coherent theoretical views of statutory interpretation and its role in democratic governance.

Theories often emphasize models and market elements of the legislative process that are less relevant to national security legislation. National security is an area largely motivated by conduct removed from classic “rent-seeking” and market motivations. While there are concentrated interests in this area among the agencies and contractors, national security legislation is not the subject of the same type of interest-seeking behavior. Second, national security is an area combed by powerful winds of constitutional law that add a different dimension to statutory interpretation. Given the degree of deference afforded to the Executive Branch in this area, “national security” claims are treated as fundamentally different from other areas of statutory interpretation by the courts. National security has been a “jurispathic” element in litigation that kills debates that would rage in other areas. Statutory interpretation cases in this narrow area are commonly shaped by values outside the statute, particularly notions of presidential power and executive privilege that militate heavily in favor of summary judgments. Finally, national security has never been viewed as a particularly good vehicle to discuss pluralistic issues that drive much legisprudential scholarship. While civil rights statutes or environmental statutes raise questions of insular or marginalized minorities, national security laws are based, in principle, on a collective, nonfactional interest.

The isolation of national security cases from traditional statutory interpretation critiques is evident in judicial decisions. Although most courts are acutely sensitive to the danger of judicial activism and the restraining principles of judicial interpretation, they appear less influenced by such concerns in national security rulings. Accordingly, national security rul-

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9. Such areas are not entirely divorced from national security rulings. National security operations in areas like Puerto Rico can have a disproportionate effect on minority populations. Certainly in the case of Area 51, the most at-risk population outside the facility were low-income individuals living in towns like Rachel, Nevada. In articles on legisprudence or public choice theories, the relative role of the legislative and judicial branches in dealing with social issues, particularly the protection of insular minority interests, remains a continuing debate. See, e.g., William N. Eskridge, Jr. & Gary Peller, The New Public Law Movement Moderation as a Postmodern Cultural Form, 89 Mich. L. Rev. 707, 732 (1991) (discussing the need for judicial action in areas like desegregation in the context of the new legal process school); William N. Eskridge, Jr. & Philip P. Frickey, Statutory and Constitutional Interpretation: Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. Pitt. L. Rev. 691, 720 (1987) (discussing views on the protection of insular groups through judicial review versus political process); Dorothy A. Brown, The Invisibility Factor: The Limits of Public Choice and Public Institutions, 74 Wash. U. L.Q. 179, 211 (1996) (criticizing public choice literature as failing to consider the relative inability of some minority groups to influence or capture the legislature).
nings tend to reflect much greater bias, overt use of outcome-determinative methodologies, and a general lack of theoretical consistency in comparison to other areas. Judges who are strict textualists in every other area will adopt approaches that are atextual and outcome-determinative in national security cases. These cases reveal an intriguing interplay between statutory interpretation and common law. In the national security area, common law principles are applied routinely in areas subject to multiple statutory sources. Thus, while some scholars have called for a reinforcement of common law authority in the age of statutes,\textsuperscript{10} national security cases constitute an island of continued common law jurisprudence in a sea of statutory authority. These cases, however, raise a largely unexplored question of the relative costs of preserving common law principles rather than forcing disputes, where possible, into a statutory framework. While this question raises many issues beyond the scope of this Article, the Article will suggest some of the inherent difficulties and dangers in the application of common law privileges to the national security area. This Article will also explore how the common law can defeat the full range of interpretivist theories by moving a dispute outside the context of a legislative scheme. My interest in this modest endeavor is not to debate the relative value of textualist, intentionalist, or purposivist theories but to show how any dialogue within the tripartite system can be severely curtailed by some common law elements.

The recent Area 51 litigation offers an especially compelling example of the legisprudential issues raised by national security cases. The Area 51 litigation was in part an attempt to advocate a view of statutory interpretation in the national security area that was consistent with other fields regulated by "command and control" statutes.\textsuperscript{11} The final decisions in the litigation highlighted the distortive effect of national security and common law privileges on statutory interpretation. The Area 51 litigation was composed of two largely identical and consolidated cases. Divided between the Environmental Protection Agency (EPA) in one case and the military in the other case, the two filings raised the same regulatory functions and disclosures. The same common law privilege was applied in both cases. Yet, the district court reached diametrically different results. In the first case against the EPA, the district court adopted a traditional textualist approach to the case and balanced the environmental and the national security interests. In the second case against the military, however, the court adopted a markedly different approach. Viewing the case as a national security case, as opposed to an environmental case, the court considered the merits of the case outside the structure of the statute and based its decision in favor of the military entirely on a com-

\textsuperscript{10} See infra notes 78-82 and accompanying text.

\textsuperscript{11} While there is always some bias in writing on a case in which one participated, Area 51 was selected in part as a pro bono effort by the Author because of its statutory interpretation issues. Since the workers prevailed in one case and secured reversals and remands in the other case, there are numerous points in this litigation on which the Author agreed with both the district court and the court of appeals.
mon law privilege. Eschewing any balancing of different public values in the statute, the court’s analysis recognized only a single public value as embodied in the common law in favor of national security interests. This Article is an effort to explain the sharp contrasts in these cases, albeit with the full disclosure that the Author comes to the question as both an academic and an advocate.\textsuperscript{12}

In this litigation, environmental laws and national security claims came into conflict at a “black facility,” or a federal facility whose very existence was denied by the government. On the most basic level, the court was confronted with a simple and straightforward legal issue: the conflict of a statutory source with a common law privilege. In any other area, the general rule is that an unambiguous statutory source will supersede any common law privilege. In the national security area, however, common law principles are often imposed directly or indirectly to achieve a result that is normally anathema: the circumvention of the intent of Congress by an Article III court. While such interpretative results would generally bring cries of judicial activism, the national security area is routinely treated as unique by our most conservative and textualist judges. Often couched loosely in constitutional terms, the effective presumption in favor of national security claims seems irrebuttable in some cases. Federal courts appear to view national security as a value that justifies heavy judicial preference and manipulation in case analysis. Behind a facial neutrality of a common law privilege is a bias that is only tolerated because it is a majority bias. This is not to say that national security does not warrant judicial deference on many levels. However, when a federal court is presented with a clear statutory mandate, the use of common law doctrine to circumvent or blunt the effect of the law is a political judgment, albeit a popular one. This bias remains strong despite the fact that the claimed threats to national security are vague, implausible, or presented in such an extreme manner that no statutory program could withstand the common law attack.

The Area 51 litigation offers an insight into how courts actually operate in an area of statutory interpretation and why they adopt particular interpretative approaches. While many of us have been enthralled with various theories and rationales for statutory interpretation, this case study shows how removed we are from the realities of the conventional judicial officer. Area 51 represented a facially outcome-determinative interpretation. Unable to deny the clarity of the federal law, the court instead chose to apply a common law doctrine in contradiction to an express statutory provision. More than any other contemporary case, Area 51 illustrates why national security has remained virtually untouched by the legisprudence movement and the restrictive views of the courts in their role as interpreters of federal law.

\textsuperscript{12} See supra note 11.
This Article will approach these issues in four parts. In Part II, the Article will first look at the Area 51 litigation itself. For those interested in the underlying arguments and rulings, this section will show how the conflict between the common law and statutory authority arose in the two cases. In Part III, the Article will turn to the methodology of the court in its two opinions. Specifically, the Article will show how the court struggled to move part of the litigation out of the context of the command and control statute and to adopt a jurispathic approach to the dispute through the common law. The gravitational effect of the common law in this area will be explored on three different levels of the court’s analysis: the question of preemption, the question of the scope of the common law privilege, and, finally, the adoption of a controversial “mosaic” theory of classification. In Part IV, the Article will explore the relative costs of resolving such disputes through a common law privilege as opposed to a statutory framework. The application of common law in cases like Area 51 effectively removes these disputes from both the context of a statutory framework and the legislative process. By superimposing common law principles on a command and control statute, courts significantly raise the costs for the legislative process in dealing with national security issues. The result is an area largely shaped by judicial choices that can be highly political and dangerously countermajoritarian.

II. AREA 51: A CASE STUDY OF THE GRAVITATIONAL EFFECT OF THE COMMON LAW ON STATUTORY INTERPRETATION IN THE NATIONAL SECURITY AREA

The Area 51 litigation proved to be a fascinating microcosm of the issues surrounding judicial interpretation in national security cases. The aspect of the case that is most relevant to this article is the relationship between the court’s statutory interpretation and its conflicting application of federal common law in the use of the state secrets privilege. While legisprudence articles often deal with appellate decisions or broad patterns, the Area 51 litigation offers a detailed account of a court’s struggle with traditional statutory interpretive principles and overwhelming common law bias in favor national security interests. How this process distorted the court’s treatment of public values in both statutory law and common law is only evident with an understanding of the underlying facts and allegations in the litigation.

A. FACTUAL BACKGROUND

The record in this case is voluminous and would be impossible to present in any meaningful form in a single article. Composed of two cases, the litigation ultimately produced six appeals, a successful emergency stay to protect the workers from retaliation, and reversals of the lower court.13

13. The opinion of the United States Court of Appeals for the Ninth Circuit affirming, reversing, and remanding in part the decisions of the district court is reported in Kasza v.
The litigation is continuing at the time of this publication.\textsuperscript{14}

The locus of this litigation is a once secret facility commonly referred to as "Area 51." The facility is located approximately ninety miles northwest of Las Vegas next to a large dry lake, Groom Lake.\textsuperscript{15} The workers filed two citizen suit actions as current or former workers at the facility who may have been exposed to extremely harmful levels of hazardous wastes. In addition to refusing to acknowledge the existence of this facility, the government also threatened that any worker who spoke to counsel regarding his or her employment at the facility would be subject to arrest. Despite these threats, workers did come forward and retained the Environmental Crimes Project of George Washington University\textsuperscript{16} to represent them in an effort to address the violations committed at the facility for decades. Given the threats of prosecution, the workers sought leave to file the action anonymously.

On September 9, 1994, the court granted the motion and placed the

\begin{footnotesize}
\textsuperscript{14} Much of the material in this litigation remains under court seal despite a Court of Appeals decision reversing and remanding on the sealing decisions of Judge Pro. The record to the case is quite voluminous, and, rather than cite endless briefs, this background material is taken from documents in the Author's office. These Area 51 documents are being organized into a set of material that will be made available to the public after the end of the litigation.

\textsuperscript{15} Containing a long runway, aircraft, vehicles, a large number of hangers, and fuel storage tanks, the "Area 51" facility can be seen from public lands and in a variety of photographs, including satellite photographs of the facility that are publicly available. For several months during litigation, the government refused to admit the existence of the base to either plaintiffs or, under direct questioning, the court. In late November, 1994, however, the government formally admitted that the facility existed and stated that it should be referred to as "the operating location near Groom Lake." \textit{Frost I}, 161 F.R.D. at 435. The government represented to the court that it had no prior knowledge of the use of the name "Area 51." In response, the plaintiffs then introduced sworn statements of former workers at "Area 51;" security badges containing to this designation; and government manuals (released annually) using the designation. The government, however, represented to the court that it could not find any person in the government who knew the meaning of these references.

\textsuperscript{16} The Environmental Crimes Project is one of three projects composing the Environmental Law Advocacy Center, which the Author directs. The initiation of the litigation in the Environmental Crimes Project reflects the underlying allegation of knowing that environmental crimes were committed at the facility. The Area 51 litigation was ultimately taken over by the Shapiro Environmental Law Clinic within the Center at George Washington University.
\end{footnotesize}
identities of the workers under court protection. The workers then proceeded to file a complaint under RCRA with affidavits submitted under seal, alleging that government officials and contractors were engaging in extremely harmful hazardous waste operations under the cloak of secrecy at Area 51. In the first suit against a "black facility," the workers signed sworn statements that the military was burning large quantities of hazardous wastes in trenches the size of football fields. According to the workers, these trenches were regularly filled with 55-gallon drums, covered with combustible material, doused with jet fuel and set ablaze. It is a crime to burn hazardous wastes in an open pit or trench. It is also a crime to dispose of, store, or transport hazardous wastes without a permit under RCRA. This criminal conduct also included the shipment of hazardous wastes by contractors from California to illegally burn or buy at Area 51 without permits or other basic RCRA conditions. Workers were prepared to testify under oath that federal officials openly acknowledged the criminal acts committed at the facility and the use of national security laws to prevent their detection.

In the two cases, plaintiffs alleged that workers at Area 51 became sick from exposure to the hazardous fumes and several developed a rare and painful skin disorder that resembles a fish-like scale which continually cracks and bleeds. One of the workers at the facility, Mr. Robert Frost, died before this case was filed. A supervisor at the facility, Mr. Frost's injuries were later the subject of a public administrative hearing and correspondence that became part of the record in this case. Mr. Frost's tissues were tested and found to contain elevated levels of hazardous substances consistent with exposure to the burning of hazardous wastes.

