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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 09-1163, Milner v. The  
5 Department of the Navy.

6 Mr. Mann.

7 ORAL ARGUMENT OF DAVID S. MANN

8 ON BEHALF OF THE PETITIONER

9 MR. MANN: Mr. Chief Justice, and may it  
10 please the Court:

11 There are four points I would like to make  
12 this morning. First, the plain language of Exemption 2  
13 dictates an extremely narrow category of materials,  
14 those related solely to internal personnel policies and  
15 rules.

16 Second, even if you look beyond the plain  
17 language and look to the legislative history, the  
18 legislative history is focused, and the additional  
19 legislative history from the House is focused, only on  
20 law enforcement or investigatory materials, items that  
21 were covered through the 1986 amendments to FOIA, making  
22 any additional judicial High 2 unnecessary.

23 The third point: Because of FOIA's purpose,  
24 if you find that the language, the plain language, is  
25 not clear or if you find that the legislative history

1 isn't sufficient, then the focus must be on an  
2 interpretation that supports disclosure, not secrecy.

3 And finally, Congress, in enacting FOIA,  
4 conducted the balancing. In reserve for it, itself, the  
5 authority to add to or expand FOIA through Exemption 3.  
6 It did not leave agency discretion available for the  
7 agencies to decide what documents they can provide or  
8 not.

9 Moving into our first argument, the plain  
10 language. At issue is a very short sentence related  
11 solely to internal personnel rules and procedures --  
12 rules and practices. Congress chose to use the words  
13 "related solely" on purpose. That's an extremely narrow  
14 view. Now, we understand if you look at the words in  
15 isolation, perhaps you could see that there is some  
16 conflict between them. "Related" could be broad;  
17 "solely" is extremely narrow. But when read together,  
18 as they should be in this statute, "related solely" is  
19 an extremely narrow class of documents.

20 JUSTICE ALITO: Could I ask you this? The  
21 D.C. Circuit's decision in Crooker has been the leading  
22 decision in this -- on this issue for nearly 30 years,  
23 and there has been a great deal of reliance on it,  
24 certainly by the lower courts in general, and perhaps  
25 also by Congress and by the executive branch. Do you

1 think there's anything to be said for deference to that  
2 decision based on the fact that it has been -- there has  
3 been reliance on it to such a great degree for such a  
4 period of time?

5 MR. MANN: No, Your Honor. When Crooker  
6 came down, the court was faced with an extremely -- a  
7 circumstance dealing with these FBI or ATF search and  
8 seizure manuals, and the court adopted and created the  
9 High 2 exemption. But, again, we believe in 1986  
10 Congress dealt with that expressly, explicitly, and took  
11 the exact same language and inserted into a stand-alone  
12 exemption, Exemption 7(A), making Crooker no longer  
13 needed or necessary. In the past, the Court --

14 JUSTICE ALITO: I ask -- I ask the question  
15 because the world has changed in a lot of ways since  
16 1981, and one is that there is now, I think, much  
17 greater concern about the disclosure of information that  
18 has perhaps profound security implications. That was  
19 not as much of a concern in -- in 1981.

20 If you think about, for example, suppose  
21 there's a Federal building with a hallway that is  
22 accessible only to somebody who has a code key. Would  
23 that be -- is that -- does that have to be disclosed  
24 under FOIA? Or architectural plans for a Federal  
25 building that would disclose the size of the bomb that

1 would be necessary to bring the building down or bring  
2 part of the building down; is there any FOIA exemption  
3 that covers things like that?

4 MR. MANN: Well, Your Honor, there could be  
5 a variety of FOIA exemptions -- it could fit under 7  
6 depending on whether or not it's law enforcement-  
7 related. For example, if it's FBI instructions on  
8 guarding a facility or guarding individuals, perhaps  
9 that would be law enforcement. And if it's protecting  
10 individuals within that building, under 7(F). Or it  
11 could be something addressed specifically through  
12 Exemption 3.

13 And coming to your original -- the original  
14 part of your question, that times have changed, we  
15 recognize that; and Congress recognized certainly that  
16 times could and would change when it adopted it, and  
17 that's why we believe Congress kept for itself  
18 Exemption 3.

19 JUSTICE GINSBURG: Even though --

20 JUSTICE BREYER: 7 and 3 --

21 JUSTICE GINSBURG: Even though you -- you  
22 said that there is now 7, Exemption 7, the amendment to  
23 that, so you don't need 2 --

24 MR. MANN: You --

25 JUSTICE GINSBURG: Still, as far as I know,

1 every court of appeals that has weighed in has accepted  
2 Crooker. And I was a little puzzled why you were so  
3 intent on rejecting so-called High 2, because after all,  
4 in this very case, Judge Fletcher, dissenting -- it's  
5 true -- but he said he accepts Crooker, he accepts High  
6 2, and he still thinks you win. So you don't need to  
7 reject Crooker to prevail.

8 MR. MANN: We don't need to reject -- under  
9 Judge Fletcher's viewpoint, we did not need to reject  
10 High 2 to prevail. But, again, he was the dissent. But  
11 more importantly, Crooker -- again, we think this  
12 language -- this case rises and falls on the plain  
13 language of the statute, and Crooker was an expansion of  
14 that, and we need to accept that Crooker was an  
15 expansion of that. And Congress accepted that it was an  
16 expansion when they came up with 7(E).

17 JUSTICE BREYER: Why does that show that? I  
18 mean, why doesn't it show acceptance of Crooker?

19 MR. MANN: Well, I think --

20 JUSTICE BREYER: I mean, if that -- Crooker  
21 was -- was interpreting section 2 --

22 MR. MANN: I think --

23 JUSTICE BREYER: -- that was the  
24 interpretation. Everyone had followed it, every court.  
25 Nobody disagreed. All your four arguments Judge Edwards

1    went into thoroughly.  Everyone but Judge Wilkey  
2    approved it.  And so Congress reads that, and they make  
3    it specific in 7, but they say nothing about 2.

4                   MR. MANN:  I think there are three points to  
5    look at on that.  First of all, Congress originally did  
6    look at amending section 2 -- Exemption 2, at the same  
7    time they looked at amending Exemption 7.  They chose  
8    not to.  Now, we don't -- we can't read everything into  
9    that, but they chose not to.  They made 7 specifically,  
10   and 7 covered all of the language that we would be  
11   looking for.  So really, if you're still reading  
12   Exemption 2 to include a High 2, then 7(E) becomes  
13   superfluous.

14                   And then a final point and I think a very  
15   important point --

16                   JUSTICE SCALIA:  Well, you had a different  
17   Congress.  I mean, the Congress that passed the law is  
18   not necessarily the same Congress that -- that failed to  
19   amend the law.  Are we to consider laws to be in effect  
20   only for so long as the Congress that passed them is  
21   sitting, and then the failure to make any changes in  
22   light of judicial decisions by later Congresses  
23   effectively amends the law?

24                   MR. MANN:  No.

25                   JUSTICE SCALIA:  That's an extraordinary



1 proposition.

