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The Taming of the "2": *Milner v. Department of the Navy* Signals the Curtain Call on Debates Surrounding the Scope of FOIA's Exemption 2

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> "Old fashions please me best; I am not so nice / To change true rules for odd inventions."[1]
>
> – William Shakespeare

I. INTRODUCTION

For more than three decades, federal courts have grappled with the intended scope of Exemption 2 of the Freedom of Information Act (FOIA),[2] which protects material "related solely to the internal personnel rules and practices of an agency" from mandatory public disclosure.[3] However, in *Milner v. Department of the Navy*,[4] the United States

1. WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act 3, sc. 1.
2. 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.
3. *Id.* § 552(b)(2).
4. 131 S. Ct. 1259 (2011) (abrogating Massey v. FBI, 3 F.3d 620 (2d Cir. 1993); Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir. 1992); Kaganove v. EPA, 856 F.2d 884 (7th Cir. 1988);

Supreme Court put an end to all conflicting postulations regarding the precise boundaries of Exemption 2 by holding that military explosive distance data does not qualify for agency withholding under the exemption.[5] In its opinion, the Court declared that Exemption 2 encompasses records relating to employee relations and human resource issues but does not extend to more substantial internal matters whose disclosure would risk circumvention of the law.[6] As a result of the Court's strict construction of the text of the exemption, *Milner* will likely have a significant impact on federal agencies that previously relied on Exemption 2 to withhold sensitive information not explicitly protected by one of the FOIA's other existing statutory exemptions.[7]

II. FACTUAL BACKGROUND

The story of *Milner v. Department of the Navy*[8] begins in Puget Sound, Washington, where the United States Navy maintains Naval Magazine Indian Island (Indian Island). The Navy uses Indian Island to store and transport weapons, ammunition, and explosives.[9] To aid in its operations on the island, the Navy utilizes Explosive Safety Quantity Distance (ESQD) information that prescribes "minimum separation distances" for explosives.[10] ESQD information allows the Navy to organize facilities in a manner that would prevent chain reactions in the event of a detonation. ESQD information is also occasionally employed to illustrate the hypothetical effects of an explosion on the island.[11]

In 2003 and 2004, Glen Milner, a resident of Puget Sound, submitted FOIA[12] requests to obtain ESQD information concerning Indian Island.[13] Invoking FOIA's Exemption 2[14] and Exemption 7,[15] the

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Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981)).

5. *Id.* at 1271.

6. *Id.*

7. *See id.* (acknowledging that its decision "upsets three decades of agency practice relying on [a broad interpretation of Exemption 2] and therefore may force considerable adjustments").

8. 131 S. Ct. 1259 (2011).

9. *Id.* at 1263.

10. *Id.* (internal quotation marks omitted).

11. *Id.*

12. 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

13. Milner, 131 S. Ct. at 1264.

14. 5 U.S.C. § 552(b)(2).

15. *Id.* § 552(b)(7)(F). Specifically, the Navy invoked Exemption 7(F), *Milner*, 131 S. Ct. at 1264, which protects from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such . . . records

Navy denied Milner's request and refused to release the information, declaring that disclosure of ESQD calculations would endanger both the naval base and the surrounding community.[16] Milner subsequently filed a suit in the United States District Court for the Western District of Washington to compel disclosure of the ESQD information.[17] The district court granted summary judgment in favor of the Navy under Exemption 2 without addressing the question of whether the documents could also be exempt under Exemption 7.[18]

The United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment.[19] Relying on the "High 2"[20] interpretation of Exemption 2, developed by the United States Court of Appeals for the D.C. Circuit in *Crooker v. Bureau of Alcohol, Tobacco & Firearms,*[21] the Ninth Circuit held that personnel documents may be withheld when the materials are predominantly internal and disclosure presents a risk of circumvention of agency regulation.[22] After determining that the ESQD information "is predominately used for the internal purpose of instructing agency personnel on how to do their jobs"[23] and that disclosure "would risk circumvention of the law" by "point[ing] out the best targets for those bent of wreaking havoc,"[24] the court of appeals ultimately concluded that the ESQD information was exempt from disclosure.[25]

The United States Supreme Court granted certiorari to resolve a circuit split regarding the scope of Exemption 2.[26] Adopting a narrow view of Exemption 2, the Court held that ESQD information may not be withheld as material "related solely to the internal personnel rules and practices of an agency"[27] because the information concerns neither employee relations nor human resources issues.[28] In an 8-1 ruling, the

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. . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F).