17. Despite these orders, the government attempted during the appeal of the cases to learn the identities of the litigants with the approval of the district court. This led to a rare emergency appeal and emergency stay of Judge Pro's order by the Ninth Circuit, which found that the workers satisfied the high standard of proof in showing a threat by the government from these interviews. The government dropped its attempt after the emergency stay order.


19. Because the workers' identities were sealed to protect them from government retaliation, they never appeared in court or spoke openly on the case. However, workers were made available to CBS' "60 Minutes" with concealed voices and images to give an account of the burning operations at Area 51. See 60 Minutes: Area 51: Catch 22; Workers at Nonexistent Air Force Base Sue Government to Release Hazardous Waste Information (CBS television broadcast, Mar. 17, 1996) [hereinafter Area 51: Catch 22].

20. After his death, tissue and fat samples were removed and tested at Rutgers University by Dr. Peter Kahn, who also worked on the Agent Orange study. Kahn found traces of a great variety of chemicals consistent with the accounts of the hazardous wastes burned at the facility including dioxins and dibenzofluorenes. See ABC World News Tonight: Groom Lake Employees Health Complaints (ABC television broadcast, Aug. 1, 1994). Some of these chemicals had never been encountered in testing before the Frost case. Mr. Frost's widow, Ms. Helen Frost, is one of the plaintiffs in this action. In 1995, Mr. Walter Kasza, one of the John Doe workers, died of cancer allegedly linked to his exposure to hazardous waste operations at Area 51. Mr. Kasza worked closely with Mr. Frost at Area 51. The court agreed to substitute Mr. Kasza's widow, Stella, as a party in the action.
The workers brought the two separate citizen suit actions under the Solid Waste Disposal Act, as amended by RCRA. The first action, *Kasza*, charged the Administrator of the EPA with the failure to perform nondiscretionary regulatory functions at Area 51, including her obligations to inspect the facility for hazardous waste activity, to make available to the public all reports gathered during such inspections,\(^{21}\) and to notify the Air Force of its duty to conduct a hazardous waste inventory for the facility. The workers alleged that, absent a presidential exemption under RCRA, the military had to disclose this material on an annual basis.\(^{22}\) The workers sought injunctive and declaratory relief, as well as any other relief the court deemed appropriate and just. The second action, *Frost v. Perry*, charged the Secretary of the United States Department of Defense and other executive officers with specific violations of certain RCRA provisions, including the failure to conduct hazardous waste inventories at Area 51, as required under 42 U.S.C. § 6937, and the burning of hazardous wastes in open air pits. The workers sought injunctive and declaratory relief.\(^{23}\)

\(^{21}\) Section 3007(b) of the Solid Waste Disposal Act, 42 U.S.C. § 6927(b), provides in pertinent part:

\[(1) \text{Any records, reports, or information (including records, reports, or information obtained by representatives of the Environmental Protection Agency) obtained from any person under this section shall be available to the public, except that upon a showing satisfactory to the Administrator (or the State, as the case may be) by any person that records, reports, or information, or particular part thereof, to which the Administrator (or the State, as the case may be) or any officer, employee or representative thereof has access under this section if made public, would divulge information entitled to protection under section 1905 of Title 18, such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section . . . .}\]


\(^{22}\) Section 6001(a) of the Solid Waste Disposal Act, 42 U.S.C. § 6961(a), provides in pertinent part:

\>[Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements . . . . The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so.}\]


\(^{23}\) From the outset, the Area 51 litigation generated hundreds of media stories across the country and abroad. Despite government refusals to even admit the existence of the base for the first part of the litigation, media repeatedly published photographs of the bases and its operations from nearby public lands. See, e.g., Jason Vest, *Alien Toxins*, *The Village Voice*, Nov. 16, 1999, at 45; Tony Batt, *Workers' Attorney Appeals to Supreme Court in Area 51 Case*, *Las Vegas Rev.-J.*, Aug. 4, 1998, at 3B; Debra Cassens, *National
B. RELEVANT LEGAL ARGUMENTS AND JUDICIAL RULINGS

In *Kasza*, Browner answered the workers' complaint by denying knowledge of the existence of Area 51 and invoked the military and state secrets privilege (hereinafter "state secrets privilege") as an affirmative defense. Because this claim of privilege was improperly raised and supported, plaintiffs moved to strike this claim. Browner subsequently agreed that the privilege was improperly raised and withdrew the claim of privilege from its answer. The workers commenced discovery and requested a variety of EPA regulatory documents and written responses to requests for admissions and interrogatories. In response, Browner provided some information pertaining to Area 51, including the fact that the EPA had never inspected Area 51, as required under 42 U.S.C. § 6927,\(^{24}\) and that the federal agencies operating that same facility had never conducted a hazardous waste inventory, as they were required under 42 U.S.C. § 6937. Browner, however, refused to respond to a majority of the workers' discovery requests under a renewed assertion of the state secrets privilege.\(^{25}\) To support this second assertion of the state secrets privilege over EPA regulatory documents and related written inquiries, Browner relied upon an affidavit of the Secretary of the United States Department of the Air Force, Sheila Widnall. The workers filed a series of motions to compel Browner to respond to discovery requests in complete, redacted or summarized form.

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24. Section 3007(c) of the Solid Waste Disposal Act, 42 U.S.C. § 6927(c), provides in pertinent part:

> The Administrator shall undertake on an annual basis a thorough inspection of each facility for the treatment, storage, or disposal of hazardous waste which is owned or operated by a department, agency, or instrumentality of the United States to enforce its compliance with this subchapter and the regulations promulgated thereunder . . . . The records of such inspections shall be available to the public as provided in subsection (b) of this section.

25. Information Browner withheld from plaintiffs under a claim of privilege included the admission or denial of the statement that "paint wastes," "pesticide wastes," or "hazardous wastes" of any type had ever been generated, stored, or disposed of at Area 51.
In *Frost*, the Air Force answered the workers' complaint by refusing to admit or deny the existence of the facility and also by asserting the state secrets privilege as an affirmative defense.\(^{26}\) After the workers moved to strike the Air Force's first assertion of the state secrets privilege, defendants withdrew the national security defense with an admission that the assertion was unsupported and premature. After months of litigation, in November 1994, the Air Force admitted the existence of the facility and discovery commenced. In February 1995, Secretary Widnall then supplied a declaration in support of a renewed claim of state secrets privilege. The public Widnall declaration identified ten categories of information that the Secretary sought to withhold from the plaintiffs and the public.\(^{27}\) In response to the Widnall declaration, the workers requested various items of information through discovery that were not encompassed within any of the ten categories identified. The Government, however, refused to respond to most of the workers' discovery requests, asserting that a mosaic theory of classification barred disclosure.\(^{28}\) Under this theory, even the most innocuous unclassified fact is treated as classified to avoid contributing to a "mosaic" of information available to foreign intelligence. Thus, the United States argued that even facts printed previously on the front page of the *New York Times* or visible from public lands can be treated as classified for the purposes of the state secrets privilege to prevent the creation of a mosaic. The workers filed a series of motions to compel the government's answers to discovery, including the reasons why a claim of privilege would bar disclosure of generic information, such as the presence of "hazardous wastes" without revealing specific wastes or waste quantities. The workers also argued that the government could redact sensitive information from the requested documents or summarize information to avoid disclosure of sensitive information.

As part of the support for their arguments, the workers placed into the record a copy of a publicly available government manual, containing no classification markings, which related to Area 51.\(^ {29}\) This widely available

\(^{26}\) From the commencement of the workers' suits, all of the defendants, in both *Kasza* and *Frost*, were represented by the same Department of Justice attorneys. The workers requested that the district court disallow the same attorneys from simultaneously representing both a regulating and regulated agency in the same enforcement action. The district court denied the workers' motion, finding that the Attorney General alone possesses the authority to determine whether a conflict of interests exists between federal agencies and that the federal judiciary did not even have authority to conduct an inquiry into the matter.\(^ {27}\) See *Frost* v. Perry, 161 F.R.D. 434, 436-37 (D. Nev. 1995) (hereinafter *Frost I*). The ten categories of information claimed as privileged are (a) program names; (b) the mission of the facility; (c) capabilities; (d) military plans; (e) intelligence sources; (f) scientific or technological matters; (g) certain physical characteristics; (h) budget, finance, and contracting relationships; (i) personnel matters; and (j) security sensitive environmental data. See *id.* at 437.

\(^{28}\) Under a claim of privilege defendants refused to admit or deny the existence of specific items that would constitute "hazardous waste" including jet fuel, a car battery, and used equipment lubrication oil at this facility.

\(^ {29}\) See generally Wittes, *Groom Lake*, supra note 23, at 12.
manual contained much of the information that defendants claimed as privileged. Upon receipt of this manual, defendants classified the manual and requested both the district court and plaintiffs to relinquish their copies of the manual as well as the motion, supporting memorandum of law, and a significant number of files in opposing counsel's office. The court held a sealed hearing on the matter. During the hearing, the Justice Department renewed its request and also requested that the court order the surrender of the files in counsel's office. The district court imposed various restrictions on the parties for the remainder of the case, including orders that filings be sealed and that counsel restrict access to the area until the matter of the manual was resolved. The court eventually determined that it did not have the jurisdiction to order plaintiffs to turn over the manual, their motion and related materials. However, the court retained the seal over the contents of the Author's office, access to which remains restricted to anyone but counsel.

On May 19, 1995, the EPA moved for summary judgment, asserting that it had fulfilled its obligations under 42 U.S.C. § 6927(c) by inspecting Area 51 and that it had received a hazardous waste inventory, conducted pursuant to 42 U.S.C. § 6937, from the Air Force relating to Area 51. Accordingly, the EPA argued that the workers' claims for relief were now moot. The EPA did not provide the plaintiffs or the public with copies of

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30. This order included the government's demand that counsel contact any reporter who may have obtained public copies of the filing. Since there was no record, this required that a warning be sent to hundreds of media organizations notifying them that material they may have received was subsequently classified. The government asked them to return the copies of the manual. No one complied. Some, however, proceeded to state that the manual was on the Internet at various sites. See id.

31. Rather than deal with the order directly, the Court of Appeals adopted a remarkably misleading semantic device. The Court of Appeals suggested in a footnote that there are no significant restrictions in place over counsel's "office." See Kasza II, 133 F.3d at 1170 n.9. It is certainly true that the court order imposed a seal on the contents of the office, which is an order still in effect. At the insistence of the government, the office was secured under federal guidelines governing classified information, including restrictions to access. There is no disagreement that the district court placed all of the material claimed as classified under a court seal and issued two orders regarding the allegedly classified documents. This was one of the "sealing" orders that was remanded on appeal.

32. In response to the workers' motions to compel, and related motions to redact or summarize privileged information, defendants in both cases supplied the district court with an in camera, ex parte document from General Thomas Moorman. See Frost II, 919 F. Supp. at 1465. The Moorman declaration argued in support of extending the Widnall declaration to bar the majority of the workers' discovery requests. General Moorman further argued that redaction or summarization was implausible. In both cases, the district court upheld the workers' claims of privilege and denied the workers' requests for redaction or summarization.

