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COMMENTS

THE END OF A DYNASTY: A COMMENT ON *MILNER V. DEPARTMENT OF THE NAVY*

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I. INTRODUCTION

In March 2011, the United States Supreme Court overturned three decades of Freedom of Information Act (FOIA) precedent in *Milner v. Department of the Navy*.[1] The Court held that Exemption 2 of FOIA relates only to records concerning employee relations and human resources and does not protect all "'predominantly internal' materials whose disclosure would 'significantly ris[k]' circumvention of agency regulations or statutes."[2] The Court reasoned that the Navy's interpretation of Exemption 2 would be contrary to FOIA's purpose, which was to facilitate the disclosure of government records to the public in the interest of transparency,[3] and the Navy's broad interpretation would take FOIA down

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1. Milner v. Dep't of the Navy, 562 U.S. 562 (2011).

2. *Id.* at 566 (alteration in original) (footnote omitted) (citation omitted) (quoting Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562).

3. *Id.* at 572; *see also* FBI v. Abramson, 456 U.S. 615, 636 (1982) ("It scarcely needs to be repeated that Congress' ultimate objective in requiring such disclosure was 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" (quoting

the same path as its predecessor, the Administrative Procedure Act's public-disclosure section, which "gradually became more 'a withholding statute than a disclosure statute.'"[4]

This Case Comment argues that the *Milner* Court should have gone beyond the ordinary meaning of the word *personnel* used in Exemption 2 and given weight to the legislative history because lower courts and agencies had followed *Crooker v. Bureau of Alcohol, Tobacco & Firearms*'s[5] interpretation for three decades; moreover, Congress implicitly ratified *Crooker* when it amended Exemption 7(E) with similar language but left Exemption 2 untouched.[6] This Case Comment begins with the history of FOIA and the case law interpreting and applying Exemption 2 before examining the Court's reasoning in *Milner* and critiquing its approach.

II. BACKGROUND

A. The Formation of the Freedom of Information Act

FOIA was enacted to replace section 3 of the Administrative Procedure Act (APA).[7] While section 3 of the APA allowed for public disclosure of government records, the Supreme Court concluded in *Department of the Air Force v. Rose*[8] that Congress enacted FOIA because section 3 of the APA had become ineffective.[9] According to the Court, "Congress therefore structured . . . [FOIA] whose basic purpose reflected 'a general philosophy of full agency disclosure.'"[10]

Despite the primary intent of Congress to create an overhauled disclosure statute with the enactment of FOIA, Congress included nine disclosure exemptions within FOIA that allow government agencies to resist publicly disclosing records sought under the authority of FOIA.[11] At

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978))).

4. *Milner*, 562 U.S. at 565 (quoting EPA v. Mink, 410 U.S. 73, 79 (1973)) (reasoning that Congress sought to fix this issue with the "public-disclosure section of the Administrative Procedure Act" when it enacted FOIA).

5. *Crooker*, 670 F.2d 1051.

6. *Milner*, 562 U.S. at 574–75.

7. Dep't of the Air Force v. Rose, 425 U.S. 352, 360 (1976) (citing 5 U.S.C. § 1002 (1964) (repealed 1966)); *see also* 5 U.S.C. § 552(b)(2) (2012).

8. *Rose*, 425 U.S. 352.

9. *Id.* at 360 (quoting *Mink*, 410 U.S. at 79).

10. *Id.* (quoting S. REP. NO. 89-813, at 3 (1965)).

11. *Milner*, 562 U.S. at 565.

issue in *Milner* was the language of Exemption 2, "which protects from disclosure material that is 'related solely to the internal personnel rules and practices of an agency.'"[12] The APA's disclosure-exemption provision that Exemption 2 replaced allowed for "*any* matter relating solely to the internal management of an agency" to be shielded from public disclosure.[13] This former disclosure exemption led to a massive wave of government agencies that refused to disclose massive quantities of documents that "range[d] from the important to the insignificant,"[14] which prompted Congress to change the language of the exemption to give it a "narrower reach."[15]

B. Defining the Scope of Exemption 2

Lower courts have historically disagreed over the scope of Exemption 2's language—"internal personnel rules and practices."[16] The main cause of this controversy is the conflicting interpretations of this language presented between the House and the Senate reports on the bill.[17] For instance, the Senate Report said that the "[e]xemption . . . relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like."[18] By contrast, the House Report carved out a broader exemption:

> Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which

12. *Id.* (quoting § 552(b)(2)).
13. *Id.* (emphasis added) (quoting 5 U.S.C. § 1002 (1964) (repealed 1966)).
14. H.R. REP. NO. 89-1497, at 5, 8 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2422, 2425.
15. *Milner*, 562 U.S. at 565 (quoting *Rose*, 425 U.S. at 363).
16. *See id.* at 569; Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1072 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562.
17. *See Rose*, 425 U.S. at 363; *compare* H.R. REP. NO. 89-1497, at 10, *with* S. REP. NO. 89-813, at 8 (1965).
18. *Rose*, 425 U.S. at 363 (quoting S. REP. NO. 89-813, at 8).

are withheld under the present law.[19]

Courts that found the House Report persuasive often concluded that Exemption 2 carries an implied provision that allows government agencies to resist the disclosure of documents that would risk the "circumvention of agency regulation."[20] Conversely, courts that read Exemption 2 narrowly, frequently cited the Senate Report.[21] This disagreement led to a circuit split divided by which report the sitting court deferred to.[22]

The first major case concerning Exemption 2 came in 1976 when the Supreme Court decided *Department of the Air Force v. Rose*.[23] In *Rose*, Justice Brennan wrote for a five-justice majority; three justices, Chief Justice Burger and Justices Blackmun and Rehnquist, dissented.[24] Relying on the Senate Report, the Court held that the language of Exemption 2 concerned "matter[s] with merely internal significance" and that Exemption 2 existed "simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest."[25] However, the Court did not discuss whether Exemption 2 could be used to resist the disclosure of documents whose "disclosure [would] risk circumvention of agency regulation."[26] Indeed, the Court never addressed this circumvention argument because it was confident that the material requested did not pose a risk of circumvention of agency regulation.[27]

In 1978, the Second Circuit explicitly addressed the issue left open in *Rose*—whether the exemption applied when disclosure might risk circumvention of, or disruption with, agency operations.[28] In *Caplan v. Bureau of Alcohol, Tobacco & Firearms*,[29] the court held that a Bureau of Alcohol, Tobacco & Firearms (ATF) manual, which discussed raids and searches, should be withheld because its "release . . . would hinder

19. *Id.* (quoting H.R. REP. NO. 89-1497, at 10).
20. *Id.* at 364.
21. *See Milner*, 562 U.S. at 567 n.2.
22. *See id.*
23. *Rose*, 425 U.S. 352.
24. *Id.* at 354, 382, 385, 389. "Justice Stevens took no part in the consideration or decision of this case." *Id.* at 382.
25. *Id.* at 369–70.
26. *Id.* at 369.
27. *See id.* at 364.
28. Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 547 (2d Cir. 1978).
29. *Caplan*, 587 F.2d 544.