16. *Milner,* 131 S. Ct. at 1264.

17. Milner v. U.S. Dep't of the Navy, No. C06-01301-JCC, 2007 WL 3228049, at *1-2 (W.D. Wash. Oct. 30, 2007), *rev'd*, 131 S. Ct. 1259.

18. *Id.* at *8.

19. Milner v. U.S. Dep't of the Navy, 575 F.3d 959, 961, 972 (9th Cir. 2009).

20. *See infra* text accompanying notes 65-66.

21. 670 F.2d 1051 (1981), *abrogated by Milner*, 131 S. Ct. 1259.

22. *Milner*, 575 F.3d at 968.

23. *Id.*

24. *Id.* at 971.

25. *Id.* at 972.

26. *Milner,* 131 S. Ct. at 1264.

27. 5 U.S.C. § 552(b)(2).

28. *Milner,* 131 S. Ct. at 1271.

Court reversed the judgment of the court of appeals and remanded the case for further proceedings.[29]

III. LEGAL BACKGROUND

A. The Freedom of Information Act

Initially enacted in 1966, the Freedom of Information Act (FOIA)[30] provides that all citizens have a judicially-enforceable right to access federal agency records unless those records are protected from public disclosure by one of nine statutory exemptions.[31] At issue in *Milner v. Department of the Navy*[32] is FOIA's Exemption 2,[33] which insulates from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency."[34] Over the years, the scope of this exemption has become the source of much debate: some courts have interpreted the exemption's language broadly, while others have taken a more narrow approach.[35]

A great deal of the discussion surrounding the intended scope of these twelve words can be traced back to the legislative history of FOIA. Much confusion has arisen from the fact that the House[36] and Senate[37] reports, which accompanied the ratified act, differed significantly in their proffered illustrations of the types of information that Exemp-

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29. *Id.*

30. 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

31. *Id.*

32. 131 S. Ct. 1259 (2011).

33. 5 U.S.C. § 552(b)(2).

34. *Id.*

35. *Compare* Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993) (stating that Exemption 2 extends to information concerning "those rules and practices that affect the internal workings of an agency") (internal quotation marks omitted), Kaganove v. EPA, 856 F.2d 884 (7th Cir. 1988) (exempting the EPA Rating Plan from mandatory disclosure where an employer would reasonably expect the document to be internal and disclosure would frustrate the document's objective) *and* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (holding that "if a document for which disclosure is sought meets the test of 'predominant internality,' and if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure"), *with* Cox v. Levi, 592 F.2d 460, 462-63 (8th Cir. 1979) (declaring that Exemption 2 protects only "housekeeping" matters); *and* Hawkes v. Internal Revenue Serv., 467 F.2d 787, 797 (6th Cir. 1972) (stating that the plain language of Exemption 2 relates only to "employee-employer type concerns").

36. H. REP. NO. 89-1497 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418.

37. S. REP. NO. 89-813 (1965).

tion 2 would be employed to protect.[38] While the Senate Report declared that "[e]xamples of [internal personnel rules and practices of an agency] 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,"[39] the House Report proffered a significantly different interpretation of the exemption's intended coverage. According to the House Report, Exemption 2 would cover "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners" but would not extend to "all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures."[40] Because Congress never reconciled the conflicting reports, the judiciary was left with the arduous task of interpreting the reach of Exemption 2's protection.

B. Rose and the Caveat Conundrum

The Supreme Court's first opportunity to evaluate the scope of Exemption 2 and its conflicting legislative history came in 1976 with *Department of the Air Force v. Rose*.[41] In *Rose*, present and former student law review editors brought an action under FOIA to compel disclosure of case summaries from honor and ethics hearings at the United States Air Force Academy.[42] The United States District Court for the Southern District of New York granted the Air Force's motion for summary judgment, holding that the case summaries "related solely to the internal personnel rules and practices of an agency"[43] and were, therefore, shielded from mandatory disclosure by Exemption 2.[44] The United States Court of Appeals for the Second Circuit reversed, and the United States Supreme Court granted certiorari.[45] In a 5-3 opinion

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> The Senate Report expressly states that documents concerning minor matters of employment-like sick leave policy-are exempt from disclosure, whereas the House Report indicates that such matters should be released. The so-called contradiction between the House and Senate Reports, however, exists only with respect to the exemption of trivial employment matters. The House Report's statement that Exemption 2 permits exemption of more substantive matters–such as 'manuals of procedure for Government investigators or examiners'–is uncontroverted by the Senate Report.