2 MR. MANN: No, that's not the proposition  
3 I'm making. The proposition I'm making is that when the  
4 1986 -- '84 through '86 took place, and they looked at  
5 this and they saw the issue with Jordan and they saw the  
6 issue with Crooker, their decision was to consolidate  
7 that exemption, what had been called "High 2," into  
8 7(A).

9 JUSTICE BREYER: How do you know? What we  
10 have is 7(E) in front of us; 7(E) says we want to be  
11 sure something like Crooker's interpretation of 2  
12 applies with law enforcement. It's simply a case -- so  
13 they apply it with law enforcement. Absolutely now it's  
14 guaranteed. Crooker is not guaranteed because it could  
15 be overturned. You never know what will happen.

16 But what in that suggests they don't want  
17 Crooker to apply to the Fed for example, or to the Navy,  
18 or to -- which is here storing -- it's storing  
19 explosives. Why would -- I mean, I can't get anything  
20 one way or the other from the fact they passed 7.

21 MR. MANN: Well, I should --

22 JUSTICE BREYER: Why should I get one rather  
23 than the other? For every argument you make, I can see  
24 an argument the other side -- that they make.

25 MR. MANN: Well, another point that I would

1 like to make --

2 JUSTICE BREYER: What's your answer to that?

3 It was a question, really.

4 (Laughter.)

5 MR. MANN: Well, my answer is, is you are  
6 correct that they did not read -- they did not  
7 specifically state what they were doing or why. So all  
8 we can do is look at what they did in its totality.

9 JUSTICE SOTOMAYOR: But there was a proposal  
10 to amend 2 --

11 MR. MANN: There had been an original --

12 JUSTICE SOTOMAYOR: And there was a  
13 conscious decision by Congress not to do 2 to conform to  
14 Crooker more generally, but to only pass 7. So there  
15 has to be a meaning to the decision to limit the  
16 amendment.

17 MR. MANN: I -- I would believe that they --  
18 backing up to Crooker, if you look at the arguments in  
19 Crooker and you look at I believe every point in  
20 Crooker, where they discuss either the legislative  
21 history or they discuss other case law analysis leading  
22 to High 2, it was focused on these investigative  
23 materials: examiner's materials, manuals, manuals that  
24 we didn't want the regulator to have an opportunity to  
25 have. And that's all now captured in 7(E).

1 JUSTICE GINSBURG: Are you interpreting --

2 JUSTICE SCALIA: Mr. Mann, do you assume  
3 that there's always a reason for Congress's not passing  
4 a law? I mean, it's hard enough to figure out their  
5 reason for passing a law --

6 (Laughter.)

7 JUSTICE SCALIA: -- but there could be an  
8 infinitude of reasons why a law is not passed.

9 MR. MANN: I accept that, Your Honor.

10 JUSTICE SCALIA: Do you know of any case in  
11 which the failure of Congress to amend a law in order to  
12 overrule a court decision other than a decision of this  
13 Court has been held to be an implicit approval of that  
14 decision? Do we have a single case where we've said,  
15 oh, there was a line of court of appeals cases, and  
16 since Congress failed to amend the statute to take  
17 account of those court of appeals cases, Congress must  
18 have approved them. Do we have any case like that?

19 MR. MANN: No, we don't, Your Honor.

20 JUSTICE SCALIA: I don't know of any.

21 MR. MANN: Your Honor, but I would like to  
22 make one additional point on this. What -- by doing  
23 what Congress did in 1986 -- and, again, they're not  
24 telling us this, but we can look at the statute -- what  
25 they've done is preserve once again that clear, distinct

1 line between the exemptions. Exemption 2 on its plain  
2 -- now Exemption 2 under its plain language is for use  
3 related solely to internal personnel matters. That's an  
4 isolated exemption. We don't need to go back to it to  
5 look abroad and start looking for other exceptions. We  
6 have Exemption 7(E) now to handle that. So there's a  
7 clear, sharp dividing line. And as this Court said in  
8 Rose, actually quoting Vaughn, that we needed that sharp  
9 dividing line to let agencies know --

10 JUSTICE SOTOMAYOR: Counsel, in Rose we  
11 talked about a legitimate public purpose in seeking  
12 information. I tie my question to Justice Alito's,  
13 which is at what point does -- is it legitimate for the  
14 public to seek information, internal information,  
15 relating to the rules and practices of personnel? Can  
16 the public seek information that places the community at  
17 a severe security risk? Is it possible for us to say  
18 that that kind of information, given our line of  
19 reasoning in Rose, could not be legitimate public  
20 information?

21 MR. MANN: But it does not have to be using  
22 the Exemption 2, as it's stated, for -- for the internal  
23 personnel policies. There are other reasons and ways  
24 that some materials that might create a security risk  
25 can be protected.

1           Congress has -- there's over 150 -- I  
2 believe the number currently is 153 statutes that  
3 they've enacted under section 3, using section 3. That  
4 includes as recently as last -- last year, when the  
5 Department of Defense v. ACLU case came before you.  
6 Congress stepped -- that was dealing with the Abu Ghraib  
7 photos. Congress stepped in and passed an amendment to  
8 the Securities Act to exempt those documents  
9 specifically from release, in order to protect. And  
10 that was using the proper authority. It didn't require  
11 an agency to go back and rely on an "Expand 2,"  
12 Exemption 2.

13           And that's the danger of the expansion we're  
14 looking at, is it allows Exemption 2 to be used for an  
15 open-ended -- any time an agency feels it may be  
16 appropriate that it might not want to release something,  
17 it can rely on Exemption 2. That was never the intent.  
18 Congress tried from the beginning to preserve for itself  
19 that discretion and that authority and to remove the  
20 discretion.

21           As we point out -- as we've set out for you  
22 in our briefs, if you look at the legislative history,  
23 many of the agencies and Department of Justice that came  
24 before Congress asked for that discretion, and Congress  
25 did not give it to them. They reserved, and, instead,

1 we have Exemption 3.

2 So what we're saying is that you do not need  
3 to -- there may be reasons that you want to take high  
4 security information and have it isolated from the  
5 public's review, but it's not through using an exemption  
6 that was really designed for minor internal matters.

7 JUSTICE KENNEDY: Of course, if that's -- if  
8 that's the outcome of this case and if you prevail, that  
9 would mean that more things will be classified and  
10 withdrawn wholly from scrutiny; whereas, if other  
11 exemptions are used, they can be shared to a greater  
12 extent. So really what you're arguing for is for  
13 withholding more information from more people.

14 MR. MANN: I don't think I am, Your Honor,  
15 because I believe that, through the Exemption 3, they  
16 can't limit it to. For example, in this case if there  
17 was a need for Congress to adopt a specific protection  
18 for these maps, it could.

19 The problem that we have here in this case,  
20 again, is these maps at this base have been given out.  
21 And, again, it's a map. It's a map showing the range,  
22 the size of an explosion, and its effect on the  
23 surrounding community. That map has been given out from  
24 this base to some people, and some of those people they  
25 gave it to actually gave it to the newspaper. It's been

1 not given out to others, including my client. Other  
2 bases nearby, our Bangor Trident Submarine Base, gave  
3 out the map upon request.