33. Section 3016 of the Solid Waste Disposal Act provides in pertinent part:

Each Federal agency shall undertake a continuing program to compile, publish, and submit to the Administrator (and to the State in the case of sites in States having an authorized hazardous waste program) an inventory of each site which the Federal agency owns or operates or has owned or operated at which hazardous waste is stored, treated, or disposed of or has been disposed of at any time. The inventory shall be submitted every two years beginning January 31, 1986. Such inventory shall be available to the public as provided in section 6927(b) of this title.

the inspection and inventory reports as required by 42 U.S.C. § 6927(b),
claiming that the entirety of these reports was covered by the state secrets
privilege. On June 16, 1995, the Air Force, and related entities, also
moved for summary judgment. The Air Force did not, however, argue
mootness. Instead, the Air Force argued that the state secrets privilege
previously invoked by Secretary Widnall prevented the workers from
making a *prima facie* showing that it had violated any RCRA provision
with regard to Area 51.34

The district court reviewed the hazardous waste inspection and inven-
tory reports *ex parte* and *in camera*. Finding these documents to be satis-
factory, the court entered partial summary judgment in *Kasza* with regard
to the workers’ inspection and inventory claims, finding them to be satis-
fied.35 Notably, the court chose to rule that these statutory claims were
satisfied (and therefore moot) as opposed to barred under the common
law. The court denied Browner summary judgment on the workers’ pub-
lic disclosure claim and ordered the government either to obtain a presi-
dential exemption or to disclose the inventory and inspection reports as
required under 42 U.S.C. § 6927(b).36 The court continued to withhold
these documents, as well as any redacted or summarized version, from
the workers finding that they were protected from disclosure under Air
Force Secretary Widnall’s claim of state secrets privilege.37 On Septem-
ber 29, 1995, President Clinton issued a presidential determination that
exempted from public disclosure any information relating to Area 51
classified by the Air Force.38 Thereafter, the district court entered a de-
claratory judgment in favor of the workers with regard to their claim that
Browner had violated the public disclosure requirements of 42 U.S.C.
§ 6927.39 Subsequently, the district court found the workers to be the
substantially prevailing parties with regard to their inspection claims, but
not their public disclosure claim, for purposes of attorney fees.40

36. *See id.* at 1252.
37. The court initially attributed the invocation of the privilege to Browner. The court
noted that past cases require the invoking agency head to review the documents withheld
under the privilege. Here, Browner was invoking in a case separate from the Air Force
case to withhold EPA documents. Yet, the workers demonstrated that Browner had never
invoked a claim of privilege over EPA regulatory documents. After accepting this error,
however, the court simply modified its order to reflect that Secretary Widnall had made a
claim of privilege. Widnall, however, could not have reviewed the EPA documents and the
Air Force was not a party in the EPA case.
38. *See Kasza II*, 133 F.3d at 1164. Due to the litigation, President Clinton has continued
to issue his annual exemption in compliance with the Act. Christine Dorsey, *Clinton
Reaffirms Area 51 Must Remain Classified Information*, LAS VEGAS REV. J., Feb. 2, 2000,
at 4B.
39. *See id.*
40. In *Kasza*, the Ninth Circuit affirmed the district court’s summary judgment decision
while reversing and remanding issues on attorneys fees and sealing orders. Kasza v.
Browner, 133 F.3d 1159 (9th Cir. 1998). The Ninth Circuit rejected the workers’ conten-
tion that the district court erred by (1) basing its summary judgment on information it also
found to be privileged, (2) finding the workers’ claims for declaratory and injunctive relief
to be moot, (3) rejecting the workers’ argument that Browner, not Widnall, was the appro-
The plaintiffs successfully appealed the district court’s decision in *Kasza* on a variety of issues, including its decision not to declare the workers as prevailing parties on all issues. On February 24, 2000, the district court issued its decision on remand, granting the workers’ requested relief on some sealed material and reversing its prior decision in favor of the government on the public disclosure claims in the case. The court held that its earlier finding that *Kasza* was not a substantially prevailing party with regard to her public disclosure claims was wrong and should be corrected. Clearly, *Kasza’s* lawsuit was the catalyst for requiring the EPA to comply with RCRA by either publicly releasing the information contained in the inspection and inventory reports or by obtaining a Presidential Exemption under RCRA § 6001(a).

In *Frost I*, the district court granted the military’s motion for summary judgment finding the entire subject matter of the RCRA citizen suit to be a state secret. In the *Frost I* decision, the court resolved the entire case within the context of the common law privilege. Unlike *Kasza*, the court did not balance the interests of national security and the express interests of the RCRA in resolving the dispute. Rather, the court simply found the privilege properly raised and the entire subject matter of the citizen suit action to be a classified matter. After the workers secured a reversal and remand of *Frost* requiring further findings on the trial court’s refusal.
to declare the workers the prevailing parties in the case, Judge Pro again refused to declare the workers to be prevailing parties in the case due to the application of the privilege.44

C. THE GRAVITATIONAL EFFECT OF THE COMMON LAW PRIVILEGE ON THE ANALYSIS IN KASZA AND FROST

The Area 51 litigation presented a basic question of statutory interpretation that would likely have posed little difficulty for any judge outside of the national security area.45 Congress clearly enacted a statutory framework for environmental compliance at all federal facilities as well as a straightforward process for presidential waivers based on national security from such compliance. There was no gap to be filled; no ambiguity to be addressed. Rather, the central controversy related to the application of a clear environmental statute to a national security site.

The Area 51 cases are hardly unique in the use of common law preference for national security interests. What is unique is the fact that the court had two cases that were indistinguishable, except for the defendants. In Kasza, the court viewed the case as a simple issue of statutory interpretation and adopted a textualist approach. As part of this approach, the court recognized the competing public values balanced in the statute between environmental law and national security interests. Pro specifically rejected the overbroad claims of the Administration that national security trumped the environmental statute.46 In Kasza, the court allowed the Administration to correct its violations of federal law with the issuance of a proper presidential exemption.47 Without withdrawing their argument that the President’s constitutional authority as Commander in Chief trumped any environmental statutes, the United States complied on September 29, 1995, and issued the first presidential exemption for a black facility.48

44. Frost v. Cohen, CV-S-94-714-PMP (D. Nev. Feb. 24, 2000) (order of Judge Philip Pro). The district court did not offer any new explanation for the different treatment of the cases beyond one line suggesting that “to the extent Frost’s claims coincided with those in Kasza under RCRA, Frost’s action cannot, as a practical matter, be viewed as having brought about the results which were substantially achieved . . . in the Kasza case.” Id. This decision, which was released shortly before the publication of this article, will be appealed.


46. See Doe I, 902 F. Supp. at 1251 (“The Court . . . finds the apparent tension [between national security laws and the RCRA] cited by the Administrator to be illusory.”).

47. Pro then effectively applied this exemption to prior years by refusing to order production of material never exempted during prior annual periods. The workers immediately opposed this ruling since Congress mandated an annual period for exemption and the law contained no provision for retroapplication of a belated exemption.

48. On September 29, 1995, President Clinton issued a presidential determination that purported to exempt from public disclosure any classified information related to the Groom Lake facility. The Presidential exemption provided:

I find that it is in the paramount interest of the United States to exempt the United States’s Air Force’s operating location near Groom Lake, Nevada
It was the *Frost* ruling, however, that showed the greatest gravitational pull of national security values. Rather than ruling, as in *Kasza*, that the military failed to comply with federal law or balancing the interests of the environmental and national security, Pro ruled that the entire matter was a state secret. Under the national security paradigm, there are not competing public values but only one value: national security. The difference between the two rulings could not be more evident than in the first two counts. In granting summary judgment, the court specifically stated that “[the workers] cannot provide the essential evidence to establish [their] *prima facie* case for any of [their] eleven claims due to the Defendants’ assertion of the military and state secrets privilege.”

In the *Kasza* and *Frost* actions, however, the first claims were virtually identical. In *Kasza*, the court ruled on the first claim and found the workers to be the prevailing party in forcing an inspection and inventory of the facility. In *Frost*, however, the court ruled that it could not reach this issue since any consideration would be barred under the privilege.

In the *Frost* Complaint, the workers first alleged that the government never complied, published, or submitted to the EPA an inventory of Groom Lake base, including a list of the hazardous waste that has been stored, treated, or disposed of at Groom Lake base. The first claim in the *Frost* complaint contained the same language as the first claim of the *Kasza* Complaint, which referred to the Administrator’s failure in requiring the same act at the same facility. The first claim in the *Kasza* alleged that the U.S. Air Force has never complied, published, or submitted to the U.S. EPA an inventory including Groom Lake base or a list of the hazardous waste that is stored, treated, or disposed of or that has been disposed of at Groom Lake base.

In its summary judgment decision on the *Kasza* Complaint, the court openly discussed the fact that a § 6927 inspection and a § 6937 inventory were completed due to the workers’ citizen suit action. Moreover, the government openly discussed the completion of the inventory at the facility and the future arrangements for inspections and inventories in public filings. The fact that an inventory had been completed was hardly a secret since the government used the fact of its completion to establish the case for summary judgment. Thus, these two cases began with the same

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50. See *Doe I*, 902 F. Supp. at 1249-50 ("Simply put, Plaintiffs’ objectives in bringing this citizen suit have been accomplished: the Administrator has performed her nondiscretionary duties under RCRA with regard to the inspection and inventorying of the operating location near Groom Lake."); *Id.* at 1250; see also *Kasza I*, 932 F. Supp. at 257-58.
general claim dealing with the same inventory performed at the same facility by the same the government. Moreover, the state secrets privilege was invoked in both cases by the Secretary of the Air Force as to many of the same documents, including the critical inventory reports. In one case, the court reached the inventory claim, declared the workers to be the prevailing party and dismissed the inventory claim as moot, due to the completion of the inventory. In the other case, the court ruled that the issue was not moot, but rather untriable, due to the state secrets privilege. This obvious contradiction shows not only the powerful effect of framing a case in common law terms, but the arbitrary use of the privilege to produce outcome-determinative results.

Putting aside the obvious disconnect between the national security rulings in the two cases, the state secrets privilege in *Frost* proved the most interesting element of the litigation. This litigation presented the first time that the state secrets privilege, a common law creation, has come into conflict with the federal hazardous waste provisions of RCRA. The tension between the state secrets privilege and RCRA produced a host of issues of first impression, including the circumstances under which the entire subject matter of a case (and even the operative regulatory term of a statute) can be declared a state secret.

As will be shown below, however, these issues were resolved outside of traditional rules of statutory interpretation.

III. THE INTERPLAY OF STATUTORY INTERPRETATION AND THE COMMON LAW IN THE AREA 51 LITIGATION

The court's decisions in *Kasza* and *Frost* contained one common methodological element. The court viewed any determination made under common law evidentiary rules to be largely unaffected by the context of the litigation, even if the common law rule would defeat a command and control statute. Accordingly, the court ruled that the common law privilege was not preempted by RCRA and applied an absolute mosaic theory without any consideration of contradictions with the statutory program.

The two cases, however, took sharply different (and inexplicable routes)

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51. At the very least, the court should have ruled as to the first claim and declared the matter moot and the workers as prevailing party due to an inventory having been completed. Clearly, the court cannot state, as a legal matter, that it cannot reach this question after doing so only months before in a related case. While the Ninth Circuit did not reverse Pro on this obvious error, it did reverse and remand, for Pro to reconsider, whether the workers should be declared the prevailing party in *Frost* as they had in *Kasza*. See *Kasza II*, 133 F.3d 1159.

52. One of the most ominous aspects of this case concerns the military's use of the privilege to withhold evidence of any criminal conduct committed at the facility in the context of the hazardous waste violations. The workers sought information from defendants that could only constitute criminal acts if committed. Respondents countered by stating that, if criminal conduct did occur at the facility, the Executive Branch could legitimately claim executive privilege as to evidence of its own criminal acts. The district court agreed, and the court of appeals simply chose not to address this issue in upholding the use of the privilege.

in the final judgment of the court on the merits. Ultimately, the district court found the EPA in violation of the statute without the need to refer to the specific disclosures mandated under the statute. The court simply gave the President the choice of compliance or forced disclosure. Yet, in *Frost*, the court structured its final decision in terms of a national security case with little dependence on the statutory scheme. Where *Kasza* focused on the statutory language and process for exemption, *Frost* focused on the state secrets privilege and the necessities of national security. Thus, in *Frost*, the common law privilege drove the analysis as a value that was exogenous to the statute. While courts are expected to engage in statutory interpretation with some underlying concept of the role of the judiciary in the tripartite system, the *Frost* case reveals little more than outcome-determinative methods of interpretation to satisfy an overriding and univocal judicial purpose.

A. THEORIES OF STATUTORY INTERPRETATION IN THE COMPANY OF THE COMMON LAW

National security cases easily fulfill every fear of textualists in the area of statutory interpretation. The textualist school would restrict courts in their role as interpreters of federal law to avoid the danger of countermajoritarian or elitist influence by the judiciary. A textualist-based theory of interpretation promotes the democratic process in resolving such conflicts through democratic formalism that minimizes the court's role. Many judges appointed after the first Reagan Administration advocated a philosophy that was heavily textualist as part of the political backlash against "judicial activism." The period of denounced liberal interpretation was followed by a period of heavily text-bound rulings with Associate Justice Antonin Scalia, Judge Frank Easter-

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54. See *Doe I*, 902 F. Supp. at 1252.
55. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990) [hereinafter Eskridge, The New Textualism] (noting that this formalistic approach "posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened").
56. Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 539 (1997) (under this view "democratic formalism ensures that statutory and constitutional provisions will not be given 'spirits' and 'purposes' attributable to the (unenacted) political morality of any particular era.").
57. Notably, however, even Justices known for more liberal interpretation defended textualists' rulings, when essential to avoid "an aimless journey." United States v. Locke, 471 U.S. 84, 93 (1985).
THROUGH A LOOKING GLASS DARKLY

brook and other jurists at the forefront. In Green v. Bock Laundry Machine Co., Scalia described his brand of new textualism:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress, but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.

There are two goals motivating the textualist approach that are particularly relevant to the Area 51 litigation. First, textualism is seen as a way of preventing Congress from effectively delegating its authority to judges in resolving problems outside of the bicameral system. Second, textualism ideally encourages Congress to supply clear language under the assumption that courts will not go beyond the text in the application of federal laws.

The first rationale is particularly important in national se-


59. Easterbrook has expressed a distinctly non-evolutionary branch of textualism. See Easterbrook, Text, History, and Structure, supra note 5, at 69 (“Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new.”).