Crooker, 670 F.2d at 1061.

39. S. REP. NO. 89-813, *quoted in Crooker*, 670 F.2d at 1059.
40. H. REP. NO. 89-1497, *reprinted in* 1966 U.S.C.C.A.N. at 2427.
41. 425 U.S. 352 (1976).
42. *Id.* at 354-55.
43. *Id.* at 357; 5 U.S.C. § 552(b)(2).
44. *Rose*, 425 U.S. at 356-57.
45. *Id.* at 357-58.

delivered by Justice Brennan, the Court affirmed the decision of the Second Circuit, holding that the requested documents were not exempt from mandatory disclosure because they did not concern only routine matters of merely internal significance and their disclosure would not impose any particular administrative burden on the Air Force.[46]

After briefly discussing the basic purpose of FOIA,[47] the Court dove into Exemption 2's legislative history.[48] In its analysis, the Court noted that most courts considering the discrepancies between the House and Senate Reports have concluded that the Senate Report more accurately reflects congressional intention.[49] Observing that the House Report primarily focused on exempting disclosures that might enable regulated personnel to circumvent agency regulation[50] and reiterating the Second Circuit's determination that this was not a case in which knowledge of administrative procedures might help outsiders to circumvent regulations or standards,[51] the Court found the Senate Report to be more authoritative.[52]

Relying on the narrow approach of the Senate Report, the Court interpreted Exemption 2 to protect internal agency matters so routine or trivial that they could not be subject to a genuine and significant public interest.[53] The Court further declared that the general thrust of Exemption 2 is to relieve agencies of the burden of assembling and maintaining such information for public inspection.[54] However, the Court's interpretation of Exemption 2's intended coverage carried an important caveat: the Court's understanding of the exemption's scope would govern "at least where the situation is not one where disclosure

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46. *Id.* at 369-70.

47. "The basic purpose of FOIA is 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." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). Thus, FOIA reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Rose*, 425 U.S. at 360-61; S. Rep. No. 89-813.

48. *Rose*, 425 U.S. at 360-67.

49. *Id.* at 363 (citing Stokes v. Brennan, 476 F.2d 699, 703 (5th Cir. 1973); *Hawkes*, 467 F.2d at 796; Stern v. Richardson, 367 F. Supp. 1316, 1320 (D.C. Cir. 1973); Consumers Union of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 801 (S.D.N.Y. 1969); Benson v. GSA, 289 F. Supp. 590, 595 (W.D. Wash. 1968)) ("Almost all courts that have considered the difference between the Reports have concluded that the Senate Report more accurately reflects the congressional purpose.").

50. *Id.* at 366-67.

51. *Id.* at 364.

52. *Id.* at 367.

53. *Id.* at 369-70.

54. *Id.*

may risk circumvention of agency regulation."[55] Thus, the Court explicitly left open the question of whether Exemption 2 applies to situations where disclosure may risk circumvention of agency regulation and, more importantly, the possibility for future application of the House Report's interpretation of the exemption.

C. *The United States Supreme Court's (Not So Brief) Intermission*

While the Supreme Court's ruling in *Rose* began to define the contours of Exemption 2, the decision did not dispel all confusion, and it would be thirty-five years before the Court would have another opportunity to address the exemption's intended scope. Even before the Court's decision in *Rose*, some circuits had determined that Exemption 2 protects only internal matters of a relatively trivial nature.[56] However, relying on the *Rose* caveat, other circuits began applying Exemption 2 to more substantial internal matters when disclosure would risk circumvention of agency regulations.[57]

Five years after *Rose*, the United States Court of Appeals for the District of Columbia decided what would become the leading case on the broadened interpretation of Exemption 2's coverage. In *Crooker v. Bureau of Alcohol, Tobacco & Firearms*,[58] the D.C. Circuit extensively analyzed Exemption 2, examining the overall design of FOIA, its legislative history, the Supreme Court's cautionary words in *Rose*, and even "common sense," in order to determine the scope of the exemption.[59] Ultimately, the court of appeals determined that if an agency record is "predominately internal[]" and its disclosure "significantly risks circumvention of agency regulations or statutes," then Exemption 2 protects the material from mandatory disclosure.[60]

In the years that followed, at least three additional United States Courts of Appeals subsequently adopted the *Crooker* interpretation of Exemption 2.[61] While these circuits broadly applied Exemption 2, other circuits strictly construed the Exemption to protect only human resource

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55. *Id.* at 369. The "circumvention of agency regulation" language appears to be primarily concerned with whether public disclosure of requested information would allow individuals to thwart agency regulations. *See Id.* at 364.