investigations, enable violators to avoid detection and jeopardize the safety of Government agents."[30] Specifically, the court reasoned that Exemption 2 "includes internal material such as the withheld portions of the ATF manual where disclosure may risk circumvention of agency regulation."[31]

Caplan's interpretation was further supported in 1980 when the Ninth Circuit, in *Hardy v. Bureau of Alcohol, Tobacco & Firearms*,[32] concluded that *Caplan* correctly withheld an ATF manual under the provisions of Exemption 2 because doing so would "risk circumvention of agency regulation."[33] The *Hardy* court reasoned that "[t]he Supreme Court opinion in *Rose* not only does not preclude but . . . support[ed] . . . this interpretation."[34]

Then in 1981, the District of Columbia Circuit decided *Crooker v. Bureau of Alcohol, Tobacco & Firearms*.[35] The court decided that Exemption 2 allowed the ATF to withhold a manual because it was "used for predominantly internal purposes . . . [and] designed to establish rules and practices for agency personnel."[36] The court acknowledged that "it is conceded that public disclosure would risk circumvention of agency regulations."[37] Since the decision in *Crooker*, courts began to distinguish between a "'Low 2' exemption when discussing materials concerning human resources and employee relations, and [a] 'High 2' exemption when assessing records whose disclosure would risk circumvention of the law."[38] Through this, the *Crooker* court effectively created a bifurcated-exemption scheme within Exemption 2.[39]

The distinction between the Low 2 exemption and the High 2 exemption can be seen as an attempt by the courts to "reconcile" the House and Senate reports on Exemption 2.[40] Human resources and employee

30. *Id.* at 545.
31. *Id.* at 548.
32. Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653 (9th Cir. 1980).
33. *Id.* at 656.
34. *Id.*
35. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), *abrogated in part by* Milner v. Dep't of the Navy, 562 U.S. 562 (2011).
36. *Id.* at 1073.
37. *Id.* (emphasis omitted).
38. *Milner*, 562 U.S. at 567.
39. *Id.* at 573.
40. *See* P. STEPHEN DIDIERE III, THE FEDERAL INFORMATION MANUAL: HOW THE GOVERNMENT COLLECTS, MANAGES, AND DISCLOSES INFORMATION UNDER FOIA AND OTHER STATUTES 225 (2013).

relations records covered by the Low 2 exemption are relatively trivial in nature and carry little to no risk of harm if disclosed.[41] Records covered by Low 2 are exempted simply because it would be far too wasteful and time-consuming for the withholding agency to produce and disseminate masses of predominantly internal personnel records, such as daily employee notices concerning circumstances in the workplace that are relevant only at the time of their creation.[42] This burden far outweighs any public benefit that would be derived from the disclosure.[43]

On the other hand, predominately internal data that would be covered by the High 2 exemption would run a much greater risk of causing harm through disclosure.[44] For example, individuals may exploit an agency's law enforcement manual with details regarding procedures for the conduct of a criminal investigation to "violate the law . . . [without] detection."[45] There are two central characteristics that are shared by records shielded under Exemption 2: (1) they were intended to be used by the agency that created them; and (2) they affect how that agency interacts with its personnel in some way.[46] The bifurcation of Exemption 2 sorts those internal personnel records into categories based on the level of harm that their disclosure could cause, which ultimately illustrates the various motivations for exempting the two different types of predominately internal personnel records from disclosure.[47]

Despite the case law built on the issue seemingly left open in *Rose*—that Exemption 2 may be used to withhold documents whose disclosure risks circumvention of agency regulation—other courts have come to the opposite conclusion, that no such argument is available under the express provisions of Exemption 2.[48] Indeed, in 1978, prior to its decision in

41. OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 262 (Mar. 2007 ed.).

42. *Id.* at 262–63.

43. *Id.* at 263.

44. *Id.* at 273–74.

45. *Id.* at 274 (quoting Hawkes v. IRS, 467 F.2d 787, 795 (6th Cir. 1972)).

46. *See id*. at 263–64.

47. *See id*. at 262, 273–74.

48. *See* Milner v. Dep't of the Navy, 562 U.S. 562, 567 n.2 (2011).

> Three other Courts of Appeals had previously taken a narrower view of Exemption 2's scope, consistent with the interpretation adopted in *Department of Air Force v. Rose*, 425 U.S. 352 (1976). See *Cox v. Department of Justice*, 576 F.2d 1302, 1309-1310 (CA8 1978) (concluding that Exemption 2 covers only an agency's internal "housekeeping matters" (internal quotation marks omitted)); *Stokes v.*

Crooker, the District of Columbia Circuit had held in *Jordan v. U.S. Department of Justice*[49] that the public disclosure of documents concerning guidelines for prosecutorial discretion should be granted because "Exemption 2 was not designed to protect documents whose disclosure might risk circumvention of agency regulation."[50] To reach this conclusion, the court looked to the plain meaning of the statute's language and the comments provided in the Senate Report to define *personnel*, while disregarding the House Report altogether.[51]

III. CASE DISPOSITION

A. Facts

In *Milner v. Department of the Navy*, petitioner Glen Milner, who lived near the Puget Sound in Washington State, made a FOIA request to the United States Navy.[52] Specifically, Milner requested "Explosive Safety Quantity Distance (ESQD) information. The ESQD information prescribes [the] 'minimum separation distances' for explosives and helps the Navy to prepare for" the effects of hypothetical explosions of the "weapons, ammunition, and explosives" stored on Naval Magazine Indian Island—a naval installation in the Puget Sound.[53] When the Navy received Milner's request, "[it] refused to release the data, stating that disclosure would threaten the security of the base and surrounding community. In support . . . the Navy invoked Exemption 2."[54]

> *Brennan*, 476 F.2d 699, 703 (CA5 1973) (holding that Exemption 2 "must not be read so broadly as to exempt" an Occupational Safety and Health Administration manual for training compliance officers); *Hawkes v. IRS*, 467 F.2d 787, 797 (CA6 1972) ("[T]he internal practices and policies referred to in [Exemption 2] relate only to . . . employee-employer type concerns").

Id. (alterations in original).

49. Jordan v. U.S. Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) (en banc), *abrogated by* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562.

50. *Id.* at 771; *see also Crooker*, 670 F.2d at 1067–68 (discussing *Jordan*'s holding).

51. *Jordan*, 591 F.2d at 763, 771.

52. *Milner*, 562 U.S. at 567–68.

53. *Id.* at 568 (quoting Milner v. Dep't of the Navy, 575 F.3d 959, 974 (9th Cir. 2009), *rev'd*, *Milner*, 562 U.S. 562).

54. *Id.* at 568.