61. Id. at 528 (Scalia, J., concurring in the judgment); see also Robert J. Martineau, Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction, 62 GEO. WASH. L. REV. 1, 12-13 (1993) (discussing Scalia’s concurrence and new textualist views).

62. Professor John Manning elaborated:

[T]extualism, properly understood, implements a special application of the nondelegation doctrine [since] under that view, textualism serves only to keep Congress from delegating to its own agents or members the de facto authority to “say what the law is” outside the process of bicameralism and presentation—a concern that is not present with other extratextual sources of meaning.


63. Professor Manning described this view:

[Interpretative decisions based on such things as legislative history by courts contravene a crucial structural premise of the Constitution: lawmaking and law-elaboration must be distinct so that legislators will have a structural incentive not to enact vague or ambiguous laws. If Congress must rely on the
curity cases, an area where there may be less legislative interest than areas with greater relevance to voters and classic rent seekers. Likewise, the second rationale is compelling in this area because national security questions are often left ambiguous in statutory programs. RCRA is an exception where Congress did precisely what textualists ask: Congress mandated a process for the treatment of national security claims by the President within the confines of the command and control statute.

If one were to rule on the text or face of the statute, the outcome would appear clear. Congress spoke directly to areas in which the President did not wish to comply with all or parts of RCRA. In creating a national security exemption, Congress did not provide for any additional avenues or methods of withholding information. The national security exemption effectively codified the common law privilege with one critical difference: exemptions would be incorporated into several command and control systems and would have to be made on both a public and annual basis. The court followed a textualist approach in Kasza but, in dealing with military defendants on the same claim, abandoned the text and moved its decision outside the statutory framework. In Frost, the court was clearly uncomfortable with rejecting national security claims or forcing compliance by the military to fulfill a perceived lesser goal of environmental compliance. Rather than apply the clear language of the statute in Frost, the court found a method to recognize Congress' obvious intent while protecting the military from actual enforcement of Congress' provisions on federal facilities. Not only did this approach depart from textualist values, but it defeated a collateral goal of textualism: to create a predictable judicial role in interpreting statutory language, giving Congress an incentive to draft language with care and precision.

The Frost case offers an interesting variation of the problem described by textualists like Easterbrook, that judicial discretion in statutory inter-

executive and judiciary, rather than its own agents, to resolve statutory ambiguity, it cedes policymaking discretion to the other branches when it enacts such laws. In the absence of meaningful, direct judicial enforcement of the nondelegation doctrine, that structural constraint acts as an important deterrent against the legislature's filling in the details of statutes without adhering to the constitutionally prescribed process of bicameralism and presentment.

Id. 65. There is little legislative history on the exemption in RCRA. But see H.R. REP. No. 94-1491, at 67 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6305 ("[The Presidential exemption provision] authorizes the President . . . to grant an exemption to any facility or activity of the federal government . . . if the President . . . determines that the national security interests of the United States demands such exemption be made."). Of course, reviewing the Area 51 interpretation from a textualist approach is a task made easier by the general dislike for legislative history by such textualists as Scalia. See generally William N. Eskridge, Jr., Legislative History Values, 66 CHI.-KENT L. REV. 365, 372 (1990); Breyer, supra note 58, at 862-63; Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295, 1307 n.50 (1990).

66. See FARBER & FRICKEY, supra note 7, at 523-24 ("Knowing that courts will follow only their plain language, legislators will have an incentive to draft carefully and precisely. Thus, by adopting formalism, courts help foster the democratic process. If Congress dislikes the results, it is always free to legislate again.").
pretation leaves "judges free to bend law to 'intents' that are invented more than they are discovered" and thereby make the judges "the real authors of the rule." Here, the district court correctly read the meaning of Congress' intent to impose the national security exemption. After accepting this textual meaning of the law, however, the court then refused to acknowledge the obvious displacement of a common law rule designed for the same purpose. This rather convoluted effort would have failed any honest textualist test. In United States v. Missouri Pacific Railroad Co., the Supreme Court stressed that "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." In this litigation, no absurd consequences resulted from the preemption of a common law rule that covers the same question as the statutory provision. The Executive Branch was required by Congress to make public all exemptions from federal law—a commendable and unburdensome task. The alternative finding of an intent to create an exemption system while permitting the circumvention of any enforcement of that system is precisely the type of absurd result that textualists fear.

The Frost decision does little better under an intentionalist or a purposivist theory. These theories tether the court's interpretative role to fulfilling the majoritarian decision of the legislature. Intentionalists view the act of statutory interpretation as not simply giving force to the textual language, but also to the intent of Congress in crafting the statute. To achieve this end, various sources eschewed by textualists are embraced by intentionalists. Such leading intentionalist scholars as Daniel Farber and

67. Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.)

68. Cf. Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 Colum. L. Rev. 749, 752 (1995) (noting that judges will occasionally use textual justifications in statutes that do not reveal a "plain meaning" or reveal a meaning "universally believed" to be the opposite); see also Daniel A. Farber, Statutory Interpretation and the Idea of Progress, 94 Mich. L. Rev. 1546, 1549 (1996); William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term - Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 77-78 (1994). The imposition of a jurispathic common law rule is sometimes facilitated by ignoring plain meaning to inject a needed ambiguity into a statute and thereby avoid implied preemption.

69. 278 U.S. 269, 278 (1929); see also 2 Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1144 (tentative ed. 1958); cf. The Right Honorable Lord Renton, The Interpretation of Statutes, 9 J. Legis. 252, 254 (1982) (pursuant to "ut res magis valeat quam pereat, it should be assumed that Parliament intended to achieve something and not to produce a nullity; therefore, if there is more than one possible interpretation, that which makes the provision effective should be followed.") (quoted in Martineau, supra note 60, at 8).

70. See K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results.").

Philip Frickey advocate the incorporation of such sources as legislative history to articulate the legislative intent behind a statute.\textsuperscript{72} Likewise, Judge Posner argues that a court must construe a statute in light of the court's judgment as to how Congress "would have wanted the statute applied to the case."\textsuperscript{73} As an originalist theory, intentionalism shares the concern of textualism that courts carry out congressional mandates. While intentionalists treat the text as the most significant, however, it is not the only source for divining that mandate. An intentionalist approach to the interpretation of RCRA would find overwhelming evidence of Congress's intent to create a public process of reporting and exemption of federal facilities. In both its legislative history and its structure, RCRA was designed as a comprehensive system of reporting with specific provisions for federal facilities. By creating a basis to exempt such facilities on national security grounds, there is little mystery as to the original intention of Congress. The dismissal of the action against the military on national security grounds directly circumvented this intent without any attention to its consequences for future enforcement of the Act.

An alternative approach to statutory interpretation is the use of the perceived statute's purpose to assist in gap-filling or resolution of ambiguities.\textsuperscript{74} This purposivist approach may actually differ from the original intent of the statute to capture the contemporary meaning of a provision in light of the intended goals of the Congress at the time of enactment. Henry Hart and Albert Sacks in many ways epitomize this approach by arguing that courts should construe statutes under the assumption that Congress intended to achieve "reasonable purposes reasonably."\textsuperscript{75} A more recent variation on this theme can be found in Jonathan Macey's work in which statutory gaps are filled with the "public-regarding purpose" of the statute.\textsuperscript{76} While Macey recognizes that public choice critiques of hidden dealing may have merit, he advocates this express purposive approach to a statute to frustrate hidden bargains that would otherwise be given effect under a dualist approach like Easterbrook's.\textsuperscript{77} Macey's approach is particularly well-suited for litigation like Area 51. The public-regarding purpose of RCRA's citizen suit provisions and disclosure/exemption provision is clear. Congress enacted the national security exemption to create a uniform system of compliance for federal facilities, including a public annual disclosure of exempted facilities by the President. The thrust of this process is a fully informed public and a fully accountable chief executive. The court's interpretation preserving

\textsuperscript{72} See Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 Va. L. Rev. 423, 424 (1988) (advocating a "flexible, pragmatic approach" that gives "legislative intent . . . an important role").

\textsuperscript{73} Posner, The Federal Courts, \textit{supra} note 71, at 287.

\textsuperscript{74} See generally William N. Eskridge, Jr., Dynamic Statutory Interpretation, 25-34 (1994).

\textsuperscript{75} Hart & Sacks, \textit{supra} note 69, at 1415.

\textsuperscript{76} See Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223 (1986).

\textsuperscript{77} See \textit{supra} note 5.
the use of the state secrets privilege (and its absolute application in this case) soundly defeats that goal. Yet, the court did not attempt to offer an alternative "purpose" to explain why Congress would first mandate annual reporting but not assume that common law rules to the contrary would give way to the federal statute. Such a result does not serve any public-regarding purpose since the Executive Branch is under no duty beyond informing the public of the decisions of its President to waive environmental protections or provisions. National security values are clearly part of the statute to the extent that they are accommodated by a provision allowing for unquestioned presidential exemption of federal facilities. This trade-off between national security and environmental values is a quintessential legislative function.

The Frost case could have presented a unique forum for any one of a variety of interpretative theories. Scholars like Macey would have the court seek the public-regarding purpose of a statute. Others like Cass Sunstein would have the court consider "how statutory interpretation will improve or impair the performance of governmental institutions." However, under the common law approach, there was no "practical reasoning" or dynamic interpretation; there was no "nautical" or "archeological" approach. Theories of interpretation under the privilege are only relevant to the limited extent of preemption. Thus, once the court adopted a common law privilege designed to operate outside of the statute and its legislative values, these theories and the evolved function of the statute became irrelevant.

The state secrets privilege is not an interpretative but a jurispathic device. Judges often begin such cases with the expectation that there are simply some cases that cannot be tried due to the dangers of national security. The common law in the national security area is viewed differently since it is linked conceptually to the survival of the political system. Since national security is viewed as threatened by any disclosures in sensitive areas, the courts maintain a certain cushion of protection for national security agencies in the application of federal laws. By treating the state secrets privilege as an "evidentiary rule," courts have effectively immu-

78. See Macey, supra note 76.
83. The privilege operates with all of the "violence" described by Robert Cover in his influential work, Nemos and Narrative:

[Courts often work] to suppress law, to choose between two or more laws, to impose upon laws a hierarchy.... Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest.

Cover, supra note 8, at 40, 60.
nized the common law rule from anything but a direct legislative assault. Since the rule theoretically goes only to the proof of a case, the basis of an action is largely irrelevant to this application. This gives the adoption of the privilege in any national security case the veneer of neutrality. A court may largely avoid the confines of statutory interpretation by moving a determinative question outside the statute. As discussed below, this was certainly the case with the Area 51 litigation.

B. PREEMPTION AND JUDICIAL CHOICE: THE USE OF COMMON LAW AS AN OUTCOME—DETERMINATIVE ELEMENT IN THE FROST CASE

The common law privilege’s affect on the statutory interpretation in the Area 51 litigation is most evident in examining two insular issues: the preemption of the privilege and the application of the privilege if not preempted in the case. Both the district court and the court of appeals agreed that the question of preemption of the common law was potentially determinative in favor of the workers since the statute was clear as to requirements for federal facilities. If the common law was preempted, the statute’s provisions would govern entirely. However, if the common law was not preempted, the court could apply its requirements outside of the statutory framework and determine if the action could be sustained once the needs of the privilege are met. Accordingly, the decision to preserve the privilege and to apply it in an absolute form in Frost warrants closer attention. A preemption question at its most fundamental level presents a court with the choice between resolving a dispute within or without a statutory framework. Both the trial and appellate courts correctly noted that the only question related to the preemption of the state secrets doctrine was the clarity of the statute.

Outside the national security area, the preemption issue presented in the Area 51 case would be a simple matter for most courts when interpreting the statute. The state secrets privilege is a federal common law evidentiary privilege. All federal common law is subject to “the paramount authority of Congress.” Courts resort to federal common law only in the absence of an applicable Act of Congress. The standard that applies to the preemption of federal common law is much lower than the standard that applies to the preemption of state law. Unlike the deter-

84. See In re United States, 872 F.2d 472, 474 (D.C. Cir. 1989); Frost I, 161 F.R.D. at 437.
87. See id. at 366-67. The displacement of state law raises a host of federal questions that are simply not present in a case of federal common law. Paul Lund explains: When a federal court acts unilaterally to “displace” governing state law, ... it runs headlong into substantial federalism and separation of powers objections ... [while] [t]hese same concerns ... do not arise when federal law governs by congressional direction that calls upon the federal courts to fill in the contours of federal law in accordance with congressionally adopted policy.
mination of whether federal law preempts state law, which requires a clear and manifest congressional purpose to preempt state law, "the relevant inquiry is whether the statute 'speaks directly to the question' otherwise answered by federal common law."88

The application of the privilege to a command and control statute is problematic only to the extent that the command and control statute incorporates a process that overlaps with the common law privilege.89 Obviously, if a statute does not speak to such disclosure as part of its overall regulatory scheme, the privilege is certainly a relevant and worthy matter for judicial construction. Unlike laws like FOIA, however, command and control statutes tend to be comprehensive in mandating both citizen suits and the public disclosure of information.90 Both citizen enforcement and the public disclosure of information are viewed as core, not collateral, purposes of such laws as RCRA.