56. *See, e.g., Stokes,* 476 F.2d 699; *Hawkes,* 467 F.2d 787.

57. *See, e.g., Kaganove,* 856 F.2d 884; *Crooker*, 670 F.2d 1051; Hardy v. BATF, 631 F.2d 653 (9th Cir. 1980); Caplan v. BATF, 587 F.2d 544 (2d Cir. 1978).

58. 670 F.2d 1051 (D.C. Cir. 1981).

59. *Id.* at 1074.

60. *Id.*

61. *See* Milner v. U.S. Dep't of the Navy, 575 F.3d 959, 968 (9th Cir. 2009); *Massey*, 3 F.3d at 623; *Kaganove,* 856 F.2d at 888-89.

and employee relations matters from mandatory disclosure.[62] Considering the two alternative interpretations of Exemption 2, a different name developed for each interpretation. The term "Low 2" was coined to describe the strict construction of Exemption 2; namely, as applying to human resource and employee relations materials.[63] Thus, "Low 2" is used to protect internal matters of a relatively trivial nature from public disclosure.[64] The term "High 2," on the other hand, was coined to describe the broadened construction of Exemption 2; namely, as applying to materials that are predominantly internal and whose disclosure would risk circumvention of agency regulation.[65] Thus, "High 2" is primarily concerned that FOIA disclosures not "benefit those attempting to violate the law and avoid detection." [66]

More than three decades after its decision in *Rose*, the Supreme Court was summoned to determine the validity of the broadened "High 2" interpretation of Exemption 2. In *Milner v. Department of the Navy*,[67] the Court would finally put to rest the controversy surrounding the scope of FOIA's Exemption 2.

IV. COURT'S RATIONALE

A. *Justice Kagan–The Majority*

Justice Kagan's majority opinion in *Milner v. Department of the Navy*[68] can be divided into three distinct parts. First, the Court firmly established the scope of Exemption 2 of the Freedom of Information Act (FOIA)[69] by looking to its statutory language.[70] Next, the Court addressed and rejected the Navy's proffered alternative readings of Exemption 2.[71] Finally, recognizing the strength of the Navy's interest in protecting certain types of information, the Court emphasized the existence of various other exemptions the Navy may employ to achieve its goals of nondisclosure.[72]

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62. *See Cox*, 592 F.2d at 462-63; *Hawkes*, 467 F.2d at 797.
63. *Milner*, 131 S. Ct. at 1263.
64. *See, e.g.*, *Rose*, 425 U.S. at 369-70.
65. *Milner*, 131 S. Ct. at 1263.
66. *Crooker*, 670 F.2d at 1053.
67. 131 S. Ct. 1259 (2011).
68. 131 S. Ct. 1259 (2011).
69. 5 U.S.C. § 552(b)(2) (2006).
70. *Milner*, 131 S. Ct. at 1264-66.
71. *Id.* at 1266-70.
72. *Id.* at 1270-71.

In *Milner,* the majority initially focused its consideration of Exemption 2's scope by focusing on the exemption's text: "related solely to the internal personnel rules and practices of an agency."[73] After declaring the key word marking the boundaries of the exemption to be "personnel," the Court determined that, when used as an adjective to modify "rules and practices," the term most logically refers to human resource matters.[74] Quoting the discussion of FOIA's Exemption 6[75] in *Department of the Air Force v. Rose,*[76] the Court provided an example of the common and congressional meaning of "personnel".[77] According to the Court, a "personnel file is the file showing, for example, where [an employee] was born, the names of his parents, where he has lived from time to time, his . . . school records, results of examinations, [and] evaluations of his work performance," and is typically maintained in the human resources office.[78] Exemption 2, the Court explained, uses "personnel" the same way–"an agency's 'personnel rules and practices' are its rules and practices dealing with employee relations or human resources."[79] Reinforcing its statutory interpretation, the Court noted that this construction of Exemption 2's language is supported by the FOIA's philosophy of broad disclosure and the narrow reach Congress intended its statutory exemptions to maintain.[80] Pursuant to the plain meaning of the text, the Court concluded that Exemption 2 does not protect the ESQD information from disclosure because the information concerns the physical rules governing explosives and the handling of dangerous materials, rather than workplace rules governing sailors or treatment of employees.[81]

After defining the scope of Exemption 2, the majority addressed two alternative readings of the exemption that were offered by the Navy to support withholding the Explosive Safety Quantity Distance (ESQD) information.[82] First, the majority considered the Navy's suggestion that the Court adopt the *Crooker v. Bureau of Alcohol, Tobacco & Firearms*[83] construction of Exemption 2.[84] The Court quickly dis-

73. *Id.* at 1264; 5 U.S.C. § 552(b)(2).