B. Procedural Posture

In response to the Navy's denial of his request, Milner filed suit but lost on summary judgment in district court.[55] On appeal, the Ninth Circuit affirmed the lower court's decision, relying on the holding in *Crooker*: Exemption 2 may be used to shield documents whose disclosure risks circumvention of agency regulation.[56] According to the Ninth Circuit, Exemption 2 was the appropriate vehicle to resist disclosure because the maps and data that Milner sought were "predominantly used for the internal purpose of instructing agency personnel on how to do their jobs."[57] The Supreme Court granted certiorari to reconcile the circuit split on the interpretation and application of Exemption 2.[58]

C. The Opinion

Courts commonly employ the plain meaning rule to interpret statutory language.[59] The theory behind the plain meaning rule is that the statute's meaning is clear from the text itself; no further interpretation is needed.[60] This textualist approach relies heavily on the "apparent plain meaning [of the text] . . . [that] an ordinary speaker of the English language" would understand.[61] Courts often use dictionaries as guides while interpreting the meaning of statutory text.[62] More precisely, courts frequently defer to a well-respected dictionary that was edited at a time close to the enactment of the statute in question.[63] Although various canons of statutory interpretation were used and discussed throughout *Milner*, the Court was

55. *Id.*
56. *Id.*
57. *Id.* (quoting *Milner*, 575 F.3d at 968).
58. *Id.*
59. *See* MICHAEL SINCLAIR, TRADITIONAL TOOLS OF STATUTORY INTERPRETATION 35 (2013).
60. *Id.*
61. William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)).
62. *See generally* Samuel A. Thumma & Jeffrey L. Kirchmeir, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 256 (1999) (describing the Supreme Court's use of dictionaries and noting that "through the 1997–1998 term, the Court cited dictionaries in nearly 180 opinions to define more than 220 terms").
63. *Id.* at 272.

ultimately persuaded by the text of Exemption 2 itself.[64]

Writing for the majority in *Milner*, Justice Kagan emphasized the importance of "the provision's 12 simple words: 'related solely to the internal *personnel* rules and practices of an agency.'"[65] According to the Court, the explicit language of Exemption 2's twelve words limit the application of Exemption 2 to matters involving "personnel rules and practices"—that is to say, anything that relates to an agency's "employee relations and human resources."[66] The Court looked to *Webster's Third New International Dictionary* (1966) and to *Random House Dictionary* (1966) to glean the meaning of *personnel* before referring to either the House or Senate report.[67] In addition, the Court referenced Exemption 6, which protects "*personnel* and medical files" (files that contain information such as performance evaluations, benefits, home address, etc.) from disclosure, to exhibit how the word *personnel* is used in reference to employment matters or human resources.[68] According to the Court, *personnel*, as used in these two exemptions, relates to information that "concern[s] the conditions of employment in federal agencies."[69]

The Court also looked to the D.C. Circuit's decision in *Jordan* and adopted its list of examples of information "concern[ing] the conditions of employment": "matters relating to pay, pensions, vacations, hours of work, lunch hours, parking, etc."[70] In contrast to *Jordan*'s list of examples, the information sought by Milner concerned "data and maps [used to] calculate and visually portray the magnitude of hypothetical detonations" and the possible effects on Indian Island and the surrounding area.[71] The Court was quick to point out that the information Milner sought had nothing to do with conditions of employment.[72] Rather, it "concern[ed] the physical rules governing explosives, not the workplace rules governing sailors."[73] In fact, the Court determined that "[b]y no stretch of imagination [did the data and maps requested] . . . relate to 'personnel rules

64. *See* Milner v. Dep't of the Navy, 562 U.S. 562, 569–80 (2011).
65. *Id.* at 569 (emphasis added) (quoting 5 U.S.C. § 552(b)(2) (2012)).
66. *Id.* at 581.
67. *Id.* at 569.
68. *Id*. at 570 (emphasis added) (quoting § 552(b)(6)).
69. *Id.*
70. *Id.* at 570 (quoting Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc), *abrogated by* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981), *abrogated in part by Milner*, 562 U.S. 562).
71. *Id*. at 572.
72. *Id.*
73. *Id.*

and practices.'"[74] The Court made clear that under Exemption 2 "[a]n agency's 'personnel rules and practices' [only include] its rules and practices dealing with employee relations or human resources,"[75] not "physical rules governing explosives."[76]

The Navy argued for a different interpretation. It first argued that Congress did not exclusively limit the application of Exemption 2 to employment or employee matters because Congress purposefully refrained from including "internal employment rules and practices" in the statute.[77] The Court disagreed; instead, it found that the small amount of legislative history concerning Congress's decision to change the language of Exemption 2 just "as easily supports the inference that Congress merely swapped one synonym for another" and never really intended to give Exemption 2 a broad application.[78] Further, the Court reasoned that the "unexplained disappearance of one word from" the draft of Exemption 2 was a "mute intermediate legislative maneuver[]" and not reliable for determining congressional intent.[79]

Next, the Navy argued for the broader interpretation of Exemption 2—the High 2 interpretation drawn from the House Report and adopted in *Crooker*—that would allow agencies to deny FOIA requests when "disclosure would significantly risk[] circumvention of . . . agency functions."[80] Once again, the Court was not persuaded; it found *Crooker*'s broad interpretation "disconnected from Exemption 2's text."[81] The Court concluded that the plain language of Exemption 2 did not contain any basis for also exempting information that "risk[ed] circumvention of agency regulations or statutes," and it quickly disavowed the Navy's reliance on the House Report.[82] "According to the [H]ouse Report, '[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure [under Exemption 2], but this exemption would not cover . . . employee relations and working conditions

74. *Id.*
75. *Id.* at 570.
76. *Id.* at 572.
77. *Id.* (quoting Brief for the Respondent at 30–34, 34 n.11).
78. *Id.*
79. *Id.* (quoting Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989)).
80. *Id.* at 573 (alteration in original) (quoting Brief for the Respondent, *supra* note 77, at 41).
81. *Id.*
82. *Id.* at 566, 573.

and routine administrative procedures.'"[83] But in stark contrast with the House Report, the Senate Report favored a strict interpretation: that "the phrase 'internal personnel rules and practices of an agency' means 'rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.'"[84] Here, the Court waded into the inter-circuit controversy over the persuasiveness of the House versus the Senate reports and, while it favored the Senate Report, the Court found neither report decisive; instead, it cited the Court's long-standing policy to choose "clear statutory language" over "dueling committee reports."[85]

Continuing its argument for "*Crooker*'s High 2 approach," the Navy argued that the Court should adopt *Crooker*'s interpretation because of Congress's "subsequent legislative action"; after *Crooker* was decided, Congress amended Exemption 7(E) to include the *Crooker* circumvention requirement.[86] Exemption 7(E) was amended to protect from disclosure "law enforcement records whose production 'would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.'"[87] The Navy argued that this amendment was evidence that Congress approved of *Crooker*'s approach because the amendment added *Crooker*'s judicially created Exemption 2 "circumvention of the law standard" to Exemption 7(E).[88]

Again, the Court was unimpressed with the Navy's argument and countered the Navy by pointing out that while Congress was modifying Exemption 7(E), it could have easily modified Exemption 2 to specifically include *Crooker*'s standard as well, yet it chose not to.[89] The Court believed that if Congress truly intended to give Exemption 2 the effect that the *Crooker* court gave it, then Congress "would have had no reason to alter Exemption 7(E) . . . [because] *Crooker* would do the necessary work" to shield such documents from disclosure.[90] Additionally, the Court

83. *Id.* at 573–74 (third alteration in original) (quoting H.R. REP. NO. 89-1497, at 10 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2427).