4 If this map that we're looking at is that  
5 secure, then perhaps it should be that secure and  
6 protected across the board. But that's not what we  
7 have. We have -- instead, we have an individual within  
8 an agency making a decision to withhold a certain  
9 document from some people and not others, and when they  
10 give it out to the others, they have no control over  
11 what those people do with that map. And that's not a  
12 correct use of the Exemption 2.

13 JUSTICE BREYER: Well, why do you want to  
14 know? How wide the corridors are in some Federal  
15 buildings, and terrorists could use that to bad purpose,  
16 but we want to give it to the firemen because they'll  
17 use it for a good purpose. We want the policemen to  
18 know, we want different civic groups sometimes to know,  
19 but we want to keep a limitation. We want it  
20 restricted, restricted to minimize the chance it will  
21 get into the wrong hands. I mean, I don't see anything  
22 illogical about that. What's -- what's illogical about  
23 that?

24 MR. MANN: But it shouldn't be through  
25 Exemption 2 because it's not --

1 JUSTICE BREYER: Why?

2 MR. MANN: It's not an internal --

3 JUSTICE BREYER: Well, that's a different  
4 argument.

5 MR. MANN: Right.

6 JUSTICE BREYER: I mean, your four arguments  
7 seem to me to be the same arguments that Judge Edwards  
8 and the D.C. Circuit considered, and they are excellent  
9 arguments, and there are arguments on both sides, and  
10 then they considered it and came to a conclusion. But  
11 this is a different argument you're making here, and I  
12 was addressing that.

13 MR. MANN: It's a different argument in the  
14 sense that what Judge Edwards was looking at and the  
15 Crooker decision was looking at was a specific group of  
16 documents, these manuals of policy and procedure. And,  
17 again, we believe that that was addressed through the  
18 7(E) in 1986.

19 So we're back now to: Should there still be  
20 a High 2 category? Is that how we want to read this --

21 JUSTICE BREYER: I mean, it's only addressed  
22 for law enforcement. It's -- there are many  
23 dangerous or -- for example, this isn't law enforcement;  
24 this is munitions. The Navy thinks, rightly or wrongly,  
25 I guess you can -- that they don't want these maps



1     circulated because they think it would make it easier to  
2     blow up the munitions. They want the firemen to have  
3     them, they want the civil defense workers to have them,  
4     but they don't want people who might blow them up to  
5     have them.

6                   MR. MANN: Well --

7                   JUSTICE BREYER: Now, that's -- that's their  
8     reasoning. Now, that isn't addressed, it seems to me,  
9     in 7, because 7 deals with law enforcement.

10                  MR. MANN: I would agree that this, perhaps,  
11     is not addressed in 7. 7 was -- was argued before the  
12     Ninth Circuit, but not answered on whether or not these  
13     fit under 7. But, again, it should not come back to the  
14     use of Exemption 2. Perhaps another exemption --

15                  JUSTICE GINSBURG: As I -- as I read the  
16     D.C. Circuit decision, you -- you are assuming or you're  
17     suggesting that the D.C. Circuit saw a gap that Congress  
18     hadn't provided for, and it filled that gap. And now  
19     the add-on that the D.C. Circuit made is no longer  
20     necessary, so we lop it off. But the judges on that en  
21     banc court thought that they were interpreting the  
22     statute going through all of the steps that you  
23     outlined. Language is rarely so plain that there's no  
24     room for a different interpretation.

25                  And then Judge Edwards looked to the

1 legislative history to see how that might inform the  
2 decision, but -- but really, to suggest that Crooker was  
3 just sort of a stopgap until Congress amended the  
4 statute I think is not fair to that decision.

5 MR. MANN: Your Honor, the issue here is not  
6 so much Crooker as it is what the Ninth Circuit has done  
7 to, we believe, expand Crooker, because you're correct.  
8 I mean, obviously, the Crooker decision was a  
9 well-written, long, and very detailed decision, both the  
10 en banc as well as the dissents, but -- the dissent.

11 But even there, they were looking at that  
12 same legislative history, and it's the same legislative  
13 history that this Court looked at in *Rose*, and there is  
14 a limit. They didn't say that it needed to reach all  
15 the way out to cover anything as broad as a category of  
16 what the Navy's proceeding with here. They looked at  
17 manuals of procedure, the disclosure of which would  
18 enable the regulated community to circumvent those  
19 agency regulations. Again, you addressed that as  
20 arguably dicta, but that's the statement you had made in  
21 *Rose*, that it was by the regulated to circumvent  
22 regulations.

23 The documents we have, for example, in this  
24 case are not. The regulated entity under the  
25 Operating-5 manual is the Navy. It's how the Navy

1 stores and moves its munition around. So even under a  
2 reading of -- of Crooker, what Crooker was looking at,  
3 looking at the House report, taking the House report on  
4 its face, taking the testimony before Congress that was  
5 on its face -- again, that was still dealing with these  
6 operating rules and guidelines for government  
7 investigators or examiners, but not --

8 JUSTICE SCALIA: Mr. Mann, I thought you  
9 disagreed with the premise of Justice Ginsburg's  
10 question; that is, that you assert that the language  
11 related solely to the internal personnel rules and  
12 practices of an agency is quite clear.

13 MR. MANN: I do.

14 JUSTICE SCALIA: I thought maybe you were  
15 abandoning that.

16 MR. MANN: No, no. I mean, I -- but what I  
17 was saying was that we do believe it was quite clear.  
18 But if -- even if you went beyond, which obviously they  
19 did in Crooker, and obviously you could argue from the  
20 House report -- even if you go beyond, it's still a  
21 limited category that does not reach so broad as what  
22 the Ninth Circuit has opened up here, and as what the  
23 Navy is arguing before you now, which is even broader  
24 than what the Ninth Circuit reached.

25 JUSTICE BREYER: How is it -- how is it

1 broader? I -- I looked for the words. I just missed  
2 them, and you can point them out.

3 When I read about the circumvention, what  
4 Crooker says is: "We hold that since the document for  
5 which disclosure is sought meets the test of  
6 'predominant internality,' and since its disclosure  
7 significantly risks circumvention of federal statutes or  
8 regulations," it is exempt.

9 It didn't say anything about circumvention  
10 because there is a regulated entity and it is that  
11 regulated entity that will circumvent. It just spoke of  
12 circumvention, as far as I saw. But maybe there's  
13 another place where it talks about regulated entity. Is  
14 there?

15 MR. MANN: Well, I believe it's addressed in  
16 the decision during the context leading up to the  
17 decision, but it is addressed by this Court in Rose --

18 JUSTICE BREYER: Oh, that's -- but that --  
19 if we're looking at Crooker, I just read the words  
20 "would there be circumvention" --

21 MR. MANN: Right.

22 JUSTICE BREYER: -- and it seemed to me, in  
23 this case, the Navy has plans and they use those plans  
24 to store munitions safely, and the risk that they worry  
25 about is someone will get ahold of the plans and use the

1 positions of those munitions in order to make them  
2 unsafe, for example, blowing them up. So that seemed  
3 like a very serious circumvention of what the regulation  
4 was there for.