74. *Milner,* 131 S. Ct. at 1264.

75. 5 U.S.C. § 552(b)(6) (2006) (protecting "personnel and medical files" from mandatory disclosure).

76. 425 U.S. 352 (1976).

77. *Milner,* 131 S. Ct. at 1265 (quoting *Rose,* 425 U.S. at 377).

78. *Id.* (alteration in original) (quoting *Rose,* 425 U.S. at 377).

79. *Id.*

80. *Id.* at 1265-66.

81. *Id.* at 1266.

82. *Id.* at 1266-68.

83. 670 F.2d 1051 (D.C. Cir. 1981).

pelled any hope of adopting the *Crooker* interpretation, stating that such interpretation is completely disconnected from Exemption 2's text in that the interpretation ignores the plain meaning of "personnel" and adopts a circumvention requirement that has no basis in the language of the exemption.[85] Further illustrating its point, the Court proclaimed that "the only way to arrive at High 2 is by taking a red pen to the statute–cutting out some words and pasting in others until little of the actual provision remains."[86]

After its initial refusal to adopt *Crooker*, the Court considered the Navy's arguments that both the legislative history of Exemption 2 and Congress's subsequent action in amending the FOIA in 1986 supported the adoption of the Crooker formulation.[87] Noting that the Navy relied heavily on the legislative history of Exemption 2 to advocate the *Crooker* interpretation, the Court reiterated the common rule that legislative history is used by courts to clear statutory ambiguity, not create it.[88] Because the House and Senate Reports were squarely at odds in regards to Exemption 2, the Court declared that clear statutory language trumps dueling committee reports.[89] The Court also went on to reject the Navy's argument that Congress's 1986 amendment to FOIA's Exemption 7(E)[90] ratified *Crooker*, stating that the decision to amend Exemption 7(E), rather than Exemption 2, suggests that Congress approved the "circumvention" language only as to law enforcement materials.[91] The final nail in the *Crooker* coffin was hammered in by the Court's rebuttal of Justice Breyer's assertion that *Crooker* has been consistently relied upon and followed by lower courts for thirty years.[92] Declaring that the *Crooker* following is not as prolific as proclaimed by the dissent, the Court stated that it would not ignore the rules of statutory interpretation to take the side of a "bare majority" of jurisdictions.[93]

Next, the Court addressed the Navy's argument for adoption of a "clean slate" approach to Exemption 2 based on its text, which would "encompass[] records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental

84. *Milner*, 131 S. Ct. at 1266.
85. *Id.* at 1267.
86. *Id.* (quoting Elliot v. Dep't of Agric., 596 F.3d 842, 845 (D.C. Cir. 2010)).
87. *Id.* at 1267-68.
88. *Id.* at 1267.
89. *Id.*
90. 5 U.S.C. § 552(b)(7)(E) (2006).
91. *Milner*, 131 S. Ct. at 1267-68.
92. *Id.* at 1268.
93. *Id.* at 1269.

functions."[94] Declaring that such a construction would strip the word "personnel" of any real meaning and produce a sweeping exemption, the Court rejected the Navy's argument under the contention that such a reading would pose "the risk that FOIA would become less a disclosure than a withholding statute."[95] The Court finally noted that the clean slate interpretation has no basis in the text of Exemption 2 and would violate the rule favoring a narrow construction of FOIA exemptions.[96]

Explicitly recognizing the strength of the Navy's interest in protecting the ESQD information, the Court concluded by noting that the Navy has other tools at hand to protect such materials.[97] Specifically, the Court pointed to FOIA's Exemptions 1,[98] 3,[99] and 7[100] as possible means for shielding the ESQD information at issue.[101] As a final suggestion, the Court stated that if the Navy were unable to procure protection of sensitive information under any of FOIA's exemptions, then it could seek relief from Congress.[102]

The majority ultimately concluded that, consistent with the plain meaning of "personnel rules and practices," Exemption 2 encompasses only records relating to employee relations and human resources issues.[103] Holding that the ESQD information at issue does not qualify for withholding under the exemption, the Court reversed the court of appeals and remanded the case for further proceedings consistent with its opinion.[104]