84. *Id.* at 574 (quoting S. REP. NO. 89-813, at 8 (1965)).

85. *Id.*

86. *Id.* at 574–75 (citing 5 U.S.C. § 552(b)(7)(E) (2012)).

87. *Id.* (quoting § 552(b)(7)(E)).

88. *Id.*

89. *Id.* at 575.

90. *Id.*

explained that if Congress really wanted to ratify *Crooker*'s treatment of Exemption 2, Congress would have amended Exemption 2, rather than Exemption 7(E), to add the risk-of-circumvention standard.[91] The Court concluded that because Congress made no attempt to amend Exemption 2, and instead amended Exemption 7(E), Congress intended for *Crooker*'s circumvention standard to only apply to law enforcement records under Exemption 7(E).[92]

Alternatively, the Navy argued that the statute "encompasse[d] records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental functions."[93] Specifically, the Navy contended that any internal document concerning the rules and practices for an agency's personnel should be shielded from disclosure because Exemption 2's text covers documents concerning internal personnel rules and practices.[94] The Court struck down the Navy's final argument because the Court found that the term *personnel* refers to material "*about* personnel," not documents "*for* personnel."[95] As a result, the Court acknowledged that Milner merely sought documents that "assist[ed the] Navy personnel in storing munitions"; thus, in no way did the documents "relate to 'personnel rules and practices'" as stated in Exemption 2.[96]

Additionally, the Court gave a policy reason for its refusal to follow the Navy's interpretation of Exemption 2.[97] The Court feared that this interpretation "would produce a sweeping exemption" to *all* documents relating to internal rules and practices, and "FOIA would become . . . 'a withholding statute'" and "extend, rather than narrow, the APA's former exemption."[98] Ultimately, this interpretation would essentially negate Congress's reasons for replacing the APA with FOIA in the first place.[99]

Finally, the Court acknowledged the Navy's valid desire to withhold the requested documents in the interest of security; however, it explained that the Navy had alternative methods available to "shield" certain

91. *Id.*
92. *Id.*
93. *Id.* at 577 (quoting Brief for the Respondent, *supra* note 77, at 20).
94. *Id.*
95. *Id.* at 577–78.
96. *Id.*
97. *Id.* at 578–79.
98. *Id.* (quoting EPA v. Mink, 410 U.S. 73, 79 (1973)).
99. *Id*.

documents from disclosure.[100] Indeed, the Court suggested that Exemption 1 would have been a more appropriate vehicle to resist the disclosure of the documents in question.[101] Exemption 1 protects from disclosure matters "specifically authorized . . . to be kept secret in the interest of national defense or foreign policy and are . . . properly classified."[102] The Court also suggested that the Navy could have used Exemption 3 to resist disclosure.[103] Exemption 3 protects documents "specifically exempted from disclosure by [another] statute . . . if that statute" was designed to withhold specified records that reference this exemption.[104] If Congress wanted to allow the Navy to withhold the records in question, the Court pointed out that Congress could have used the provisions of Exemption 3 to specifically authorize the Navy to withhold the records.[105]

Finally, the Court also found that Exemption 7 would have also been more appropriate than Exemption 2 because Exemption 7 "protects 'information compiled for law enforcement purposes.'"[106] Specifically, the Court pointed to Exemption 7(F), which protects records whose disclosure "could reasonably be expected to endanger the life or physical safety of any individual."[107] The Court then reversed the judgment of the court of appeals and remanded the case.[108]

D. The Concurring Opinion

Justice Alito filed a concurring opinion in which he primarily discussed the applicability of Exemption 7.[109] Justice Alito acknowledged that the Navy's Exemption 7 argument was reasonable because the records that Milner requested were used "for the purpose of identifying and addressing security issues."[110] According to Justice Alito, it is not necessary under Exemption 7 for documents to "have been originally 'compiled for law enforcement purposes,'" so long as the information is

100. *Id.* at 580–81.
101. *Id*. at 580.
102. 5 U.S.C. § 552(b)(1)(A)–(B) (2012).
103. *Milner*, 562 U.S. at 581.
104. § 552(b)(3).
105. *Milner*, 562 U.S. at 581.
106. *Id.* (quoting § 552(b)(7)).
107. *Id.* (quoting § 552(b)(7)(E)).
108. *Id.*
109. *Id.* at 582–85 (Alito, J., concurring).
110. *Id.* at 585 (quoting Answering Brief of Appellee at 39, Milner v. Dep't of the Navy, 575 F.3d 959 (9th Cir. 2009) (No. 07-36056)).

at some point in time "given to law enforcement officers for security purposes."[111] Justice Alito interpreted the ordinary meaning of the phrase "law enforcement purposes" to "include[] not just . . . investigation and prosecution of offenses . . . but also proactive steps designed to prevent criminal activity and to maintain security."[112] Thus, Justice Alito recognized that the Navy's use of the documents in question—"[t]he ESQD information"—could be interpreted as information for "identifying and addressing security issues" under Exemption 7(F).[113]

E. The Dissenting Opinion

Justice Breyer filed a dissenting opinion in which he rejected the majority's decision largely because he was hesitant to disturb the thirty years of precedent following *Crooker*.[114] Justice Breyer pointed out that in the three decades since the decision in *Crooker*, every court of appeals that decided an Exemption 2 issue had either "followed or favorably cited" the holding in *Crooker*.[115] In addition, Justice Breyer called attention to the fact that the circuits that had opposed *Crooker* did so "in the 1970's *before Crooker was decided*."[116] In Justice Breyer's view, those circuits had not been consistent with their pre-*Crooker* holdings and since have either supported *Crooker*'s argument or reserved judgment.[117]

Further, Justice Breyer was persuaded by the Navy's argument that Congress ratified *Crooker*'s treatment of Exemption 2 when Congress amended Exemption 7 because it was "well aware of *Crooker*, [and still] left Exemption 2 untouched."[118] To support this argument, Justice Breyer

111. *Id.* at 584 (citing John Doe Agency v. John Doe Corp., 493 U.S. 146, 154–55 (1989)).

112. *Id.* at 582.

113. *Id.* at 585 (quoting Answering Brief of Appellee, *supra* note 110, at 39–40).

114. *Id.* (Breyer, J., dissenting).

115. *Id.*

116. *Id.* at 586.

117. *Id.* ("I read subsequent decisions in two of those Circuits as not adhering to their early positions." (first citing Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1080–81 (6th Cir. 1998); and then citing Saldek v. Densinger, 605 F.2d 899, 902 (5th Cir. 1979), *superseded by statute*, Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207–48 (codified as amended at 5 U.S.C. § 552(b)(7)(E) (2012))). Justice Breyer went on to note that the Eighth Circuit has not directly adopted *Crooker*, but "its district courts understand *Crooker* now to apply." *Id.* (citing Gavin v. SEC, No. 04-4552, 2007 WL 2454156, at *5–6 (D. Minn. Aug. 23, 2007)).