In enacting RCRA, Congress codified an absolute privilege, or exemption, for the President and spoke directly to the question of national security claims over RCRA regulatory material.91 Faced with the likelihood that sensitive facilities would be regulated under the Act, Congress codified the use of both a Presidential declaration and an absolute privilege under the Federal Facilities Provision.92 Congress specifically enacted the Federal Facility Compliance Act93 to compel government agencies to comply with the same laws imposed on private companies. The national security exemption allowed the President to avoid any responsibilities for annual periods with an express statement under the federal law. Faced with the likelihood that sensitive facilities would be regulated under the Act, Congress codified the use of both a Presidential exemption and an absolute privilege under the Federal Facilities Provi-

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89. Under the maxim of expressio unius est exclusio alterius, a court normally will draw inference from the language and structure of the statute, such that "where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23, at 216 (5th ed. 1992).
90. In City of Milwaukee v. Illinois, 451 U.S. 304, 326 (1981), the Supreme Court noted the ability of courts to ignore the obvious breadth of a command and control statute to "in effect . . . write their own ticket" under the guise of federal common law.
91. See United States v. Colorado, 990 F.2d 1565, 1576 (10th Cir. 1993) (noting that the President had not granted an exemption to the Rocky Mountain Arsenal and concluding that the military facility was fully subject to all RCRA provisions). Past efforts to read similar exemptions into RCRA have also been rejected. See Solano Garbage Co. v. Cheney, 779 F. Supp. 477, 486 (E.D. Cal. 1991) (rejecting claim of Air Force that it can refuse compliance with RCRA on national security grounds, noting "the statute only authorizes the President to grant exemptions from compliance with federal, interstate, state, and local requirements").
Section 6961 expressly authorizes the president to exempt individual federal facilities when he deems such an exemption “to be in the paramount interest of the United States.”

By structuring the decision in terms of the common law privilege as opposed to the values or process contained in the command and control statute, various competing public values were effectively circumvented. In this case, the President chose not to file a national security exemption with Congress for successive annual periods. This was done despite the fact that the national security exemption has previously been used and has been discussed by the courts as the method to protect national security interests. In upholding the government’s use of the privilege to circumvent an enforcement provision of RCRA, Judge Pro ruled that an agency can defy federal law and then use a common law evidentiary privilege to do what the law forbids: to excuse federal facilities from the full application of RCRA without the issuance of a presidential exemption. Not only does this violate the express language of the statute, but the court’s decision creates a practical shield from some citizen suit enforcement and renders any opposition to summary judgment virtually impossible in future cases.

What is interesting from a statutory interpretation standpoint is that the court did not attempt to claim ambiguity as to the requirements of the

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95. Id.; see also H.R. REP. NO. 94-1491, at 67. (“[The Presidential exemption provision] authorizes the President . . . to grant an exemption to any facility or activity of the federal government . . . if the President . . . determines that the national security interests of the United States demands such exemption be made.”).
96. See, e.g., United States v. Colorado, 990 F.2d at 1576 (noting that the President had not granted an exemption to the Rocky Mountain Arsenal and concluding that the military facility was fully subject to all RCRA provisions); see also Solano Garbage Co., 779 F. Supp. at 486 (rejecting Air Force claim that it can refuse compliance with RCRA on national security grounds, noting “the statute only authorizes the President to grant exemptions from compliance with federal, interstate, state, and local requirements”).
97. In his concurrence to the appellate decision, Judge Tashima specifically rejected the majority’s affirmation of the lower court’s use of the privilege and agreed with the workers that Congress fully provided a statutory mechanism for withholding such information, 42 U.S.C. § 6961(a). Unlike the determination of whether federal law preempts state law, which requires a clear and manifest congressional purpose to preempt state law, “the relevant inquiry is whether the statute ‘speaks directly to the question otherwise answered by federal common law.’ County of Oneida, 470 U.S. at 236-37 As noted by Judge Tashima, the national security provision of RCRA is virtually identical to the common law privilege and preempts the privilege as to RCRA regulatory material: “Considering the structure of RCRA as a whole, it is clear that Congress has ‘spoken directly’ to the question of when and how information that is required by RCRA may be kept secret.” Kasza II, 133 F.3d at 1178. Tashima’s view on preemption had one curious element. Tashima would have prevented the government from using the state secrets privilege, yet he chose to concur as opposed to dissent. This is difficult to reconcile with the record since the entire basis for Pro’s ruling in Frost was that he could not consider the underlying facts as barred by the state secrets privilege.
98. Since the workers prevailed against the EPA, there is a basis upon which to bring citizen suits against classified sites like Area 51. However, the court created a barrier as to direct enforcement against the agencies operating such facilities.
99. Cf. Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958) (noting “unless Congress has created rights which are completely illusory, existing only at the mercy of government officials,” executive privilege has its limitations in a democratic system).
national security exemption. To the contrary, the court ordered compliance with the provision in the *Kasza* case. The statutory interpretation issue raised by the court was the perceived ambiguity in the congressional intention to preempt a common law doctrine. Thus, according to the court, the statute could be clear as to Congress' intent to force the President to comply with the national security exemption, but not clear in preempting any common law doctrines that would interfere with that obligation. By rejecting preemption, however, the court moved the case outside of the statutory framework and the balancing of public values inherent in any statutory interpretation. Once the court preserved the common law doctrine in the litigation, however, it faced a second problem. The military insisted that any forced discovery of environmental records, even the acknowledgment of hazardous wastes visible from public lands, would threaten national security. Accordingly, the state secrets doctrine not only had to be preserved but extended to block the full scope of the federal law.

C. The Adoption of an Absolute State Secrets Privilege in the Area 51 Litigation

If a federal common law rule can be applied by a federal court in a regulated area, the next level of analysis for the court was to determine the extent that such conflict can be allowed by the federal court. The effect of a properly invoked claim of privilege is to exclude the information from discovery or consideration by the court. There are only a handful of cases where courts have ruled that an entire subject matter is a state secret. Rather, most cases have followed the guidelines created in *United States v. Reynolds* and applied the privilege only to those items of discovery that are found to be state secrets and only to those portions that cannot be disentangled from sensitive material. Of the seven cases in which courts have found a subject matter to be a state

100. See *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983). Since a claim of privilege possesses the ability to subvert even the most meritorious of claims, the Supreme Court has noted that it is a privilege that must not be lightly invoked by the government. *See United States v. Reynolds*, 345 U.S. 1, 7 (1953); *see also Ellsberg*, 709 F.2d at 57. The Court has specified the procedure to be followed by the government when it seeks to utilize the privilege. In *Reynolds*, the Court stated that "[i]t here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8. As explained by the Court: "the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced." *Id.* at 8 n.20 (quoting *Duncan v. Cammell, Laird & Co.*, (1942) A.C. 624, 638).

101. *See*, e.g., *Black v. United States*, 62 F.2d 1115, 1119 (8th Cir. 1935); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1143 (5th Cir. 1992); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991); *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1496 (C.D. Cal. 1993); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984). None of these cases were reviewed by the Supreme Court.

102. 345 U.S. 1 (1953).
secret, none were regulatory matters brought under a "command and control" statute. Rather, six of the actions were tort cases in which a private claim was barred because proof of the claim would have required detailed discussion of the operating capabilities of classified weaponry or intelligence operations. The seventh case was a Freedom of Information Act (FOIA) claim in which the workers sought the actual information gathered under a surveillance.

In prior privilege cases, the common law was traditionally applied in the absence of a statutory process to deal with conflict over national security information. In contrast, the Area 51 litigation involved an enforcement action brought under a "command and control statute" enacted by Congress. Central to this command and control system are the citizen enforcement provisions allowing citizens to act as "private attorneys general." Such citizen suit enforcement is particularly important in the national security area where the government is the alleged violator and has a history of poor self-regulation. To allow the Executive Branch to claim an entire regulatory subject matter to be a state secret would effectively negate the statutory scheme as it applied to national security sites by circumventing the core enforcement mechanism.

What made the Area 51 litigation a fascinating academic model was not only the use of a common law privilege to defeat a clear statutory source, but the additional use of the highly controversial "mosaic theory" to effectively defeat any enforcement of the statutory provisions. Throughout the litigation, the government repeatedly made reference to a mosaic theory as the basis for withholding any discovery specifically dealing with the regulatory status and any hazardous waste activities of the facility in the past or the present. Under the government's theory, innocuous and unclassified information can be a state secret if linked to Area 51. Thus, according to the government, an item of information may be individually unclassified, and even publicly known, but still a potential

103. See Black, 62 F.3d at 1118-19; Bareford, 973 F.2d at 1143; Zuckerbraun, 935 F.2d at 547-48; Bowles, 950 F.2d at 156; Fitzgerald, 776 F.2d at 1244; Farnsworth Cannon, 635 F.2d at 281; Bentzlin, 833 F. Supp. at 1496.

104. See Molerio, 749 F.2d at 820.

105. To achieve those purposes, Congress explicitly provided a means by which national security interests were to be protected and compliance with the statute was to be achieved. Thus, as noted earlier, if a facility's compliance responsibilities are incompatible with national security concerns, the president may annually exempt the facility so long as he reports his decision to both the Congress and the public. See 42 U.S.C. § 6961.

106. Courts have recognized and protected legislative authority in past cases. See Halpern, 258 F.2d at 43 (refusing to allow the state secrets privilege to serve as a basis for dismissing a complaint after "Congress has created rights which it has authorized federal district courts to try"). Congress enacted an enforcement system, supported by citizen suits, for all federal facilities. Since this regulation applied to all federal facilities, Congress enacted a national security exemption for the President to exclude any facility from compliance under the Act. Thus, if a facility's status or activities are incompatible with compliance or present unique problems for security, the President may annually exempt the facility so long as he takes public responsibility for the decision to exempt. See 42 U.S.C. § 6961.
danger due to a hypothetical combination with other facts.\textsuperscript{107} The workers challenged the use of this theory as both inherently abusive and in direct conflict with the court-imposed restrictions on the use of the privilege.\textsuperscript{108}

The adoption of the mosaic theory allowed the court to remove the dispute from the context of the statute and its countervailing public values. Clearly, the application of the theory was not simply an "evidentiary" matter, but went to the core of the enforcement process mandated by Congress. The artificial separation of the evidentiary principle from the context of the command and control statute served little more than an outcome determinative purpose. Citizen suits are designed to facilitate disclosure and compliance within a regulatory scheme. The superimposition of a common law rule of evidence that would defeat that scheme should have prompted, at a minimum, some effort to accommodate the conflicting public values in the statutory and common law authority. The court's failure to limit the use of the mosaic theory is particularly troub-

\textsuperscript{107} This theory was first introduced in Defendants' Opposition to the First Motion to Compel. The mosaic theory is also expressly mentioned in the Widnall Declaration as the foundation for privilege assertions on some of the material requested in the case. In its decisions denying discovery, the district court also refers to the theory as a basis for the withholding of discovery. See \textit{Frost II}, 919 F. Supp. at 1464-67. The Widnall Declaration defined the mosaic theory as part of the critical classification section of the Declaration:

Security Classification: Under Information Security Oversight Office guidance, "[c]ertain information that would otherwise be unclassified may require classification when combined or associated with other unclassified information." (32 CFR 2001.3(a)). Protection through classification is required if the combination of unclassified items of information provides an added factor that warrants protection of the information taken as a whole. This theory of classification is commonly known as the mosaic or compilation theory. The mosaic theory of classification applies to some of the information associated with the operating location near Groom Lake. Although the operating location near Groom Lake has no official name, it is sometimes referred to by the name or names of programs that have been conducted there. The names of some programs are classified; all program names are classified when they are associated with the specific location or with other classified programs. Consequently, the release of any such names would disclose classified information.

\textit{Frost I}, 161 F.R.D. at 436 (emphasis added).

Thus, the Widnall Declaration specifies that the mosaic theory applies only to some information relating to the facility, and not, as the government claims, all information related to the facility.