B. Justice Alito–The Concurrence

Justice Alito concurred with the majority, writing separately to highlight the Navy's alternative argument raised below that the ESQD information is shielded from mandatory disclosure by Exemption 7(F).[105] Noting that this exemption will remain open to the Navy on remand, Justice Alito discussed Exemption 7 at length before concluding

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94. *Id.* (citation and internal quotation marks omitted).
95. *Id.* at 1270 (quoting EPA v. Mink, 410 U.S. 73, 79 (1973)).
96. *Id.*
97. *Id.* at 1270-71.
98. 5 U.S.C. § 552(b)(1) (2006) (preventing access to classified documents).
99. 5 U.S.C. § 552(b)(3) (2006) (shielding records that any other statute exempts from disclosure).
100. 5 U.S.C. § 552(b)(7) (2006) (protecting information compiled for law enforcement purposes).
101. *Milner*, 131 S. Ct. at 1271.
102. *Id.*
103. *Id.* (internal quotation marks omitted).
104. *Id.*
105. *Id.* at 1271-72 (Alito, J., concurring).

that, if the Navy is able to satisfy the threshold requirement that information be compiled for law enforcement purposes, the ESQD information may fall within the ambit of Exemption 7(F).[106]

C. Justice Breyer–The Dissent

Citing Justice Stevens for the proposition that a statute can acquire a clear meaning that the Court should not disturb, Justice Breyer's dissent advocated accepting the decision in *Crooker* as properly stating the scope of Exemption 2.[107] Justice Breyer's dissent highlighted his opinion that *Crooker* has been followed or favorably cited by every court of appeals that considered the matter over the past thirty years, and that, as such, the Supreme Court should not upset the well-established interpretation of Exemption 2.[108]

In addition to Exemption 2's long-standing precedent, Justice Breyer listed another reason for advocating *Crooker*'s construction of Exemption 2, namely, that the D.C. Circuit undertook a careful analysis of the law surrounding the exemption and disseminated a reasonable holding concerning its scope.[109] After pointing out that the court in *Crooker* examined the language of Exemption 2, legislative history, and precedent, Justice Breyer highlighted the fact that the statutory language could be read more broadly to encompass internal rules and practices that set forth guidelines for agency personnel to follow.[110] Justice Breyer also underscored the fact that the court in *Crooker* thought the House and Senate Reports were reconcilable if both sets of examples were construed as referring to internal staff information that the public had no legitimate interest in learning about.[111] Careful not to ignore its adherence to precedent, Justice Breyer acknowledged the fact that the *Crooker* approach was based on a prior opinion by Circuit Judge Leventhal, as well as language used in *Rose*.[112]

To round out his dissent, Justice Breyer criticized the majority's acknowledgment that "considerable adjustments" may be necessary in light of its opinion and further posited the question of how such adjustments are to be made.[113] In his view, "it is for the courts,

106. *Id.* at 1271-73.

107. *Id.* at 1273-74 (Breyer, J., dissenting) (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part)).

108. *Id.* at 1274.

109. *Id.* at 1275.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1277.

through appropriate interpretation, to turn Congress' public information objectives into workable agency practice, and to adhere to such interpretations once they are settled."[114]

V. IMPLICATIONS

As the Court noted, the decision in *Milner v. Department of the Navy*[115] will likely "force considerable adjustments" upon government agencies having previously relied on "High 2" to protect certain types of sensitive information. [116] While the full nature and extent of such adjustments will vary depending on the agency, certain considerations will impact all agencies confronted with Freedom of Information Act (FOIA)[117] requests. First, when seeking the protection of Exemption 2,[118] agencies must now carefully scrutinize records to determine whether the information sought falls within the ambit of the exemption's strictly construed language. Second, since Exemption 2 may no longer be used as the FOIA catch all, agencies will be compelled to creatively characterize requested information and seek out the protection of other existing exemptions. Finally, agencies must consider imploring Congress to adopt an "Exemption 10" to protect documents deemed inappropriate for public dissemination but not otherwise qualified for withholding under the current FOIA exemptions.

Pursuant to the Supreme Court's decision in *Milner*, in May 2011, the United States Department of Justice's (DOJ) Office of Information Policy (OIP) issued an "OIP Guidance"[119] for agencies regarding the utilization of Exemption 2.[120] The OIP Guidance, among other things,

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114. *Id.* at 1278.

115. 131 S. Ct. 1259 (2011).

116. *Id* at 1271.

117. 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

118. 5 U.S.C. § 552(b)(2).

119.