5 MR. MANN: But not by the regulator --

6 JUSTICE BREYER: That's correct, and I  
7 didn't find anything in Crooker that said -- and I don't  
8 know why you'd have such a theory. I don't know what  
9 the point of the theory would be, that you would care  
10 whether blowing up took place by somebody who  
11 technically was regulated by the Navy or blowing up took  
12 place by some other person, whom they're worried about.

13 MR. MANN: Because the basis -- it's -- the  
14 basis for that is, again, this Court's language in Rose,  
15 where it looked at -- again, we're going back to a very  
16 few words in the House report, and the House report is  
17 looking at these guidelines and manuals of procedure for  
18 government investigators or examiners.

19 This Court took that language and looked at  
20 it and pointed to -- well, and it's a logical extension,  
21 that if we're looking at it from these investigators or  
22 examiners, what we're concerned about is people being  
23 investigated or examined. So we don't see that that  
24 expands here.

25 And, again, it's coming back to the basis of

1    this material shouldn't be under (i)(2).  I mean, we can  
2    discuss and debate the merits of the safety of these  
3    maps.  This is, again, a map.  It's not the operating  
4    guidelines, the Operating-5 manual.  That's not what was  
5    requested or it's not what's before you, but what's  
6    before you is the map, the map which shows that the  
7    largest target, no surprise, is the loading dock.  The  
8    loading dock -- we have the materials in the joint  
9    appendix from the -- the base information, proudly  
10   discussing that loading dock and how visible a signal  
11   that loading dock is.  There are too many --

12                   JUSTICE ALITO:  Do you have any reason to --  
13   just out of curiosity, do you have any reason to believe  
14   that the current version of the ESQD map is different  
15   from the one that was published in the newspaper  
16   previously?

17                   MR. MANN:  We do not know, Your Honor.  
18   There are -- there are identified, I believe it was 14,  
19   but I may be incorrect, separate maps in the Vaughn  
20   index.  We know, if you read -- the portions that we  
21   have from the Operating-5 manual say they can move  
22   munitions around as long as they stay within the  
23   confines of the ESQD map, but it appears the map can be  
24   amended.  And, again, that's the -- that's the  
25   prevailing question here, is we're talking about public

1 waters, private land around the base, and whether or not  
2 that land stays secure. That's the great significant  
3 public interest here, is we have a city within a mile  
4 and a half of this base and of this very visible loading  
5 dock that can be seen from everywhere. On the  
6 waterfront restaurants in town, this loading dock stands  
7 out. So whether that map changes over time would be  
8 important to know.

9 If there are no further questions, I'd like  
10 to reserve a couple minutes.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
12 Mr. Yang.

13 ORAL ARGUMENT OF ANTHONY A. YANG

14 ON BEHALF OF THE RESPONDENT

15 MR. YANG: Mr. Chief Justice, and may it  
16 please the Court:

17 Petitioner has asked this Court to disrupt  
18 30 years of FOIA practice by rejecting an interpretation  
19 of Exemption 2 that has prevailed and has provided a  
20 workable standard for agencies and the courts since the  
21 D.C. Circuit's en banc decision in Crooker.

22 JUSTICE SOTOMAYOR: Could you tell me what  
23 the textual basing for Crooker's "predominantly  
24 internal" and "circumvention of agency regulation"  
25 requirements is? Where in the text are those words, and

1    how do you create them except through sort of judicial  
2    crafting?

3                   MR. YANG:  Well, I think the -- as our brief  
4    explained, there are three basic elements to Exemption  
5    2.  The first is the internal element, and we believe  
6    that means that the records at issue must be properly  
7    maintained within an agency and not for general release.  
8    And --

9                   JUSTICE SOTOMAYOR:  The problem with that in  
10   this case is that it's a mixed document.  It is  
11   predominantly for internal use, but not exclusively.

12                  MR. YANG:  Well, I think --

13                  JUSTICE SOTOMAYOR:  So how do you square  
14   that with the words "related solely to internal"?

15                  MR. YANG:  Right.  If I could just finish  
16   the internality and then talk about how it relates  
17   solely -- relates to that, I think that would be  
18   probably easiest.  The internal -- and when a document  
19   is properly held within an agency as internal reflects  
20   the FOIA balance that's at issue throughout the  
21   exemptions.  It involves the balance between the public  
22   interest in knowing information about the government and  
23   the need for the government to maintain certain things  
24   in confidence.  And in this context, Rose addressed two  
25   other contexts.  Rose explained that when there is no



1 legitimate public interest, things may be properly  
2 internal. There's simply no reason to disclose it.  
3 In --

4 JUSTICE SOTOMAYOR: Well, the case summaries  
5 there were internal solely. They were created only for  
6 purposes of the agency's honor code review or discipline  
7 review.

8 MR. YANG: Well, if it was --

9 JUSTICE SOTOMAYOR: And yet we ordered it  
10 disclosed. We created an exception to the --

11 MR. YANG: Well --

12 JUSTICE SOTOMAYOR: -- plain language of the  
13 rule, it seems to me.

14 MR. YANG: I don't believe this Court  
15 created an exception to the statute. I think what the  
16 Court did was construe the statute. And although it is  
17 not clear from the text of Rose exactly the textual  
18 foundation for that decision, I think it is best read as  
19 turning on the internality. And understanding what is  
20 properly internal under Exemption 2 must be understood  
21 in light of what FOIA is doing and what the legislative  
22 history suggests for the exemption. And so what we --

23 JUSTICE SOTOMAYOR: Oh, I agree.

24 MR. YANG: This case --

25 JUSTICE SOTOMAYOR: But I think the

1 distinction it made was that it's only internal rules  
2 and practices of the agency, a personnel agency, if the  
3 public has no legitimate interest in it.

4 MR. YANG: I think it said that that's the  
5 case where there's no countervailing interest on the  
6 other side. At least where there's no risk of  
7 circumvention, is what the Court was saying. What we  
8 have here is a different FOIA balance. What we have  
9 here is something strong on the government interest  
10 side. There are certain things that just cannot be  
11 disclosed to the public and have the government function  
12 well. This is one of these. This would be the  
13 location, type, amount of munitions stored on a Naval  
14 facility. Location --

15 JUSTICE GINSBURG: Mr. Yang, but the  
16 information about location I thought was disclosed,  
17 where these explosives were stored.

18 MR. YANG: There are -- there is -- for  
19 instance, the appendix includes a map of buildings. It  
20 doesn't explain where munitions are stored, the type of  
21 munition --

22 JUSTICE GINSBURG: But we know they're in  
23 the building. We may not know the type of munition.

24 MR. YANG: Maybe not in every building.  
25 What you know is that there are buildings, there are

1 sites, but you don't know which ones, how much, the  
2 types of munitions. And what we're talking about is  
3 more than a map. What we're talking about is more  
4 generally the ESQD information in the disclosed records,  
5 which includes --

6 JUSTICE GINSBURG: And I thought that that  
7 information was given out for the Bangor facility.

8 MR. YANG: There appears to have been a  
9 release -- and the record does not provide us detail as  
10 to why -- before 9/11 by the Bangor facility of some  
11 arcs. Now, it's important to know that arc maps have  
12 different levels of importance. For instance, you might  
13 have an arc map around a bomb squad on a base, because  
14 bomb squads need to maintain a small amount of  
15 munitions, but that arc isn't particularly sensitive.  
16 So arc maps might be released in certain contexts, and  
17 the Navy here actually does conduct a case-by-case  
18 balancing to see whether or not it would be appropriate  
19 to release this information.