\textsuperscript{108} As a legal matter, the "mosaic theory" would lead to a negation of past protections against exaggerated or tactical uses of the privilege. According to the government, it is immaterial which items are sought since any item could be part of a mosaic, even an admission as to the presence of buildings or sandy soil at this facility. Despite the limitations noted in the Widnall Declaration, the government persuaded the district court that virtually all information, even generic information such as the presence of jet fuel, plastics and pesticides at this facility, falls within the scope of the Widnall Declaration. This included the refusal to admit that jet fuel existed at an Air Force base (with a runway, aircraft and fueling trucks visible from public lands). Obviously, the mosaic theory would be unimpeachable since it suggests that even the most innocuous information can be withheld to avoid the danger of combination with other facts. This would render meaningless such requirements as disentanglement in past privilege cases. See \textit{Ellsberg}, 709 F.2d at 57.
ling in areas of generic regulatory information. The most obvious is the confirmation or denial of the existence of "hazardous wastes" at the facility. The workers noted that most of the critical claims made in this case would have been established by the simple confirmation of hazardous wastes, as an ubiquitous regulatory term. In the very least, such a confirmation would have allowed the district court to grant declaratory judgment in favor of the workers on the failure to properly inventory and permit the facility. Even if the court refused to order the release of specific regulatory information or generic waste stream information, this one fact would have allowed the workers to establish the regulatory status of the facility and thereby give limited meaning to the Act's public accountability purposes. The use of the common law in the statutory area effectively reduces the showing of the government to a statement of rout generality with literally infinite potential in any case.

The desire to impose a jurispathic result appeared so great in the case that the court simply ignored the fact that, during the litigation, defendants had released some of the very information the court claimed to be privileged. In public filings, the government openly discussed the completion of a hazardous waste inventory for Area 51 and also made a promise not to violate RCRA in the future by allowing hazardous waste inspections to occur and conducting future hazardous waste inventories. The military also stated that Area 51 would be placed on the Federal Hazardous Waste Compliance Docket, which only lists facilities where hazardous wastes are currently or ever have been stored, treated or disposed of at the facility. The workers argued that this information, coupled with Browner's admission that a hazardous waste inventory had never been performed for Area 51, constituted prima facie evidence that defendants had violated RCRA and were liable as to count one in

109. The generic term "hazardous wastes" applies to literally thousands of different wastes, including basic solvents or paints, and would convey the same regulatory status as hundreds of thousands of different businesses and facilities. It places Area 51 in the same category as George Washington University, Burger Kings and Jiffy Lubes.

110. Another obvious example of the mosaic theory gone wild was the government's claim of privilege with regard to one of the workers' requests for admission concerning the presence of any threatened or endangered species in the vicinity of the facility. The government claimed that this admission, which would only establish legal status under an Act with hundreds of species, would endanger American lives. The Air Force openly discusses one such species, the desert tortoise, as present in the area of the facility in the Nellis Range. See, e.g., GENERAL ACCOUNTING OFFICE, NATURAL RESOURCES-DEFENSE AND INTERIOR CAN BETTER MANAGE LAND WITHDRAWN FOR MILITARY USE, Apr. 26, 1994 (GAO/NSIAD-94-87) (discussing the Air Force and the desert tortoise in Nevada).

111. The Federal Agency Hazardous Waste Compliance Docket provides in relevant part:

Section 120(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) . . . requires the Environmental Protection Agency (EPA) to establish a Federal Agency Hazardous Waste Compliance Docket. The docket is to contain certain information about Federal facilities that manage hazardous waste or from which hazardous substances have been or may be released.

This is not to suggest that all courts applying the common law privilege would adopt such an extreme view as the court in *Frost*. The common law can reflect alternative public values and the imposition of a common law privilege does not forestall a court's balancing of such interests. The national security privileges tend to invite less balancing of interests but, even in these cases, some balancing is encouraged. A review of past cases indicates the rare circumstances in which courts have found entire subject matters to be state secrets. These cases involved the disclosure of specific facts on the capabilities of weapons systems or the actual identities of agents. Other cases also involved private actions brought under tort or contract and not regulatory enforcement provisions. None of these cases suggested the type of sweeping application seen in the *Frost* case with a command and control statute.

The Area 51 litigation shows how the gravitational pull of national security can warp the analysis and easily deprive the litigants of any meaningful balancing of interests. Since the privilege is ultimately a discretionary device held by the court, the degree of balancing can be quite inconsistent and haphazard. In contrast to the prior cases, the workers in the Area 51 litigation sought information regarding the regul-

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112. The workers argued that the government's confirmation of their performance of these regulatory duties constitutes substantive evidence that hazardous waste is, or has been stored, treated, or disposed of at Area 51. Other circuits have found that conduct performed pursuant to a federal environmental statute may be used as substantive evidence in proving a violation of that statute. See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1219 (3d Cir. 1993). Rather than address this contradiction, the court of appeals wholly ignored these facts and affirmed the finding of the entire subject matter, including an identical count discussed publicly in *Kasza*, to be a state secret.

113. See *Black*, 62 F.3d at 1117-18 (negligence, assault and battery, intentional infliction of emotional distress case where proof of claims required information concerning the identities of government agents and the locations of contacts with those agents); *Fitzgerald*, 776 F.2d at 1243 (where the underlying action was a libel suit and the proof required to prove or refute the claim involved whether the Navy was using marine mammals for military and intelligence purposes); *Bareford*, 973 F.2d at 1142 (manufacturing and design defect case requiring information on capabilities of a secret U.S. missile system as well as data on the design, manufacture, performance, and functional characteristics and testing of the missile systems); *Zuckerbraun*, 935 F.2d at 547 (tort action involving same underlying facts as in *Bareford*); *Benzlin*, 833 F. Supp. at 1497 (manufacturing defect case where information necessary to prove and refute claims involved classified information on Maverick missile capabilities, tactics employed by U.S. aircraft, and military orders during the Gulf War).

114. Six of these cases were tort actions in which a private claim was barred because proof of the claim would have required detailed discussion of the operating capabilities of classified weaponry or intelligence operations. See *Black*, 62 F.3d at 1118; *Bareford*, 973 F.2d at 1143; *Zuckerbraun*, 935 F.2d at 547-48; *Bowles*, 950 F.2d at 156; *Fitzgerald*, 776 F.2d at 1244; *Farnsworth Cannon*, 635 F.2d at 281; *Benzlin*, 833 F. Supp. at 1496. The seventh case was a Freedom of Information Act (FOIA) claim in which the plaintiffs sought the actual information gathered under surveillance. See *Molerio*, 749 F.2d at 819. In these cases, courts found dismissal of the actions to be appropriate because "sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *Fitzgerald*, 776 F.2d at 1241-42. These courts looked to the nature of the proof required to establish or refute the claims presented and determined that such proof would disclose sensitive military or intelligence information. In contrast, the workers' case in *Frost* sought information regarding the regulatory status of the facility.
latory status of the facility and did not require proof that specific types of hazardous wastes were ever stored, treated, or disposed of at Groom Lake facility. Instead, the workers' claims required evidence that any type of "hazardous waste," in a generic sense, is or had been stored, treated, or disposed of at the facility. Even if the court found that some claims require specific information that is sensitive, it is obviously excessive to claim that the entire regulatory subject matter is a state secret. There is no reason for the President to use such exemption provisions if, when detected, the government can avoid enforcement provisions by claiming the entirety of the regulatory subject matter as a state secret.

The mosaic theory allows a court to achieve what Congress and the Court have expressly forbidden: an absolute claim of privilege that avoids the procedures of Reynolds and negates the express national security provision of RCRA. It is also the most powerful vehicle for the common law to superimpose judicial discretion over legislative authority in the statutory area. As such, it comes with costs that easily dwarf the insular interests of any dispute in litigation.

115. Likewise, the court of appeals failed to address one of the central arguments against finding the entire subject matter of this case to be a state secret: the prior litigation of the same injuries at the same facility in a workers compensation hearing of one of the parties in the case. The workers compensation hearing considered, on the merits, the injuries of Mr. Robert Frost, who is represented in these cases by his widow, Helen Frost. That hearing dealt with the same injuries alleged in these cases and the alleged burning of hazardous wastes at the same facility. With the Air Force present to monitor security at the public hearing, the government contractor and employees were allowed to refer to the relevant facility as "Area 51" and discuss the underlying merits of the case.

116. The underlying premise upon which the government has claimed that the entire subject matter of this suit is a state secret is that Area 51 contains highly sensitive, classified operations. Recognizing the reality of this fact did not diminish the workers' arguments that certain regulatory information can still be disclosed. The nation's other classified facilities stand as an example of this fact. For example, the Lawrence Livermore Laboratory complies with RCRA by noting that it has hazardous wastes as do the Princeton Plasma Physics Laboratory, White Sands Missile Range, DOE's Oak Ridge National Laboratory and DOE's Y-12 Plant. See Federal Agency Hazardous Waste Compliance Docket, 53 Fed. Reg. 4284 (1988) Classified locations not only acknowledge hazardous waste but disclose waste stream information, including the Los Alamos Scientific Laboratory, the United States Central Intelligence Agency, and the National Security Agency.

117. The adoption of an absolute mosaic theory represents a significant departure from previously accepted procedures employed in the application of the state secrets privilege to withhold information in federal cases. In response to the "serious potential for defeating worthy claims for violations of rights that would otherwise be proved," In re United States, 872 F.2d at 476, the D.C. Circuit requires that the relevancy of the government's assertion of the privilege must be determined on an item-by-item basis. See Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 404 (D.C. Cir. 1984); Molerio, 749 F.2d at 821. The only situations where an item-by-item review of withheld information is not required is where the entire subject matter of the suit is a state secret. See Bareford, 973 F.2d at 1142. However, in such a case, the agency head responsible for the information must still review the kind of information that would necessarily be involved in proving or refuting the case and then, after such review, determine that the kind of information involved in proving or refuting the case poses a reasonable danger to the nation's security. See id. at 1141; see also Reynolds, 345 U.S. at 8; Black, 62 F.3d at 1117; Bareford, 973 F.2d at 1142; Zuckerbraun, 935 F.2d at 547; Ellsberg, 709 F.2d at 55 n.15; Halkin v. Helms, 690 F. 2d 977, 991 (D.C. Cir. 1982).
IV. THE LEGISPRUDENCE OF NATIONAL SECURITY AND THE COMMON LAW

All statutory interpretation is on some level a form of dialogue between the judicial and legislative branches. For some positivists, this dialogue can be highly abbreviated and confined. For some civic republican scholars, this dialogue is more robust and fluid. Regardless of the underlying model or theory, the tripartite system anticipates a dynamic relationship between those who make the laws and those who interpret it. These models are often tested in a classic case of an ambiguous statute with a gap in its language. The question for the court is the extent to which it should advance the purpose of a statute in the absence of a clear textual mandate. The dialogue that occurs in this circumstance is the interplay between congressional commands and judicial construction. When academics advance theories for “up-dating” or “gap-filling” in statutory interpretation, therefore, the interpretive question is considered and resolved in a single statutory context.

A second and different form of dialogue occurs when the statutory interpretation involves a secondary extrinsic source. When a court must consider two sources—statutory and common law—two voices are heard on a given subject. While other cases are confined to the disagreement over the translation of congressional intent as stated through a statute, the coexistence of statutory and common law authority requires a court to listen to the voice of Congress while considering any dissonance in the voice of prior common law decisions. In cases of clarity, common law must give way to the statute, as should have been the case in Area 51. However, where the two authorities can be reconciled, a unique moment exists where the court is forced to perform a dialogic role under a model of legisprudence. Even if the court considers a privilege to be unpreempted, the court has the opportunity to reconcile the public values advanced by both the statutory and common law sources. As opposed to adopting the all-or-nothing approach of Frost, the court could have resolved the conflict between the sources by applying the privilege while limiting its application to achieve legislative values. Specifically, the court could have required admissions or denials under the generic term of “hazardous waste” while allowing the government to withhold the specific identification of the materials at the facility. This would have advanced the public notice and deterrent elements of RCRA while accommodating national security interests of the government. While this was not the preferred approach of the workers, such a moderate approach would have allowed for the application of a common law doctrine.

118. Civic republicanism posits that the legislative process ideally transforms insular views into a majoritarian compromise. See generally Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539 (1988); see also Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 DUKE L.J. 1 (1999) [hereinafter Turley, Senate Trials].

119. To again borrow from Cover, this can be expressed as the difference between a jurispathic and jurisgenerative approach. See Cover, supra notes 8 & 83.
within the context of a statutory framework. Such compromises allow courts to serve as unique forums for the balancing of public values. Most importantly, as will be shown below, it avoids the legislative costs associated with the jurispathic role of privilege like the state secrets privilege.

A. The Dialogic Effect of the Common Law in the Area of Statutory Interpretation

The application of legisprudence theories to common law privileges at first blush may seem oxymoronic. Legisprudence is most commonly focused on the statutory source and the impact of gap-filling through the extension of statutory purposes. The common law component of these cases is relatively ignored in favor of the more concrete issues relating to the legislation and its meaning. This emphasis is understandable since common law is obviously developed outside of the legislative process and thus outside the core interests of legisprudence. Yet, the use of common law in conjunction with a statutory source raise unique legisprudential issues.120 There has been renewed interest in the common law authority of the courts in the face of the statutory onslaught of this Century.121 Guido Calabresi’s book, A Common Law for the Age of Statutes,122 addressed the dwindling role of common law. After what Calabresi calls an “orgy of statute making,”123 he suggests that there is a greater need for courts to exercise common law authority to disregard statutes as “obsolete.” Calabresi’s book was controversial precisely because he saw the role of common law as checking or correcting the majority determinations made in legislation, based on a judge’s view that the laws are now “anachronistic”124 or out of step with contemporary values. In some respects, Calabresi is simply being more candid in his view of the role of courts, which often produce the same results by subterfuge.