> In keeping with its statutory authority to encourage agency compliance with the FOIA, OIP regularly develops and issues policy guidance to all agencies on proper implementation of the FOIA. In addition, OIP issues guidance on a wide range of legal and procedural issues involving the FOIA to improve administration of the law, to promote best practices, and to increase transparency.

U.S. Dep't of Justice, *OIP Guidance*, JUSTICE.GOV, http://www.justice.gov/oip/oipguidance.html (last visited Feb. 29, 2012).

120. *See* U.S. DEP'T OF JUSTICE, OIP GUIDANCE, EXEMPTION 2 AFTER THE SUPREME COURT'S RULING IN MILNER V. DEPARTMENT OF THE NAVY (May 10, 2011), *available at* http://www.justice.gov/oip/foiapost/milner-navy.pdf [hereinafter OIP GUIDANCE]; *see also OIP Issues Guidance on Exemption 2*, FOIA.GOV (May 10, 2011), http://www.foia.gov/2011foiapost16.html. The OIP also provided two training sessions on Exemption 2 in the wake

discusses the new parameters of the exemption and possible alternatives for agency withholding under other existing exemptions.[121] This resource could be of paramount importance to agencies seeking to navigate the narrow channels of Exemption 2 considering the guidance is intended to "serve as a starting point for agencies to work through [*Milner's*] many implications [on] their FOIA-processing efforts."[122]

Perhaps not surprisingly, the Court's focus on and construction of Exemption 2's text severely limits the types of records that are now protected under the ambit of the exemption. Now, in order to qualify for withholding under Exemption 2, information must relate to an agency's personnel rules and practices as opposed to rules and practices written for personnel.[123] Moreover, information must be related "solely," meaning "exclusively or only," to the personnel rules and practices in order to be protected under Exemption 2.[124] Finally, information must be "'internal,' meaning that 'the agency must typically keep the records to itself for its own use.'"[125]

Further restricting the boundaries of Exemption 2 is the fact that the current statutory construction must also be read in tandem with the Supreme Court's previous decision in *Department of the Air Force v. Rose*.[126] Even though certain records may, on their face, appear to be protected under Exemption 2, an agency must still inquire as to whether there is a "genuine and significant public interest in disclosure."[127] "When there is a genuine and significant public interest in disclosure, the material falls outside of Exemption 2 as that interest would preclude it from satisfying the requirements of Exemption 2 that it relate 'solely' to the 'internal' personnel rules and practices of the agency."[128]

Prior to the Court's decision in *Milner*, Exemption 2 was commonly used to support agency withholding of sensitive information. In 2010, Exemption 2 was cited as a reason for agency withholding in approxi-

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of the Supreme Court's decision in *Milner*. U.S. Dep't of Justice, *OIP Training Sessions on Exemption 2 After Milner*, JUSTICE.GOV (Aug. 2011), http:www.justice.gov/oip/foiapost/2011 foiapost17.html.

121. *See* OIP GUIDANCE, *supra* note 119.

122. *Id.* at 15.

123. *Id.* at 6.

124. *Id.* at 7.

125. *Id.* (quoting *Milner*, 131 S. Ct. at 1265 n.4).

126. 425 U.S. 352 (1976). In *Rose*, the Court declared that Exemption 2 does not apply to information "subject to . . . a genuine and significant public interest" and stated it was this public interest that differentiated the information at issue "from matters of daily routine like working hours, which, in the words of Exemption Two, do relate 'Solely to the internal personnel rules and practices of any agency.'" *Id.* at 368-69.

127. OPI GUIDANCE, *supra* note 119, at 8 (internal quotation marks omitted).

128. *Id.*

mately 54,000 of the approximately 80,000 instances where a FOIA request was denied.[129] However, considering Exemption 2's new limited scope, it is unlikely that use of the exemption will be as prolific in the future. A more probable forecast is that agencies will begin utilizing other existing exemptions to a greater extent.

While agencies may look to any of the FOIA's other eight existing exemptions to protect information previously shielded from disclosure under Exemption 2, the OIP guidance and the *Milner* Court both point specifically to Exemptions 1, 3, and 7 as possible alternatives to justify withholding sensitive records.[130] Exemption 1 to FOIA's mandatory disclosure policy allows an agency to withhold information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" when such information is "in fact properly classified pursuant to such Executive order."[131] In order to properly classify a document, an agency must determine that the information's release "reasonably could be expected to result in damage to the national security."[132] Because many FOIA requests seek information ultimately withheld as a potential threat to national security, Exemption 1 could possibly be viewed by agencies as a quick fix to safeguard sensitive records.