20 Here, what we do know is that the Navy  
21 looked at the arc maps here, which are highly sensitive  
22 maps, as well as the associated ESQD information, and  
23 determined that releasing this information would provide  
24 a road map to those with bad intent to circumvent the  
25 very safety procedures that --

1 JUSTICE GINSBURG: Have you compared the two  
2 situations, in Seattle and in -- and in Bangor? What --  
3 because --

4 MR. YANG: Our brief briefly addresses this.  
5 I believe it's footnote on page -- footnote 5 on page 8.  
6 And what we can say from the record is that the Navy  
7 looked at the -- the material here, explained that  
8 Bangor is a single weapons facility, involves a much  
9 more simplistic storage and safety security problem than  
10 the Naval Magazine Indian Island. And also, I would --

11 CHIEF JUSTICE ROBERTS: Why? If these -- if  
12 these maps are so sensitive as you suggested, why  
13 weren't they classified?

14 MR. YANG: Well, it's difficult to classify  
15 when you need to share in limited circumstances with  
16 local responders. The Navy here has shared --

17 CHIEF JUSTICE ROBERTS: I'm sorry, I don't  
18 understand that. It's different to classify when?

19 MR. YANG: When you classify a document, it  
20 restricts access to people with a Federal need to know,  
21 people who have been adjudicated as eligible to receive  
22 classification, receive the proper training. The Navy  
23 in this instance needs to share limited arc information  
24 with the local fire department and the police department  
25 to make plans for in the event of an emergency. And

1     that was shared in confidence with these local force  
2     responders and was unfortunately disclosed without our  
3     authorization.

4                 CHIEF JUSTICE ROBERTS:   Well, surely, you  
5     classify documents that are shared outside the Federal  
6     Government?

7                 MR. YANG:   That is true in certain  
8     circumstances, but there are other --

9                 CHIEF JUSTICE ROBERTS:   Could you  
10    classify these maps after -- I mean, assume that you  
11    don't prevail, could you then classify these documents,  
12    preventing their release before they're released?

13                MR. YANG:   Well, if the Court were to  
14    provide us with the opportunity, I think the Navy could  
15    consider that.

16                CHIEF JUSTICE ROBERTS:   No, I mean, isn't it  
17    the case when a government agency has to go through its  
18    records in response to a FOIA request and comes upon  
19    records that would otherwise be disclosable, they can at  
20    that point say we're going to classify this so we don't  
21    have to disclose it.

22                MR. YANG:   The relevant executive order that  
23    governs classification does allow classification of  
24    materials which have been disseminated beyond the  
25    government.   But there are certain thresholds that have

1 to be met. I'm not an original classifying authority,  
2 so I would not be in a position to say whether these  
3 types of things could be classified in this instance.  
4 It's at least theoretically possible.

5 But I -- what I want to underscore is that  
6 the reason that these materials are not classified in  
7 this instance is because it is important to share with  
8 the local fire department. Now, the local fire  
9 department --

10 JUSTICE ALITO: There's -- there's a  
11 document on the FBI Web site called "Security Clearance  
12 Process for State and Local Law Enforcement," which  
13 seems to address exactly the situation in which there's  
14 a need to -- it says: "It is the policy of the Federal  
15 Bureau of Investigation to share with law enforcement  
16 personnel pertinent information regarding terrorism."  
17 And it provides a procedure for sharing that classified  
18 information.

19 MR. YANG: It is -- I don't mean to suggest  
20 that only Federal Government employees can have  
21 classification. You can -- you have contractors. There  
22 are instances where you can classify material and share  
23 it with nonfederal entities which have been given  
24 appropriate clearances --

25 CHIEF JUSTICE ROBERTS: It seems to me

1     you're asking us to do your job.  You've got to go  
2     through these documents and say -- you're telling us how  
3     sensitive these are, and, therefore, it would harm the  
4     national interest if they had to be disclosed.

5                     MR. YANG:  I don't --

6                     CHIEF JUSTICE ROBERTS:  If that's true, you  
7     can classify them and --

8                     MR. YANG:  I don't think --

9                     CHIEF JUSTICE ROBERTS:  -- instead of coming  
10    to us and saying you should torture the language in FOIA  
11    to allow us to determine that this is sensitive to the  
12    national interest and therefore shouldn't be disclosed.

13                    MR. YANG:  I don't believe that we are  
14    asking the Court to torture the language of FOIA.  We  
15    think that we have a fair reading, by no means an  
16    unambiguous reading of the statute, but a fair reading  
17    of the statute, and it's a reading that has prevailed  
18    for almost 30 years now.  And then quite beyond --

19                    JUSTICE KAGAN:  So can we talk about that  
20    reading, Mr. Yang?  Let's talk about the meaning of the  
21    statute.

22                    MR. YANG:  Sure.

23                    JUSTICE KAGAN:  The key word is -- the key  
24    term is "personnel rules and practices."  If I said to  
25    you what's a personnel file, what would you say?

1                   MR. YANG: Well, it depends on context. You  
2 may be referring to Exemption 6.

3                   JUSTICE KAGAN: It could be referring to  
4 Exemption 6, or it could be referring to just generally,  
5 just in a conversation? Your personnel file -- what  
6 does it mean?

7                   MR. YANG: Well, in the context of Exemption  
8 6, I think it refers to files pertaining to personnel.

9                   JUSTICE KAGAN: Can you think of another  
10 context in which it means something other than that?

11                  MR. YANG: I think the term -- the phrase  
12 "personnel file" itself is normally referred -- normally  
13 used to refer to personnel, but what--

14                  JUSTICE KAGAN: It's a kind of H.R. file,  
15 right?

16                  MR. YANG: That's generally true, but --

17                  JUSTICE KAGAN: So why should there be any  
18 difference if you look at the term "personnel files and  
19 practices," that these are H.R. files and practices?

20                  MR. YANG: Well, it's certainly one reading.  
21 We think that personnel rules and practices of an agency  
22 can fairly encompass instructions that you provide to  
23 personnel. For instance, if you were to instruct  
24 personnel that they are to appear at work at 9:00 and  
25 leave at 5:00, or they are to perform a certain number



1 of duties, 10 cases per day, or you need to process  
2 these cases in a certain manner -- all of those I think  
3 would be fairly characterized as personnel rules and  
4 practices of an agency, and --

5 JUSTICE SCALIA: All the rules of an agency  
6 would -- would be sucked in, wouldn't it?

7 MR. YANG: Well, no, I think --

8 JUSTICE SCALIA: I mean, all the rules the  
9 agency promulgates are supposed to be enforced by the  
10 personnel of the agency.