118. *Id.*

invoked "[t]he acquiescence rule[, which] can also support implicit congressional ratification of a uniform line of federal appellate interpretations."[119] In other words, Justice Breyer reasoned that the amendment to Exemption 7(E) after *Crooker* should have been understood as a nod of approval from Congress that the *Crooker* interpretation was valid.[120]

Justice Breyer also offered a solution to the controversy regarding whether the House Report or Senate Report controlled Exemption 2's interpretation and application.[121] Justice Breyer reminded the Court that, while deciding *Crooker*, the D.C. Circuit "held that a document . . . is exempt from disclosure [under Exemption 2] *if* (1) it 'meets the test of "predominant internality,"' *i.e.*, the document is 'not of legitimate public interest,' *and* (2) 'disclosure significantly risks circumvention of agency regulations or statutes.'"[122] In Justice Breyer's view, this "practical approach" to interpreting Exemption 2 is sensible.[123] "FOIA . . . must govern the affairs of a vast Executive Branch with numerous different agencies, bureaus, and departments, performing numerous tasks of many different kinds"; therefore, Justice Breyer argued that interpreting Exemption 2 too narrowly might result in an unsatisfying medium that would serve Congress's intent in some cases and frustrate it in others.[124] He argued that adopting this practical approach to interpreting Exemption 2 would allow the courts to "achieve a 'workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure.'"[125] Both the House and Senate reports, in Justice Breyer's view, emphasized the importance of this workable balance.[126]

Justice Breyer additionally took issue with the majority for failing to explain how the Navy should make the suggested "considerable adjustments" that the majority recognized would necessarily come now

119. *Id.* at 587 (quoting WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 1048 (4th ed. 2007)).

120. *Id.* at 585–86.

121. *Id.* at 587–89.

122. *Id.* at 588 (quoting Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1056, 1074 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562).

123. *Id.* at 589.

124. *Id.*

125. *Id.* (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 157 (1989)).

126. *Id.* (first citing S. REP. NO. 88-1219, at 8, 11 (1964); then citing S. REP. NO. 89-813, at 3, 5 (1965); and then citing H.R. REP. NO. 89-1497, at 10 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2427).

that agencies can no longer rely on *Crooker*'s guidance.[127] Expanding on Justice Alito's concurrence, Justice Breyer explained that if Exemption 7 only applies to documents that are "compiled for law enforcement purposes,"[128] then other information—for example, "building plans, computer passwords, credit card numbers, or safe deposit combinations"—would not be protected from disclosure and could nonetheless lead to "life or physical safety" concerns.[129] Although the Court suggested that the Navy had alternatives available to prevent disclosure of certain documents (e.g., Congress could have changed the language of Exemption 2 or the Navy could have invoked Exemption 3),[130] Justice Breyer argued that: (a) to do either would take a considerable length of time; (b) "both Congress and the President believe the Nation currently faces a problem of . . . too much . . . classified material"; and (c) a busy Congress cannot realistically be expected to take the time to fix a FOIA exemption.[131] Instead, Justice Breyer insisted that the Court should maintain the interpretation that courts have consistently used to translate Exemption 2 for three decades—the *Crooker* interpretation.[132]

IV. CASE ANALYSIS

The Court's reasoning in *Milner* was fundamentally flawed in five ways. First, the Court disregarded both the House Report and the Senate Report.[133] Yet, it insisted on a narrow interpretation of Exemption 2's language based on the analysis in *Jordan*—an analysis that used the Senate Report.[134] Second, the congressional conflict between the House Report and Senate Report can be harmonized.[135] Third, the Court gave too much weight to the dictionary definitions of *personnel*.[136] Fourth, *Crooker* correctly answered the question left open in *Rose*.[137] Finally, Congress

127. *Id.* at 591 ("The majority acknowledges that 'our decision today upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments.'" (quoting *id.* at 580 (majority opinion))).
128. *Id.*
129. *Id.* (quoting 5 U.S.C. § 552(b)(7) (2012)).
130. *Id.* at 581 (majority opinion).
131. *Id.* at 591–92 (Breyer, J., dissenting).
132. *Id.* at 592–93.
133. *Id.* at 574 (majority opinion).
134. *Id.* at 570; *see also* discussion *infra* Section IV.A.
135. *See* discussion *infra* Section IV.B.
136. *See* discussion *infra* Section IV.C.
137. *See* discussion *infra* Section IV.D.

implicitly ratified the *Crooker* approach by amending Exemption 7(E) to include a circumvention provision while refraining from amending the language in Exemption 2 to provide for similar language.[138]

A. The Jordan *Proxy*

In interpreting Exemption 2, the Court relied on *Jordan v. U.S. Department of Justice*.[139] The *Jordan* decision guided the Court's opinion that Exemption 2 was meant only to refer to "rules and practices dealing with employee relations or human resources."[140] In *Jordan*, the pre-*Crooker* D.C. Circuit listed examples of such documents, including "pay, pensions, vacations, hours of work, lunch hours, parking, etc.," which it drew straight from a similar list in the FOIA Senate Report.[141] Although the Court in this case relied on the interpretation in *Jordan*, it refused to follow either the Senate Report or the House Report.[142] This presents a conflict, because while the Court discarded the Senate Report with its list of documents,[143] the Court did rely on the list of examples that the court in *Jordan* developed *from* the Senate Report.[144] For the Court to refuse to use the Senate Report, citing the Court's rule that it will "decline to consult legislative history when that 'history is more conflicting than the text is ambiguous,'" highlights a peculiar inconsistency in the Court's logic.[145] If the Court refused to consult the Senate Report because the conflicting reports made the meaning ambiguous and instead interpreted Exemption 2 based upon a list of examples that the lower court had developed from the Senate Report, then the Court was either mistaken in its interpretation of the statute or has inadvertently violated its own rule of statutory

138. *See* discussion *infra* Section IV.E.

139. *Milner*, 562 U.S. at 570 (quoting Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 763 (D.C. Cir. 1978), *abrogated by* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562).

140. *Id.*

141. *Id.* (quoting *Jordan*, 591 F.2d at 771); *compare Jordan*, 591 F.2d at 771, *with* S. REP. NO. 89-813, at 8 (1965).

142. *See Milner*, 562 U.S. at 569–73.

143. *See id.* at 574; *see also* S. REP. NO. 89-813, at 8 ("Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.").

144. *Milner*, 562 U.S. at 570 (quoting *Jordan*, 591 F.2d at 763).

145. *Id*. at 574 (citing Wong Yang Sung v. McGrath, 339 U.S. 39, 49 (1950), *superseded by statute*, Supplemental Appropriations Act, Pub. L. No. 81-843, 64 Stat. 1044, 1048 (1950)).

interpretation.[146] In other words, rather than grapple with the legislative history in the Senate and House reports to determine the Congress's intent, the Court instead used the *Jordan* list as a proxy for legislative history.[147] By failing to even try and reconcile the two reports, the Court was unable to discover the true intent behind Exemption 2.