The Area 51 litigation, however, raises the question not of anachronis-
tic statutes but anachronistic common law. The role of the common law in the age of statutes has been a matter of some debate, inspired in part by Calabresi's impressive work. Yet, in this debate, the common law can be presented as more monolithic or homogenous than it is. Before common law is embraced as a force for modernization or moderation, greater attention must be given to the variety of common law principles that come into play in statutory cases. Some common law privileges appear resistant to change and reflect a long-standing view of the bench as opposed to society at large. Common law evolves at the same pace as the evolution of judicial tastes or perspectives. Perhaps for this reason, while common law tends to evolve at a fair pace in areas like tort, common law rules in the area of national security appear more static and non-evolutionary. This is particularly the case with the state secrets privilege.

As noted earlier, the state secrets privilege reflects a common rule that was developed for both a different time and a different context than that raised in the Area 51 litigation. Conflicts with the state secrets privilege arise in three basic ways. First, most of the cases involve a private litigant seeking tort or contractual relief from another private party or a federal agency. Some of these cases arise under statutes allowing recovery for actions by the government or its contractors. Second, some cases may arise under statutes such as FOIA, which allow citizens to seek information or disclosures from the government. Third, there are citizen suit actions, the first being the Area 51 litigation, in which information is sought under the auspices of a command and control statute. Each of these cases raises significantly different institutional and constitutional questions.

The state secrets doctrine was primarily developed under the pressure of the first category of cases, where the government intervened to prevent the disclosure of information harmful to the United States. In such cases, the common law privilege was needed to address unforeseen and dangerous circumstances where litigation would force the revelation of a fact inimical to the national interest. The second category of cases involve federal statutes, such as FOIA, that not only authorize an action but can also produce threats of unforeseen disclosure. FOIA is an area in which the privilege is less relevant given the ample authority to withhold sensitive information under the Act. Nevertheless, in the progress of litigation, the privilege has been used to bar discovery that would threaten

125. The decision in Frost also raises a question of judicial candor. The court's formalistic response in Frost appeared driven by an outcome-determinative intent by the court and not a fundamental theory of interpretation or legislative supremacy. The court was clearly hostile to the notion that environmental standards would be imposed on the military at a classified site. Yet, the court was unwilling to question the judgment of Congress and instead chose a neutral vehicle like the privilege to deny the requirements of the Act. The need for greater judicial candor in such decision remains a matter of academic debate. See, e.g., David L. Shapiro, In Defense of Judicial Candor, 100 HARV. L. REV. 731 (1987); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 GEO. L.J. 353 (1989).

126. See supra notes 44-48 and accompanying text.

127. See supra notes 44-48 and accompanying text.
national security.128 FOIA should represent the furtherest extreme of the application of the privilege to a statutory case given the Act's express interest in protecting sensitive information from disclosure. The Area 51 litigation falls in the final category of cases brought under a command and control statute. It is in this third area that the privilege should have the greatest scrutiny in its application when faced with both citizen suit provisions and information forcing provisions. Moreover, when applied, the privilege should be construed narrowly to tailor any common law influence to the legislative program.

Before creating the choice between the common law and the statutory scheme, the court in *Frost* did not question the continued viability of the common law rule in a command and control area. While Calabresi advocated such a query in the case of an outdated statute, there is rarely such an inquiry in the selection of a common law privilege in national security litigation. This may be due to the fact that the privilege creates a problem of judicial competence that yields readily to the opinion of the Executive Branch agencies.129 Since the privilege rests on a judgment by the agency of classification or sensitivity, the courts generally defer to such judgment and reaffirm both the privilege's application and scope in a given case. Moreover, because the privilege is based on a perceived area of near absolute executive power, courts do not treat the privilege as potentially out-dated because the area is reviewed as static and largely non-evolutionary. The privilege has continued to be applied despite the massive shift toward statutory schemes and regulation. Yet, given their role in the creation of the privilege, the courts are the forum in which such a review should ideally take place, distinct from any question of preemption under particular command and control statutes. It is in this forum that the scope of any unpreempted privilege can be debated and balanced within the context of a command and control law.

The superimposition of common law over statutory authority naturally leads to a comparison of the costs in resolving disputes in the context of statutory law as opposed to common law. If common law is used to avoid or circumvent a statutory process, it is reasonable to inquire into the relative advantage to society in having a resolution found in a common law rather than a statutory framework. Unlike the conventional statutory interpretation model, the use of a secondary extrinsic source like a common law privilege interjects a public value formed outside the open and deliberative process of the legislative branch. This emphasis comes at some obvious costs. Common law doctrines are created by judicial officers who are neither subject to popular will nor necessarily in agreement with majoritarian values. For example, the court in *Frost* reflected a strong

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128. See supra notes 44-48 and accompanying text.
129. See, e.g., Linder v. Department of Defense, 133 F.3d 17, 25 (D.C. Cir. 1998) ("Because judges 'have little or no background in the delicate business of intelligence gathering,' courts must give 'great deference' to the Director of Central Intelligence's determination that a classified document could reveal intelligence sources and methods and endanger national security.") (quoting CIA v. Sims, 471 U.S. 159, 176, 179 (1985)).
personal view of national security requirements in adopting the most extreme possible interpretation of state secrets and an absolute mosaic theory to dismiss the case.

While both the common law privilege and the statute represent public values, they were created by vastly different processes and are not necessarily equal in their claim of authority in a given conflict. Despite its limitations, as described by the public choice school, the legislative process exposes most major statutes to a vast array of competing interests and values. Common law, on the other hand, is developed by the least representative branch and often is univocal or narrow in its purpose. Where RCRA was developed through the compromise of governmental and private interests in a vast array of areas, the state secrets privilege was developed with the narrow perspective of Article III courts in dealing with national security litigation. The state secrets privilege was developed at a time when most modern national policies, such an environmentalism, were hardly recognized. Since the state secrets privilege is motivated by a single univocal value—the protection of national security secrets—it is unaffected by the changes in society as to the equally compelling value of environmental protection or worker safety or other public policies. Where statutes tend to evolve with time through periodic amendments, privileges like the state secrets privilege evolve at a glacial pace, if at all. As society has changed, the privilege continues to enforce its univocal purpose without reference to the possible elevation of some values above secrecy or national security values. Thus, where scholars like Ronald Dworkin have suggested that interpretation should be like the writing of a chain novel with judges as successor authors,¹ the privilege simply mandates a sudden ending to any statutory novel without development or continuity with the preceding chapters.

Another problem often considered in the legislative context is the danger of agency capture in the enforcement of federal laws. There is an analogous danger of capture in the common law context when dealing with national security cases. Federal judges applying the privilege are exposed to a relatively rare process of in camera, ex parte review of information presented as extremely classified and sensitive. This privileged exposure to national security information can have a distortive effect on judges.¹ Judges are suddenly initiated into a secret world that few citizens are allowed to witness. These meetings come with all of the trappings of high security. National security figures convey a level of trust upon the judge in a relationship that expressly excludes the plaintiffs or their counsel. The most extreme form of this danger of capture can be found in the proceedings of the Foreign Intelligence Surveillance Act

¹. See Ronald Dworkin, Law's Empire 313 (1986).
². See Area 51: Catch 22, supra note 19 (statement of Rep. Lee Hamilton, former chairman of the House Intelligence Committee on Judge Pro's rulings in the Area 51 litigation, calling the military's claims "unsubstantiated" and noting that "judges are often snowed by the national security establishment" in such claims.).
This secret court handles applications for domestic intercept and surveillance by the national security agencies. Judges meet with agency officials in a highly secure environment, or Special Compartmentalized Intelligence Facility (SCIF) protected from interception or monitoring. Their very environment, therefore, is supplied and maintained by the regulated agencies. The court is composed of a relatively small number of judges, often senior status judges, who become an active part of on-going espionage and intelligence operations. It is not surprising that this court has only turned down a single application out of tens of thousands in its existence. The FISA court, however, is only a more extreme form of the capture that occurs in individual national security cases. Unlike the FISA judges who at least see a steady stream of national security cases, most judges meeting secretly on privilege cases are uninitiated members of the judiciary who are subject to impressive security precautions and the protestations of sensitivity in these meetings. This is not to say that judges cannot resist such influences or maintain their independence. The use of such a judicial officer to balance the interests of the public and the government is inevitable in some cases but hardly preferable to a process laid out in a command and control statute by Congress. The increased role of the judges under the privilege only increases the possibility of capture and bias. A command and control law like RCRA obtained public support in part on the promise that the reporting and exemption system would be part of a public and largely nondiscretionary process. The involvement of the court creates the opportunity for subterfuge by the government despite the basic guarantees under the Act.

Finally, the use of the common law can help insulate issues from both public debate and legislative correction. In the national security area, when common law is used to circumvent a statutory source, a court removes the conflicts of values from a highly evolutionary and democratic process to a more static and elitist process. While common law is clearly evolutionary in most areas, national security privileges tend to be more static and, as noted above, more univocal. This comes at a cost to the legislative process and the concept of informed consent of the gov-

133. The Author witnessed the functions of this secret court first hand as an employee of the National Security Agency during the Reagan Administration.
135. See Jonathan Turley, Black-Bag Justice, LEGAL TIMES, Nov. 21, 1994, at 28 (criticizing the FISA court).
136. Obviously, under a dynamic interpretative viewpoint, the evolutionary potential of a statute is based in part on judicial construction over the course of many years or social changes. See, e.g., Eskridge & Frickey, supra note 68, at 62 ("Statutory text never anticipates all the issues that the statute will have to address, and over time the unresolved issues will multiply when social circumstances change and the political-legal equilibrium shifts."). "The statute 'means' nothing until it takes its place in the legal system, until it begins to interact with judges, lawyers, administrators, and lay people." Aleinikoff, supra note 82, at 57.
erned. It is more likely that a judicial interpretation of a statutory provision will be corrected than the case-by-case application of a national security privilege. Since these cases have very narrow application to a small group of injured parties, most such cases are rarely noticed by the public or Congress. The information and transactional costs are increased; increasing the cost of legislative action. The absence of rent-seeking pressures only further diminishes the interest of Congress to act in such cases.

Ironically, the problem identified by Calabresi in the explosion of statutory sources is also the reason why the superimposition of the common law will often go uncorrected by the legislature. Congress is now faced with so many different statutes that corrective acts are relatively rare. Certainly, individual case decisions imposing the common law privilege are unlikely to draw the attention of the relevant House or Senate Committees absent strong interests. Such interests may be present in areas at the heart of public choice scholarship with high levels of rent-seeking or wealth transfers. As will be shown below, such is not the case in the national security area. As a result, the judicial imposition of the common law not only cuts off dialogue in the courts but practically cuts off dialogue in the political system as a whole.

B. THE LEGISPRUDENCE OF NATIONAL SECURITY PROVISIONS AND THE COST OF JUDICIAL NEGATION OR CIRCUMVENTION

The superimposition of the common law in an area of command and control regulation raises concerns over the forces that influence and maintain common law privileges. A separate concern, however, is raised when such superimposition occurs in the area of national security law. One common thread among legisprudence theories is the need to tie any theory of statutory interpretation to an underlying theory of separation of powers and Article III power. The common problem of most such articles focuses on private interests and their role on the language of legislation. The premise of the Madisonian democracy is that the legislative process allows for disparate factions to engage in an open and deliberative fashion to reach majoritarian compromises. Such purposivists as

137. This creates a "falsified consent" problem. See Bernard W. Bell, Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation, 60 Ohio St. L.J. 1, 20 (1999). "Democracy is legitimate only if people vote or otherwise consent based on their true preferences, rather than those manufactured by government manipulation of information." Id. at 20-21. See also Alexander M. Bickel, The Morality of Consent 106 (1975) (discussing role of consent in democratic systems).

138. This is sharply different from the dynamics of statutory interpretation under a theory like that of Jonathan Macey, discussed earlier. See supra notes 76, 78 and accompanying text. Macey's theory of interpretation advances a statute's public-regarding purposes and is designed to discourage hidden deals or to force open deliberation within the legislative process. Likewise, the other intentionalist, purposivist, and dynamic theories presuppose a type of dialogue between the courts and the legislature that occurs within the context of a statute.