Exemption 3 protects information "specifically exempted from disclosure by statute" if the statute completely bars public disclosure or "establishes particular criteria for withholding or refers to particular types of matters to be withheld."[133] If the statute was enacted after the OPEN FOIA Act of 2009,[134] then the statute must specifically reference FOIA's Exemption 3 in order for documents to qualify for withholding under Exemption 3.[135] In the wake of the *Milner* decision,

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129. Mark Caramanica, *Demise of FOIA "High 2" Exemption Debated*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Apr. 28, 2011), http://www.rcfp.org/node/98257.

130. OIP GUIDANCE, *supra* note 119, at 9.

131. 5 U.S.C. § 552(b)(1).

132. OPI GUIDANCE, *supra* note 119, at 10; Exec. Order 13,526, 32 C.F.R. § 2001.10 (2010). Categories of information that can be considered for classification include, but are not limited to,

> military plans, weapons systems, or operations; foreign government information or foreign relations or activities; intelligence activities or sources or methods; scientific, technological, or economic matters relating to national security; programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of systems, or infrastructures related to national security; or development, production, or use of weapons of mass destruction.

Id.; Exec. Order 13,526, 32 C.F.R. § 2001.21(3) (2010).

133. 5 U.S.C. § 552(b)(3).

134. Pub. L. No. 111-83, 123 Stat. 2184 (2009).

135. OIP GUIDANCE, *supra* note 119, at 11.

it should not be surprising to see an influx of Exemption 3 statutory proposals. For example, the 2012 Defense Authorization Bill, which was proposed and passed by the House of Representatives after the Court's decision in *Milner*, contains a provision that would require withholding of information relating to military infrastructure.[136]

FOIA's Exemption 7 protects "records or information compiled for law enforcement purposes."[137] Subsections (E) and (F) may be particularly applicable to information no longer qualifying for protection under Exemption 2. Exemption 7(E) applies when the release of such information "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."[138] Exemption 7(F) applies if disclosure of the information "could reasonably be expected to endanger the life or physical safety of any individual."[139] Thus, as long as a document was compiled for law enforcement purposes, Exemption 7 may extend to protect some agency information previously shielded under the broad interpretation of Exemption 2.

With the narrowed scope of Exemption 2 comes the broadening of the potential range and quantity of information that must be disclosed under FOIA. While the other existing exemptions discussed above may allow agencies to withhold certain categories of information, it is inevitable that other types of information will no longer have a statutory basis for protection. Quite possibly, the most "practical effect of [the Court's] ruling will be to leave unprotected a great deal of information that could threaten the public safety if disclosed."[140] With concerns such as this lingering in the background of the *Milner* decision, perhaps the most appropriate option for agencies facing the challenge of protecting information without a basis for protection would be to beseech Congress to adopt an "Exemption 10." While suggestions for the potential content of such an exemption is best left to be debated by agencies and congressmen, the Supreme Court's opinion makes one fact readily apparent: if Congress "has not enacted the FOIA exemption the Government desires" then the Court will "leave to Congress, as is appropriate, the question whether it should do so."[141] The Court will

136. H.R. 1540, 112th Cong. § 1091 (2011).
137. 5 U.S.C. § 552(b)(7).
138. 5 U.S.C. § 552(b)(7)(E).
139. 5 U.S.C. § 552(b)(7)(F).
140. Leading Cases, 125 HARV. L. REV. 341, 341-42 (2011).
141. *Milner*, 131 S. Ct. at 1271.

not substitute the judiciaries "odd inventions" for the legislature's "true rules" it deems explicitly found in statutory text.

VI. CONCLUSION

In *Milner v. Department of the Navy*,[142] the Supreme Court conclusively ended a decades-long dispute revolving around the scope of FOIA's Exemption 2.[143] Narrowly construing its plain language, the Court concluded that Exemption 2 only encompasses records relating to employee relations and human resources issues and does not extend to more substantial internal matters whose disclosure would risk circumvention of the law.[144] While the full effect of the Court's strict construction of Exemption 2 will only be seen over time and developed pursuant to any subsequent congressional action, one implication of the Court's decision appears unavoidable: *Milner* will have a significant impact on federal agencies that previously relied on Exemption 2 to withhold sensitive information.

ASHLEY E. SHORT

142. 131 S. Ct. 1259 (2011).
143. 5 U.S.C. § 552(b)(2).
144. *Milner*, 131 S. Ct. at 1271.

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