11 MR. YANG: I should think so.

12 JUSTICE SCALIA: They become personnel rules  
13 and practices.

14 MR. YANG: The focus on personnel in the  
15 statute helps to distinguish between rules and practices  
16 which govern personnel, and rules and practices which  
17 also are there to govern the public in its interactions  
18 with the agency. And this goes back to the question  
19 that we initially started on. "Relates solely" -- when  
20 you're related solely to the internal personnel rules  
21 and practices of the agency, it -- it extends just  
22 beyond just the rules and practices of themselves, but  
23 it makes sure that the focus -- solely -- is still on  
24 personnel.

25 So there are things -- for instance, if the

1 rule is that you need to file a FOIA request in a  
2 certain way, and the agency instructs personnel to  
3 process it in a certain way, those rules also would  
4 affect the public. The public would need to comply. If  
5 there is a dual purpose, a dual function of the rule or  
6 practice, it would not relate solely to the internal  
7 personnel rules.

8 JUSTICE SOTOMAYOR: Well, that begs, I  
9 think, Justice Scalia's question. One could argue that  
10 everything that the agency develops except rules telling  
11 the public how to come to the agency with a complaint,  
12 et cetera -- virtually everything will govern either the  
13 internal personnel practices or the agency's practices  
14 vis-à-vis the public.

15 MR. YANG: But not everything that the  
16 agency does will relate solely or exclusively to govern  
17 the internal personnel -- the rules and practices for  
18 personnel. When there is a dual function, that is, it  
19 both instructs personnel how to do their duties and it's  
20 also something that the public must take into account --

21 JUSTICE KENNEDY: Well, if the -- if the  
22 agency has a rule that says put explosive A in building  
23 1 and put explosive B in building 2, that's hard for me  
24 to explain that it's just a personnel rule, other than,  
25 as Justice Scalia says, everything -- all functions have

1 to be undertaken by humans.

2 MR. YANG: Well, I -- I don't know that I  
3 would agree with that. I think the personnel rules and  
4 practices that are at issue here are a complex set of  
5 rules that are based on types of munitions, the --

6 JUSTICE KENNEDY: Well, what about my  
7 hypothetical? Why -- why is that person -- primarily or  
8 solely personnel rule?

9 MR. YANG: Because it is a rule that  
10 pertains to personnel. It is a rule that governs the  
11 personnel's discharge of their duties. And if the --

12 JUSTICE KENNEDY: But that goes back to the  
13 point that -- I forgot about a computer age, but,  
14 forgetting that, humans have to do most things now.

15 MR. YANG: That is true. Humans generally  
16 -- and we still do, thank goodness, do things. But the  
17 focus of the exemption in context -- the exemption  
18 applies to matters that relate solely to the internal  
19 personnel rules and practices of an agency. Personnel  
20 helps to focus the inquiry on the rules, and, again,  
21 only relating solely, on rules that govern agency  
22 personnel, as opposed to rules that might govern those  
23 personnel and govern the public's interaction with the  
24 agency. That's the key --

25 JUSTICE SCALIA: I suppose the Office of

1 Personnel Management has a pretty broad charter, then,  
2 on your theory of what the adjective means. OPM must be  
3 a very powerful agency.

4 (Laughter.)

5 MR. YANG: Well, I -- it certainly is.

6 (Laughter.)

7 MR. YANG: The -- but I think what we're  
8 saying is that personnel can have different meanings in  
9 different contexts.

10 JUSTICE GINSBURG: Can we go back to the --  
11 I mean, the origin of the Exemption 2? I thought there  
12 was a concern in Congress that, under the APA, section 3  
13 was shielding too much from the public, and so they  
14 wanted to have a narrower category. Listening to you, I  
15 really don't see how we have something that's narrower  
16 -- narrower than the old section 3 of the APA. And if  
17 you can give me an example, this is what the APA  
18 shielded that would not be shielded under section 2,  
19 maybe I would --

20 MR. YANG: Well, there were -- I can give  
21 you a few examples from the legislative history, for  
22 instance. One of the problems that Congress was  
23 concerned with is that the old exemption, exemption in  
24 section 3, had been construed to apply to internal  
25 management, including things such as phone books, agency

1 phone books for personnel. That would no longer be  
2 encompassed. Things like budgets that the agency  
3 produces, that arguably would -- internal management,  
4 that that would not be under the internal personnel  
5 rules and practices of the agency.

6           And I think it's important to remember that  
7 when Congress drafted this statute, it initially started  
8 with internal personnel -- or, excuse me, internal  
9 employment rules and practices and changed that to  
10 personnel. In the report that effectuated that change,  
11 the explanation and the only explanation was that that  
12 change was similar -- made the exemption similar but  
13 more tightly drawn than the APA's management exemption,  
14 which at the time existed in another part of the  
15 statute; it was a cross-reference.

16           When Congress then continued to revise the  
17 statute, the House made very clear in the hearings, in  
18 the House Report, and on the floor that its intent was  
19 to cover these types of -- manuals and instructions to  
20 agency personnel when doing so would risk the functions  
21 that are at issue here. And when Congress in 1986  
22 amended FOIA by adding -- or amending Exemption 7(E), it  
23 ratified the existing rule. And it did so because -- it  
24 ratified it and it had to -- it extended it in two  
25 important ways.

1           Crooker left open the question or at least  
2   made it vague as to whether prosecution guidelines would  
3   be protected by Exemption 2. The reason that was  
4   unclear is because the D.C. Circuit had previously  
5   concluded in Jordan that Exemption 2 did not apply.  
6   Crooker rejected all of Jordan's rationale, but then  
7   someone enigmatically said, but we would reach the same  
8   result. Justice Ginsburg's concurrence explained in  
9   Crooker that this muddled the waters, and when Congress  
10  revisited FOIA and Exemption 7(E), it specifically  
11  provided an exemption for law enforcement investigations  
12  and prosecutions. In doing so, it made clear that  
13  whatever existed of Jordan was gone. It also did  
14  something else --

15           CHIEF JUSTICE ROBERTS: I would have thought  
16  that the amendment to Exemption 7 really cut the other  
17  way. They amended Exemption 7; they didn't amend  
18  Exemption 2.

19           MR. YANG: Well, they amended Exemption 7 --

20           CHIEF JUSTICE ROBERTS: To adopt more or  
21  less Crooker, right?

22           MR. YANG: To adopt Crooker in certain  
23  areas.

24           CHIEF JUSTICE ROBERTS: Yes. Exactly, not  
25  this one.

1                   MR. YANG: Well, no, I think what it did is  
2     it took Crooker as understood, but what it did is with  
3     respect to law enforcement records -- and remember it's  
4     only records compiled for law enforcement purposes that  
5     would disclose techniques, procedures, or guidelines for  
6     investigations or in prosecutions. In that context,  
7     Congress lowered the bar. It provided more protection  
8     for those law enforcement records than Crooker did.

9                   This is part of what Congress was doing in  
10    Exemption 7 more generally, and this Court's decision in  
11    Reporters Committee discusses this. Before '86,  
12    Exemption 7 applied where disclosure would cause much of  
13    these harms, these enumerated harms. Congress changed  
14    "would" through most of the sub-provisions of Exemption  
15    7 to "could reasonably be expected to," and they did so  
16    also in Exemption 7(E) where -- with respect to the  
17    guidelines provision.