B. The Congressional Conflict

Construing *Rose*, the D.C. Circuit in *Crooker* determined that the dispute between the House Report and the Senate Report only pertained to the "exemption of trivial employment matters" and did not conflict at all on the question of whether documents "such as 'manuals of procedure for Government investigators or examiners'" should be shielded from disclosure.[148] The court noted that "supporters of [the bill] were not challenged in their claim that government investigatory manuals were protected under Exemption 2."[149] In fact, in its decision to use the High 2 interpretation, the court expressed that it was "loathe to construe the statute in a way contrary to the express feelings of one house, on a point on which the other house made no comment."[150] "The House Report explained [that] . . . '[a]n agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures . . . .'"[151] This seems to indicate that the Senate and the House actually agreed that documents outside of employment issues should be guarded from disclosure.

The absence of a conflict between the two houses of Congress on the inclusion of these documents in Exemption 2—including internal investigatory manuals, auditing manuals, inspection procedures, etc.—indicates that both the House and the Senate agreed that Exemption 2 would shield these types of documents.[152] If this is true, then the

146. *Id.* at 570, 574.

147. *Id.*

148. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1061 (D.C. Cir. 1981) (en banc) (quoting H.R. REP. NO. 89-1497, at 10 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2425) (citing Dep't of the Air Force v. Rose, 425 U.S. 352, 366–67 (1976)), *abrogated in part by Milner*, 562 U.S. 562.

149. *Id.*

150. *Id.*

151. *Id.* at 1063 (quoting H.R. REP. NO. 89-1497, at 7).

152. *See id.* (reviewing the Senate and House reports and recognizing "Congress' deep concern that manuals setting forth guidelines for auditing or inspection procedures should not be released to the public").

information Milner requested, which included the Navy's maps and data used to train employees to store explosives, would also seem to fit this uncontested description of documents that both the House and the Senate agreed should be shielded from disclosure.[153] Indeed, the Court in *Milner* even conceded that the "explosives data and maps . . . no doubt assist[] Navy personnel in storing munitions," and the Navy obviously used the maps and data to investigate the effects of various hypothetical explosions.[154] Thus, the Court in *Milner* should have relied on the available legislative history, which properly illustrates that Congress intended to shield from disclosure information such as the ESQD information used for training Navy personnel.

Moreover, the Court's interpretation of Exemption 2 clashes with the statute as a whole. The Court refused to find a risk-of-circumvention provision in Exemption 2 because it claimed "[its] reading . . . g[ave] the exemption the 'narrower reach' Congress intended," which limited Exemption 2 to matters relating to employee relations and human resources.[155] How can the Court claim that its "narrowe[d]" interpretation of Exemption 2 is in line with congressional intent when Congress created no fewer than nine specific exemptions within FOIA?[156] Beyond this, several other exemptions are quite broad in nature.[157] For example, Exemption 1 allows the president of the United States to shield virtually anything by issuing an executive order classifying a particular document,

153. Milner v. Dep't of the Navy, 562 U.S. 562, 587 (Breyer, J., dissenting) (citing *Crooker*, 670 F.2d at 1056–57). *But see id.* at 574 n.6 (majority opinion).

154. *Id.* at 578.

155. *Id.* at 572 (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 363 (1976)).

156. *See* 5 U.S.C. § 552(b) (2012).

157. *See id.*; Hunton & Williams v. U.S. Dep't of Justice, 590 F.3d 272, 277 (4th Cir. 2010) ("Although FOIA establishes a broad policy of transparency, its commitment to that policy is not unlimited. The Act acknowledges that 'public disclosure is not always in the public interest.' FOIA's nine specified exemptions reflect a wide array of concerns . . . ." (quoting Baldrige v. Shapiro, 455 U.S. 345, 352 (1982))); Williams & Connolly, L.L.P. v. Office of the Comptroller of the Currency, 39 F. Supp. 3d 82, 90 (D.D.C. 2014) (recognizing that while FOIA exemptions are "generally . . . 'narrowly construed,'" "Congress accorded Exemption 8" a "broad scope" (quoting Consumers Union of U.S., Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978)); Jordan v. U.S. Dep't of Justice, No. 07–cv–02303–REB–KLM, 2009 WL 2913223, at *10 (D. Colo. Sept. 8, 2009) ("Despite the general policy of narrowly construing FOIA's exemptions, the statutory language of Exemption 7(F) urges broad application to a wide range of individuals."). *But see Milner*, 562 U.S. at 571 ("We have often noted 'the Act's goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass.'" (quoting Dep't of Justice v. Tax Analysis, 492 U.S. 136, 151 (1989))).

so long as the president can show that the document in question should "be kept secret in the interest of national defense or foreign policy."[158] Exemption 7 contains six distinct sub-exemptions, ranging from documents whose disclosure could potentially "deprive a person of a right to a fair trial" to documents whose disclosure "could reasonably be expected to endanger the life or physical safety of any individual."[159] Exemption 6 protects from disclosure all matters that a government agency defines as "personnel[,] . . . medical[,] . . . [or] similar files" whose disclosure "would constitute a clearly unwarranted invasion of personal privacy."[160] This exemption now seems redundant considering the Court's interpretation of the word *personnel* in Exemption 2.[161]

C. The Dubious Dictionary

The Court's insistence on a narrow interpretation of Exemption 2's language was also flawed due to the method the Court used to define *personnel*.[162] Following established statutory interpretation doctrine, the Court's analysis of "Exemption 2's scope start[ed] with its text."[163] It looked to the ordinary meaning of the language used in the statute and assumed that this meaning was what Congress intended.[164] But to discover the ordinary meaning of the term *personnel*, as used in Exemption 2, the Court consulted *Webster's Third New International Dictionary* (1966) and *Random House Dictionary* (1966).[165] This method is unsound. As a matter

158. 5 U.S.C. § 551(b)(1)(A); *see also* Barbara B. Altera & Richard S. Pakola, *All the Information the Security of the Nation Permits: Information Law and the Dissemination of Air Force Environmental Documents*, 48 A.F. L. REV. 1, 6 (2006) ("[T]he test for Exemption 1 coverage is simply whether the President has determined by Executive Order that particular documents are to be kept secret, thus providing a broad basis to withhold documents from release." (footnote omitted)).

159. 5 U.S.C. § 551(b)(7)(B)–(F); *see also Jordan*, 2009 WL 2913223, at *10 (describing wide applicability of Exemption 7(E)).

160. 5 U.S.C. § 551(b)(6).

161. *See id.*

162. *Milner*, 562 U.S. at 569–71.

163. *Id.* at 569 ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting Park'N Fly v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).