139. See generally United States Senate Comm. on the Judiciary, 102d Cong., Big Government Lawsuits: Are Policy Driven Lawsuits in the Public Interest?
Hart and Sacks based their interpretative views on this assumption and the need to rely on the procedures of legislation to defeat special minority or opportunist interests.140 The public choice school raised compelling arguments about the failure of the modern legislative process to force such majoritarian results.141 In the age of special interest groups and lobbying, small groups with concentrated interests and benefits tend to do better than large groups with distributed interests and benefits. This is most troubling in the use of hidden special deals that occur away from the open debate and the public view in shaping the language of statutes. Often, the hidden deal is meant simply to add ambiguity to a statute to protect an interest while maintaining the appearance of the public-regarding purpose of the statute.142 Thus, the question of much of the scholarship in this area has been the proper role of courts as interpreters in light of such deficiencies. Easterbrook and others advocate textualism to leave the legislative market to its own devices and outcomes.143 Others, like Macey, advocate gap-filing to advance the stated (albeit at times disingenuous) purpose of the statute.144

All of these theories confront the problem of hidden deals and rent-seeking with private or special interests in the legislative process.145 The Executive Branch, of course, also lobbies for transfers of both power and money from the legislative branch.146 While not meeting the traditional view of rent-seeking,147 this conduct does produce the negative byproduct of hidden deals. Executive branch officials will often negotiate and bar-

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(Comm. Print 1990) (includes testimony of Professor Jonathan Turley on the Madisonian implications of federal governmental litigation in areas of controversy).

140. "Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible." Hart & Sacks, supra note 69, at 1156.

141. See generally Turley, Transnational Discrimination, supra note 6, at 354-65.

142. See id. at 356-57.

143. See supra notes 4 to 5 and accompanying text.

144. This public choice critique is part of a wider "family" of positive political theory that share "a core general presumption that political behavior is to be explained as the outcome of rational (and often strategic) actions by relevantly situated individuals within some set of defined institutional boundaries." Jerry L. Mashaw, Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development, 6 J.L. ECON. & Org. 267, 280 (1990) (quoted in Daniel A. Farber & Philip P. Frickey, Foreword: Positive Political Theory in the Nineties, 80 GEO. L.J. 457, 459 (1992)).

145. Rent-seeking is normally a term used in relation to private interests seeking "rents" from Congress. This term is defined as "the resource-wasting activities of individuals in seeking transfers of wealth through the aegis of the state." James M. Buchanan et al., Toward a Theory of the Rent-Seeking Society ix (1980); see also Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 70 (1990) (defining rent-seeking as "the dissipation of wealth through efforts to redistribute resources by way of politics."). Macey defines rent-seeking as "the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market." Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 224 n.6 (1986).

146. See Jonathan Turley, Dualistic Values in the Age of International Legisprudence, 44 HASTINGS L.J. 185, 245-59 (1993).

147. In the conventional public choice problem, the executive branch can actually reduce the advantages or costs of rent-seeking. Jonathan Macey explained:
gain for changes in legislation. Where private interests may offer financial support for a legislator, the Executive branch can offer equally concrete payment for its legislative gains from highways to military bases to federal contracts. If such hidden deals do exist (a proposition that is in little doubt), the question is whether we should be as concerned with hidden deals between Congress and agency interests as we are with hidden deals between Congress and private special interests. The answer can be found in a reexamination of the problem with hidden deals in a Madisonian democracy. The tripartite system is designed to forge consensus from otherwise disparate factional groups. By forcing open and deliberative debate, the bicameral and tripartite features of the Madisonian democracy function to encourage majoritarian results. All hidden legislative deals, whether with private or public agents, are presumptively a negative influence on this system. Of course, Congress may not have truly meant what is said in RCRA and allowed the continuation of a privilege that would defeat the stated purpose of the Act. This would be a particularly extreme case of the use of deceptive public-regarding language to conceal a hidden deal negating a right given to citizens vis-à-vis their government.

Even assuming that there is no likely basis for a hidden deal in this context, the jurispathic approach in the Area 51 litigation produces dysfunctional effects for the legislative process. The national security leg-

[While] more politically motivated than the judiciary's, [executive branch action] serves a salutary role ... by reducing the benefits that legislators obtain from passing interest group oriented legislation, thereby raising the costs of rent-seeking. Viewing agency enactment legislation as a "deal" between interest groups and lawmakers, it is obvious that the value the interest group places on the legislation will increase symmetrically with the "deal's" durability. However, interference with the power of Congress to control administrative agencies impedes the ability of politicians to make credible commitments to interest groups. This in turn lowers the price politicians can demand for providing legislation to favored groups by reducing the willingness of such groups to pay for new laws.


148. See Turley, Transnational Discrimination, supra note 6; see also Turley, Senate Trials, supra note 118.

149. Clearly, some Executive branch lobbying is hidden as a matter of policy. In appropriations legislation, the Executive branch must ask for funding of projects that are classified and appropriately presented in closed hearings. In the creation of federal law and regulations governing agencies, there is little place or need for hidden dealing with the agencies. In the structure and process of command and control statutes, however, hidden deals are unnecessary to achieve any public good since the regulatory provisions deal with global issues unconnected to any specific project or secret. Cf. Bell, supra note 137, at 20 n.59. ("Obviously government agents may lie to individuals in conducting undercover criminal operations, but such reasons for lying rarely apply to general statements to the general public."). This is particularly the case with RCRA's national security exemption where Congress simply mandated a process for the invocation of the prior authority under the common law privilege as part of a comprehensive program.

150. There is little serious reason to believe that the government engaged in a hidden deal to cripple RCRA in practice while preserving the appearance of a fully functioning statutory process. A hidden deal would have left the statute silent on the question without an express exemption process.
islation is one of the least public parts of the political process. While this secrecy is sometimes necessary in the area of appropriations, most national security issues in command and control statutes are handled in non-public communications between agency and committee staff as a matter of course. Most national security issues are buried within command and control statutes and are removed from the central “high visibility” components of the legislation. If legislation is driven by rent-seeking to any great degree, legislative interest in national security components of command and control statutes is likely to be limited and passing. Thus, when a court refuses to carry out the enforcement of a statute in national security cases, it is one of the least likely areas for legislative concern and therefore legislative correction. As noted earlier, the low likelihood of congressional correction may also be the result of the fact that, in the age of statutes, Congress simply has little time for corrections due to individual judicial judgments. This further increases the chances that those areas with the greatest rent-seeking elements will receive preferred attention over areas like national security law. In this sense, the legisprudential profile of national security legislation fits the predictions of Mancur Olson.151 In this area, we have concentrated institutional interests with highly distributed public benefits. Few citizens are likely to feel sufficient personal loss to support activism over a few national security cases. The informational and transactional costs are high for citizens in this area. Yet, the Executive Branch would likely have an interest in blocking any effort to correct decisions like Frost.

The result can be an area subject to the combination of raw executive excess, legislative acquiescence, and judicial bias. In adopting a jurisprudential approach, the court in Frost ignored the role of statutes as expression of public values. In the interpretation of a statute, the most useful method for finding meaning in a given context, beyond the actual text, is to articulate the purpose or public values underlying the statutory structure. In cases of command and control statutes, such public values are most apparent given the comprehensive purpose of the legislation. When Congress enacts a statute to govern an entire regulatory area with specific rules of conduct, it does so to advance a stated purpose; to achieve a public value.152 In the case of RCRA, Congress articulated the need to impose a unified system of environmental compliance with full public disclosures. Later, Congress added the Federal Facility Compliance Act153 to reaffirm the core principle that the government must meet the same standards that it imposes on its citizens. The absolute application of a common law privilege to effectively prevent citizen suit actions under the Act deprived the statute of coherence. The result is that national security issues can affect a great number of people with the least visibility or

151. See Mancur Olson, The Logic of Collective Action (1971); see also Turley, Transnational Discrimination, supra note 6, at 355-57.
detectability for public response. Likewise, it is the least likely to receive open and deliberative debate in most command and control legislation. Therefore, when a court acts jurispathically in the national security area, the only remaining possible forum for resolving the tension between national security and other legislative values is effectively closed.

V. CONCLUSION

Legislative debate over national security provisions allows the public a rare opportunity to demand the articulation of any trade-offs between national security values and other public values. In a field that is by necessity cloaked and covert, the legislative process is the only fully open forum for the balancing of interests outside of the unilateral decision-making of executive branch officials. The privilege reduces the incentive for the Executive Branch to engage in good faith dialogue in the legislative branch by offering a non-public process to achieve its interests in nondisclosure. While reducing an incentive for legislative dialogue, courts applying the privilege have rarely created as an alternative forum for the balancing of such interests. Thus, the type of dynamic role of the courts foreseen by Eskridge and other academics is frustrated by the application of the privilege as an extrinsic inquiry to the statute. The state secrets privilege represents the antithesis of a dialogic process. The privilege prevents a discussion of the public values inherent in both the environmental and national security areas. Any dialogue is quickly extinguished in the name of one of the two values. What was missing from the Area 51 case was any willingness of the Court to allow an open debate over the logic and scope of the government’s assertion of privilege to bar any discovery or argument. The court specifically refused to allow a hearing on the basis of claiming national security risks in the use of ubiquitous generic terms like “hazardous waste.” In refusing to allow such argument, the court increased the costs to the public and the system in legislative process. The executive branch can rely on the privilege in any statute that does not expressly preempt its application. Congress would then be able to pass public regarding legislation and the president would be able to sign such legislation while reserving the power to defeat any citizen suit through the use of the privilege.

The national security area creates much greater challenges for the public in monitoring governmental activity and holding their elected officials accountable for their conduct. There are compelling reasons for courts to err on the side of command and control statutes in resolving conflicts like the one in the Area 51 litigation. It is through the legislative process of a command and control statute that some degree of majoritarian consensus can be forged over the balance of national security and other public values. Moreover, the deficiencies in this area indicate a heightened danger in the application of jurispathic devices like the state secrets privilege. If a court removes these disputes from the statutory context, it increases the legislative costs for the public while superimposing a judicial view on the
balance of interests in the litigation. Kasza and Frost demonstrate the ability of a court to force different outcomes in largely identical cases. The use of a common law privilege can allow a court to achieve indirectly what it could not achieve directly: the circumvention or rejection of a statutory program. Much like the formalistic canons exposed by Karl Llewellyn, the application and chosen scope of the privilege allows a court to produce outcome-determinative results behind a veneer of neutrality.\textsuperscript{154} Privileges, like canons of construction, are often an invitation for countermajoritarian bias. This bias is hidden behind a methodology that offers a false and dangerous neutrality. The bias is not in the language of the opinion but the initial selection of the privilege and the determination of its scope.

The jurispathic history of national security cases is ultimately based on a judicial perception of the legitimate needs of the national security establishment. Many of these views were formed at a different time. The state secrets doctrine was widely embraced in the aftermath of World War II and the course of the Cold War. This was before the advent of precise satellite monitoring, open sky treaties, and the Internet. It was before the Information Revolution and the political revolutions overthrowing the communist regimes of Europe. Despite the changing scope and character of foreign threats, the courts continue to apply national security doctrines as unmodified and unchanged by time or social changes. Since the privilege is not part of a statutory text, it has the ability to continue largely unaffected by changes in public values and statutory schemes. This is particularly true when, as with the state secrets privilege, the common law rule is crafted as an “evidentiary rule,” relevant to the proof of a case as opposed to the underlying claims.

With common law principles like the state secrets privilege, a case can become less of a dialogue than it is a diatribe. Through the national security privilege, courts can simply refuse to balance interests of a statute against the claims of national security. When combined with the informational and transactional costs associated with legislative changes, the use of the privilege easily fulfills the countermajoritarian nightmare in statutory interpretation. Of course, the Frost case may prove to be an aberration or a passing phrase in national security rulings. However, this modest case study reveals a troubling ability of courts to influence policy or marginalize insular groups in the age of statutes. The diminishing likelihood of congressional correction of statutory decisions in some areas may have produced a corresponding increase in judicial power. This power can be exercised in preventing citizens from using statutes to articulate and defend their values vis-à-vis their government. Command and control statutes create a forum in the courts for such a dialogue. Since this may be the only forum in which these voices will be heard, the commitment made under statutes like RCRA have tremendous democratic

significance for both citizens and insular groups. Yet, it was the court’s voice, not the workers or Congress, that was heard in *Frost*. It had all of the clarity and finality that comes from a unilateral judgment unburdened by rivaling interests or values of the legislature process.
1999 Roy R. Ray Lectures
IN MEMORIAM: ROY R. RAY (1902-1994)

ROY R. Ray was born in West Virginia. He was educated at Center College in Kentucky, and received his LL.B. with Honors from the University of Kentucky in 1928. After spending a year on a fellowship at University of Michigan Law School, he was invited to teach at SMU School of Law in 1929. He continued to teach at SMU for the next 41 years. He was known for his humor and dedication to legal scholarship both in the classroom and among the faculty. Even after he retired, he was a frequent visitor at the law school and remained involved in the law school community.