18                  When guidelines for law enforcement  
19    investigations or prosecutions could reasonably be  
20    expected to circumvent the law, that's what the  
21    exemption covers. In doing so, it's providing --  
22    Congress decided to extend Crooker. It extended the  
23    protections by lowering the bar in '86, and it also, as  
24    we have discussed, did so to specifically address the  
25    D.C. Circuit's decision in Jordan, or at least what

1 might have been left of that after Crooker.

2 We see that as simply building on the back  
3 of Crooker, and it did so specifically in the -- the law  
4 enforcement context, but it did so with the premise that  
5 Crooker had properly understood Exemption 2. And it's  
6 important to remember that law enforcement context in  
7 the Exemption 7(E) will only apply in a certain subset  
8 of instances. It has to be compiled for law enforcement  
9 purposes; it has to be -- disclose techniques,  
10 procedures, or guidelines for law enforcement  
11 investigations or prosecutions --

12 JUSTICE BREYER: What happens -- I'm just  
13 curious -- on -- if you classify -- suppose you have a  
14 document, "in case of emergency, these are the  
15 evacuation procedures" of a big Federal building. And  
16 now you want to show that to the firemen, but you don't  
17 want it to be in the newspaper. All right. And the  
18 firemen don't have classifications, and they aren't  
19 cleared.

20 MR. YANG: Right.

21 JUSTICE BREYER: But I guess if -- in order  
22 to see it, they'd have to be cleared.

23 MR. YANG: They would have -- right. Be --

24 JUSTICE BREYER: How long does it take,  
25 approximately, roughly, to clear a fireman so that he



1     could, in fact, see the evacuation manual from the  
2     Federal building?

3                 MR. YANG:  I don't know exactly --

4                 JUSTICE BREYER:  Can you give me a rough  
5     idea?

6                 MR. YANG:  I'm -- this is going to --

7                 JUSTICE BREYER:  All right.  Thank you.

8                 MR. YANG:  I'm going to speculate a little  
9     bit on this --

10                JUSTICE BREYER:  Thank you.  Right.

11                MR. YANG:  But -- and if I am wildly off,  
12     we'll let the Court know.  I think it's on the order of  
13     6 months, but it could be longer.

14                CHIEF JUSTICE ROBERTS:  For what level of  
15     classification?  I gather the investigation of the  
16     person is quite different depending upon what level you  
17     want, if you want to give --

18                MR. YANG:  I think that's for the basic  
19     secret, but I would have to -- again, I don't have a  
20     precise answer for the Court, and we could provide a  
21     more fulsome answer after --

22                CHIEF JUSTICE ROBERTS:  The lower things  
23     below secret --

24                MR. YANG:  Right.

25                CHIEF JUSTICE ROBERTS:  Are those sufficient

1     classifications to prevent disclosure under FOIA?

2                 MR. YANG:   Yes.

3                 CHIEF JUSTICE ROBERTS:   What is it,  
4     sensitive?

5                 MR. YANG:   Confidential, I believe.   But  
6     yes.   Yes.   Anything --

7                 CHIEF JUSTICE ROBERTS:   And so, if you label  
8     something confidential, you don't have to disclose it  
9     under FOIA?

10                MR. YANG:   Right.   But classification is not  
11     something that the executive can do, of course, just  
12     willy-nilly.   There are certain criteria that have to be  
13     satisfied, and there are certain practical storage,  
14     access requirements that come with classification.

15                JUSTICE ALITO:   Do you think it's --

16                JUSTICE SOTOMAYOR:   Counsel --

17                JUSTICE ALITO:   Do you think it's practical  
18     to classify all of the information that might have  
19     security implications?

20                MR. YANG:   I think it's difficult.   And  
21     certainly --

22                JUSTICE ALITO:   Architectural designs --

23                MR. YANG:   Yes.   I don't --

24                JUSTICE ALITO:   -- passwords.

25                MR. YANG:   I don't think if we go that far,

1 it is practical. Plus, in many contexts, there won't  
2 have -- there won't be national -- cognizable injury to  
3 the national security, which is the touchstone of  
4 classification. So there are things -- you know, there  
5 are many types of information out there -- for instance,  
6 internal procedures regarding computer security for  
7 agencies -- that just would not normally be thought of  
8 as something that's classified.

9 Agencies also provide guidance to personnel;  
10 for instance, in screening Medicare claims that come in.  
11 Medicare --

12 CHIEF JUSTICE ROBERTS: I'm sorry. You  
13 wouldn't regard internal security procedures for  
14 computer systems as confidential?

15 MR. YANG: Not classified as confidential.  
16 In order to be classified, there has to be a  
17 determination by the original classifying authority of  
18 many things, but, among other things, it has to show  
19 that disclosure of the information could reasonably be  
20 expected to damage the national security.

21 JUSTICE KENNEDY: Would you classify those  
22 as internal procedural rules -- personnel rules? And  
23 would you also classify architectural specifications as  
24 internal personnel rules?

25 MR. YANG: It depends on context. I think

1 the computer security instructions to personnel, how you  
2 access and what criteria you must build your computer  
3 systems to be secure at -- I think that would be deemed  
4 as internal rules and practices for -- of an agency.

5 JUSTICE KENNEDY: What about architectural  
6 specifications?

7 MR. YANG: It can. I mean, I think it's a  
8 little misleading to talk about architectural  
9 specifications or maps. Those are simply methods by  
10 which you convey information. You could also write  
11 things out longhand. It would take a lot longer, but  
12 you could write out the same information longhand. So  
13 long as it fits within the rubric of internal personnel  
14 rules and practices of an agency -- that is, it is  
15 providing guidance, it is providing rules and practice  
16 for the agency's personnel to follow in conducting the  
17 agency's function -- it could well be deemed to fall  
18 within Exemption 2. Not everything would be, but  
19 certain things can.

20 JUSTICE SOTOMAYOR: So, basically, anything  
21 that the agency uses to craft its internal employee  
22 practices and rules gets swept up as private, as  
23 internal?

24 MR. YANG: No. No, no, no.

25 JUSTICE SOTOMAYOR: If -- if --

1                   MR. YANG: It certainly would be personnel  
2 rules and practices of an agency to be properly deemed  
3 internal. That's where you -- the circumvention prong  
4 comes in, of Crooker, and we believe that in order to be  
5 properly deemed internal, the disclosure would  
6 significantly risk circumvention of the agency's  
7 functions.

8                   JUSTICE SOTOMAYOR: So you are taking out  
9 the records related to personnel and not making it a  
10 condition of the disclosure. You're saying if any  
11 document circumvents the agency's functioning, that's  
12 exempted.

13                  MR. YANG: I --

14                  JUSTICE SOTOMAYOR: You're not tying --  
15 that's where I'm confused.

16                  MR. YANG: I didn't mean -- if I gave that,  
17 if I said so, I certainly didn't mean to give that  
18 impression. There are certain --

19                  JUSTICE SOTOMAYOR: So, how does --

20                  MR. YANG: There are two different --

21                  JUSTICE SOTOMAYOR: How do the documents  
22 that the agency reviews to determine and craft its  
23 internal rules and practices fall under the rubric of  
24 being related to, solely related to, personnel practices  
25 and rules?