164. *Id.*

165. *Id.* (first citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1687 (Philip Babcock Gove ed., 1966); and then citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1075 (Jess Stein ed., 1966)).

of policy, the interpretation of a hotly contested word or phrase that determines the applicability of a statute with such monumental importance should not be left to the entries of two dictionaries because "even slight definitional variations can have a significant impact on how a case is decided."[166]

Further, when a court uses a definition from a common dictionary to give meaning to a text that the legislature has duly enacted, it calls into question the idea that judges are not to be lawmakers. This is critical because a case can turn on an arbitrarily selected definition from a nonlegal source and effectively alter the statute in question by changing its meaning; this can even create a new law that extends beyond what the drafters actually intended.[167]

What group knows better about the true meaning of a law than those who drafted and enacted it? Consider an example to demonstrate this point drawn from a hypothetical that Professor Andrei Marmor developed in his book *Interpretation and Legal Theory*.[168] Suppose a patient travels to a pharmacy to fill his prescription after seeking treatment from his doctor for an ear infection.[169] When the patient arrives at the pharmacy with a prescription in hand the pharmacist realizes "that the doctor's medical prescription is ambiguous, as there happen to be two different medicines which fit it."[170] Should the pharmacist rely on what the patient thinks the prescription says and risk a deadly drug interaction, or should the pharmacist call the doctor who wrote the prescription to discover what it really says? The obvious answer is that the pharmacist should call the doctor who originally prescribed the medication.[171] Statutory interpretation should work the same way. There is no reason for courts to interpret a law by supplanting a dictionary definition for that of the drafters'—especially when the drafters are intimately involved in the

166. Thumma & Kirchmieir, *supra* note 62, at 269; *see also* Smith v. United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) ("The Court begins its analysis by focusing upon the word 'use' in this passage, and explaining that the dictionary definitions of that word are very broad. It is, however, a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" (citation omitted) (quoting Deal v. United States, 508 U.S. 129, 132 (1993))).

167. *Cf. id.* at 291 ("[W]ith some frequency, both the majority and the dissent have relied on dictionaries to support diametrically opposed conclusions.").

168. ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY (1992).

169. *Id.* at 178.

170. *Id.*

171. *See id.* at 178–79.

process of creating the law.[172]

A much more effective approach would have been to recognize that the House and Senate created Exemption 2 as a "group engaged in coordinated purposive action, in which the group relies on the guidance and judgment of committees and ratifies their publicly presented understanding."[173] While the House and Senate reports used different interpretations of the word *personnel* within Exemption 2, their respective lists of what Exemption 2 would cover do not conflict and are reconcilable.[174] Again, the Court should have integrated the House and Senate Reports to stay true to the notion that the combined wisdom of both the House and the Senate committees created a cohesive final product that protected both High 2 and Low 2 interpretations.[175] This would have ultimately preserved three decades of stability, rather than create a new law with a dictionary.

D. Rose*'s Open Question*

In its examination of *Rose*, the Court acknowledged the question that *Rose* left open—whether Exemption 2 implicitly contains a risk-of-circumvention requirement.[176] The Court answered this question by abrogating *Crooker* and applying a narrow reading of the statute that eliminated the existence of a High 2 interpretation.[177] Because *Crooker* had abrogated the D.C. Circuit's prior decision in *Jordan*, the Court in *Milner* effectively revived *Jordan*[178] when it adopted *Jordan*'s finding that *personnel* only encompasses "matters relating to pay, pensions, vacations, hours of work, lunch hours, parking, etc."[179] However, both the Court in *Milner* and the D.C. Circuit in *Jordan* overlooked the meaning of *etc.* in *Jordan*'s list of documents that fall under *personnel* in Exemption 2.[180]

172. *See id.* at 179.

173. WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION 592 (5th ed. 2014).

174. *See supra* notes 148–54 and accompanying text.

175. *Id.*

176. Milner v. Dep't of the Navy, 562 U.S. 562, 565–66 (2011) (discussing Dep't of the Air Force v. Rose, 425 U.S. 352 (1976)).

177. *Id.* at 571.

178. *Cf.* ACLU v. Dep't of Justice, 70 F. Supp. 3d 1018, 1028 & n.3 (N.D. Cal. 2014) (following *Jordan* and discussing how *Crooker* overruled *Jordan* but was itself abrogated by *Milner*), *argued*, No. 14-17339 (9th Cir. Dec. 16, 2016).

179. *Milner*, 562 U.S. at 570 (quoting *Jordan*, 591 F.2d at 763).

180. *Id.* at 570–71.

The Court acknowledged that this "'etc.' [was] important[and] doubt[ed] any court could know enough about the Federal Government's operations to formulate a comprehensive list."[181] In a way, recognizing that the documents and information shielded by Exemption 2 are too numerous to list seems to contradict the majority's own insistence on a narrow interpretation of Exemption 2.[182] Despite the use of *etc.* in the list—an abbreviation used to indicate that there is more than what is stated—the Court effectively decided to limit Exemption 2's applicability to only the examples explicitly listed in *Jordan*.[183] In *Crooker*, the court had merely added instructional manuals to the list of examples that it created in *Jordan*.[184] If the Supreme Court agreed with the reasoning employed in *Jordan* and recognized that there are too many governmental activities under Exemption 2 to explicitly list, then it seems incongruous for the Court to conclude that Exemption 2 only covers documents that "concern the conditions of employment in federal agencies" and simultaneously strike down the inclusion of instructional manuals.[185]

Manuals that instruct employees, such as the manuals on the proper conduct for an investigation as discussed in *Caplan v. Bureau of Alcohol, Tobacco & Firearms*,[186] and similar rules "*for* personnel," have as much to do with an employee's employment as other instructions, including where to park, how much time employees can take off for lunch, and how loudly employees can talk in the hallway.[187] The Court in *Milner* explained that the examples given in *Jordan* "concern conditions of employment in federal agencies," yet it concluded that the information Milner requested, which included "rules governing explosives . . . [and instructions on] the handling of dangerous materials" for Navy personnel, did not fit in this category.[188] The Court's reasoning seems to contradict its decision because a Navy employee's compliance with these rules and information that

181. *Id.* at 570.

182. *Id.*

183. *See id.*

184. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1053 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562.

185. *Milner*, 562 U.S. at 570.

186. Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 545–46 (2d Cir. 1978) (holding that an ATF manual describing the equipment, methods, and techniques of performing raids was exempt under Exemption 2 because it might "risk circumvention of agency regulation").

187. *See Milner*, 562 U.S. at 577–78 (quoting Brief for the Respondent, *supra* note 77, at 20).

188. *Id.* at 570–72.

instruct sailors how to safely store and handle explosives can quite reasonably be considered "conditions of employment in [a] federal agenc[y]."[189] Failing to follow the safety protocols and risking the detonations hypothesized by the Navy's maps and data could violate a Navy employee's conditions of employment.[190] In an effort to ensure its employees handled explosive material safely, the Navy likely spent a considerable amount of time and money training its employees to use these hypothetical-explosion models,[191] and due to the imaginable consequences, a sailor who violated these procedures would likely be terminated, if not court-martialed. Thus, this information could and should have been considered a condition of employment and should have fallen within Exemption 2.

E. Crooker*'s Implicit Ratification*

If Congress had really desired to save Exemption 2 from *Crooker*'s interpretation, it would have amended Exemption 2 to explicitly limit its scope to include only basic employee and human resources matters.[192] Instead, Congress liked the *Crooker* risk-of-circumvention exemption so much that Congress wrote it into Exemption 7(E).[193] When Congress modified Exemption 7(E) in 1986, *Crooker* had already abrogated *Jordan*'s conclusion that Exemption 2 did not contain an implicit risk-of-circumvention provision.[194] Thus, when Congress amended Exemption 7(E), the only place where it could have acquired the language to add a risk-of-circumvention provision to Exemption 7(E) was from *Crooker*.[195]

189. *Id.*

190. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 224 & cmt. e (AM. LAW INST. 1981) (defining *condition*); *id.* § 230 (discussing a *condition subsequent* or "[e]vent that [t]erminates a [d]uty").

191. *Cf. Milner*, 562 U.S. at 568 (describing how the Navy uses the ESQD information).

192. *Id.* at 586–87 (Breyer, J., dissenting); *id.* at 587 ("[T]he acquiescence rule can also support implicit congressional ratification of a uniform line of federal appellate interpretations . . . ." (alteration in original) (quoting ESKRIDGE ET AL., *supra* note 119, at 1048)).

193. *Id.* at 567 (majority opinion); Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to -49 (codified as amended at 5 U.S.C. 552(b)(7)(E) (2012)).

194. § 1801, 100 Stat. at 3207-48 to -49; Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074–75 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562.

195. *Milner*, 562 U.S. at 567.

Indeed, the Senate Report on the Freedom of Information Reform Act of 1986 said as much:

> This is intended to address some confusion created by the D.C. Circuit's en banc holding in *Jordan v. U.S. Dept. of Justice* denying protection for prosecutorial discretion guidelines under the (b)(2) exemption. . . . In so doing, the Committee was guided by the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision in *Crooker v. BATF*.[196]

From this, it is apparent that Congress was aware of how *Crooker* had interpreted Exemption 2 and approved of it.[197]

Without any acknowledgment of the Senate Report cited above, the Court in *Milner* suggested that because Congress only amended Exemption 7(E), it did not "agree[] with *Crooker*'s reading of Exemption 2."[198] One reason it gave for this was that "[w]e cannot think of any document eligible for withholding under Exemption 7(E) that the High 2 reading does not capture: The circumvention standard is the same."[199] But Justice Breyer correctly pointed out that not all documents or information that would risk circumvention of agency regulations relate to law enforcement matters.[200] "[B]uilding plans, computer passwords, credit card numbers, . . . safe deposit combinations"[201] and information with a similar "sensitivity"[202] could be fair game under the majority's reading of Exemption 2.[203] This type of information could risk the circumvention of agency regulation if disclosed to the public, but it is not shielded under Exemption 7 because this information does not pertain to law enforcement

196. S. REP. NO. 98-221, at 25 (1983) (citation omitted); *see also* 132 CONG. REC. 29620 (Oct. 8, 1986) (statement of Rep. Kindness) (quoting favorably the Senate Report and its discussion of *Crooker* (citing S. REP. NO. 98-221, at 25)); 131 CONG. REC. 252 (Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General) (discussing proposed amendments to Exemption 7(E) and citing *Crooker* favorably). Senator Hatch introduced Deputy Attorney General Dinkins's statement "[t]o provide more information about the intent of this bill." *Id.* at 247.

197. *See supra* note 196; *Milner*, 562 U.S. at 586–87 (Breyer, J., dissenting).

198. *Milner*, 562 U.S. at 575 (majority opinion).

199. *Id.*

200. *Id.* at 591 (Breyer, J., dissenting).

201. *Id.* at 588.

202. 131 CONG. REC. 244 (1985) (statement of Sen. Hatch) (referring to the "sensitivity" of information that some courts have occasionally failed to recognize under Exemption 2).

203. *Milner*, 562 U.S. at 591.

matters.[204]

Under the Court's logic, documents and information that do not pertain to law-enforcement matters but whose disclosure would risk the circumvention of agency regulation would be disclosed.[205] It is more likely that Congress intended to let the *Crooker* analysis shield these documents from disclosure under Exemption 2 and then amended Exemption 7(E) to protect those documents that pertain to law enforcement.[206] The Court should have inferred that Congress likely amended Exemption 7(E) with *Crooker*'s risk-of-circumvention provision because *Crooker* had already correctly interpreted Exemption 2, whereas no court had done so for Exemption 7(E).[207]

Moreover, the federal government has not finished with *Milner*. On April 28, 2015, Senator John McCain introduced a bill that included two exemptions to FOIA in the 2016 National Defense Authorization Act that directly responded to defense concerns after *Milner*.[208] One exemption would have shielded "military tactics, techniques, and procedures."[209] The other exemption would have protected documents "predominantly internal to an agency, but only to the extent that disclosure could reasonably be expected to risk impairment of the effective operation of an agency or circumvention of statute or regulation."[210] While ultimately Congress did not adopt either of the proposed amendments to FOIA, it declined to do so for jurisdictional reasons unrelated to the specific language included in the exemptions.[211]

V. CONCLUSION

In *Milner*, the Court concluded that *personnel*—as used in Exemption 2 of FOIA—was meant to refer only to "human resources matters . . . [not] the requested maps and data."[212] In arriving at this conclusion, the Court

204. *Id.*
205. *See id.* at 575, 581 (majority opinion).
206. *See supra* text accompanying notes 196–97.
207. *See supra* text accompanying notes 196–97.
208. S. 1118, 114th Cong. §§ 1046–1047 (2015).
209. *Id.* at § 1047.
210. *Id.* at § 1046.
211. Steven Aftergood, *DoD Seeks FOIA Exemption for Military Doctrine*, FED'N AM. SCIENTISTS: SECRECY NEWS (Jan. 6, 2016), https://fas.org/blogs/secrecy/2016/01/dod-foia-doctrine/ [https://perma.cc/HZY3-WCHQ].
212. Milner v. Dep't of the Navy, 562 U.S. 562, 572–73 (2011).

refused to follow either the House Report or the Senate Report because the plain meaning of the statute was clear on its face.[213] Rejecting the House and the Senate reports weakened the Court's argument that Exemption 2 was only meant to cover routine matters such as "pay, pensions, vacations, hours of work, lunch hours, parking, etc."[214] By using this list of examples, the Court indirectly relied upon the Senate Report that it had refused to consult, creating an inconsistency in the Court's logic.

Further, the Court's use of a dictionary to discover the ordinary meaning of the word *personnel*, rather than relying on the statute's legislative history, supplants the wisdom of the editors of *Webster's Dictionary* for that of Congress. Finally, the Court's rejection of the argument that *Crooker*'s treatment of Exemption 2 was ratified by Congress when it amended Exemption 7(E) five years after *Crooker* was decided goes against reason. If *Crooker*'s treatment of Exemption 2 was indeed contrary to the intent of Congress, Congress could have amended Exemption 2's twelve-word sentence to stop what would become three decades of abuse. Instead, Congress expanded *Crooker*'s influence.

While the Court was certainly noble to protect the citizenry's right to know about the activities of the federal government, its interpretation of Exemption 2 needlessly disrupted thirty years of established case law concerning the application of Exemption 2 and severely risked the safety of a U.S. Navy installation in the process. The Court's interpretation of Exemption 2 and the surrounding case law failed to uncover the full scope of Exemption 2 and transformed a guardian of government efficiency into a defender of parking regulations.

213. *Id.* at 573–74.

214. *Id.* at 570 (quoting Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc), *abrogated by* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), *abrogated in part by Milner*, 562 U.S. 562).