1                   If they were created separately, if they  
2   were created for multiple purposes, if they were --

3                   MR. YANG:   Well --

4                   JUSTICE SOTOMAYOR:  -- used in different  
5   circumstances besides the relationship of employees to  
6   others --

7                   MR. YANG:   I -- to bring us to, maybe, this  
8   case, to give an example, this case involves the ESQD  
9   information for Indian Island.  That information is a  
10  personnel rule or practice of the agency, or is related  
11  to it, because it tells the Navy's personnel how to  
12  store, how to move, how to --

13                  JUSTICE SOTOMAYOR:  The map doesn't.  You  
14  use the map to do the latter things.

15                  MR. YANG:   Well, I guess it's a question of  
16  how you convey that information.  If you said you can't  
17  get within 1,000 feet of point X and wrote that out as  
18  an instruction, that's one way to do it.  The map is  
19  another way to do it.

20                  JUSTICE SOTOMAYOR:  Do you see --

21                  MR. YANG:   The map simply --

22                  JUSTICE SOTOMAYOR:  I'm sorry.  I'm cutting  
23  you off because your light is on.

24                  Do you see any difference between the  
25  position you're taking and Crooker?

1 MR. YANG: No. We think that --

2 JUSTICE SOTOMAYOR: You formulate your test  
3 very differently than Crooker does. What are those  
4 differences?

5 MR. YANG: I think it's essentially the  
6 same, and let me tell you why. Crooker uses the  
7 predominant internality test, right? And there's  
8 essentially two things that the court is getting at  
9 there. It says that that means that the agency function  
10 at issue can have an impact beyond the agency. That was  
11 kind of one -- one aspect of it.

12 And, two, the Court was concerned about not  
13 having secret law; that is, things that the public would  
14 have to know and use in interacting with the agency. We  
15 think that that's essentially the same thing that we're  
16 doing. And --

17 JUSTICE KAGAN: Mr. Yang, if -- if we assume  
18 that a majority of this Court finds this statutory  
19 interpretation untenable and that you lose, but that the  
20 Court is also concerned about the government's reliance  
21 interests here and about this set of documents that have  
22 been exempted under Exemption 2 that would become  
23 unexempt, is there anything that the Court can do about  
24 that? Is there anything that the government would need  
25 to -- to advance -- to deal with those reliance

1 interests?

2 MR. YANG: You're assuming that we lose the  
3 case entirely.

4 JUSTICE KAGAN: I am assuming, yes. That's  
5 just an assumption.

6 (Laughter.)

7 MR. YANG: All right. That's not an  
8 assumption I like to deal with often, but -- well, I  
9 think if the Court were to rule against the Government  
10 on all respects, I think that that would leave us with  
11 the option of returning to Congress. This Court, of  
12 course, is free to opine on --

13 JUSTICE BREYER: If you couldn't go return  
14 to Congress and you had to classify documents falling  
15 into the category that you previously thought dealt with  
16 in Crooker, how long would that take? How many  
17 documents would you guess there were in the Federal  
18 Government? Millions? Thousands?

19 MR. YANG: There's a very large number of  
20 documents where disclosure would circumvent the very  
21 agency functions at issue, not all of which, and perhaps  
22 very many of which, would not be able to be classified  
23 under Exemption --

24 CHIEF JUSTICE ROBERTS: And all of which you  
25 already have to review to compile the Vaughn index and



1 to make sure there are not other exemptions that are  
2 applicable, right? You don't just grab a bunch of files  
3 and turn them over. You look at them before you release  
4 them under FOIA.

5 MR. YANG: That's true. It's just that the  
6 Exemption 2 serves a unique and important function.

7 JUSTICE BREYER: That wasn't my question.  
8 My question did not concern those documents that were  
9 requested. It concerns the category of documents that  
10 might be requested --

11 MR. YANG: Right.

12 JUSTICE BREYER: -- which is every document  
13 that might be requested.

14 MR. YANG: That's correct.

15 JUSTICE BREYER: And I wonder if it ranges  
16 in the millions, tens of millions, hundreds of  
17 thousands, 5,000, or if it --

18 MR. YANG: And it would be -- it would be a  
19 very large number of documents, and it would not be  
20 practical to take those case by case, and then of those  
21 that might have some national security interest, go --  
22 we -- there --

23 CHIEF JUSTICE ROBERTS: You don't have to go  
24 through everything. You have to go through the material  
25 that is requested, and you go through that material

1 already.

2 MR. YANG: We do. There is a very large  
3 number of FOIA requests.

4 CHIEF JUSTICE ROBERTS: And it takes forever  
5 to get the documents.

6 (Laughter.)

7 MR. YANG: The statute -- we are not usually  
8 complying with the statute's 20-day --

9 CHIEF JUSTICE ROBERTS: Right.

10 MR. YANG: -- turnaround. That's correct.

11 The -- I think I ought to just note two more  
12 things. Petitioner's reading of the legislative  
13 history, I think, needs to be corrected in two respects.  
14 The 1964 Senate report that Petitioner relies upon talks  
15 about rules regarding parking, lunch hours, and sick  
16 leave. That does not concern Exemption 2. That  
17 provision is regarding what ultimately became section  
18 552(a)(C)(2).

19 JUSTICE ALITO: Could I just nail down one  
20 particular point? It is the view of -- you're  
21 representing the Government, and it is the view of the  
22 Government that classification is not a practicable  
23 solution to the problem that's highlighted here.

24 MR. YANG: Correct, because not all the  
25 documents here, even if there was time to review them,

1 would fall within -- excuse me -- not in this case, but  
2 within the matter of Exemption 2, would not be able to  
3 be classified. Exemption 2 addresses a special problem.  
4 It addresses the problem of releasing documents where  
5 the very release would frustrate the function of having  
6 those documents in the agency -- for the agency.

7 And so there's no other exemption that does  
8 that. And requiring Congress -- remember, this has been  
9 the way this has worked for almost 30 years. There  
10 would have to be a very large number of Exemption 3  
11 statutes. Congress would have to go and enact them one  
12 by one. It's not a feasible solution.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Mann, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF DAVID S. MANN

16 ON BEHALF OF THE PETITIONER

17 MR. MANN: There are two points I'd like to  
18 focus again on, coming back to, is the word "personnel"  
19 matters. When this case came to me, my client told me  
20 that he could not get these maps that he had gotten  
21 previously because the Navy was classifying them as  
22 personnel documents. What is my reaction as a lawyer?  
23 What? What are you talking about? I can read the  
24 language of this statute. It's talking about a narrow  
25 exception, which is exactly what Congress set up. Nine

1 narrow exceptions. The one open-ended one is the one  
2 that Congress kept for itself, Exemption 3.

3           If the Navy doesn't believe that these  
4 documents can be or should be classified, but the Navy  
5 doesn't want to release these documents for some reason,  
6 then the Navy's recourse is to go to Congress as other  
7 agencies have done and seek a special protection for  
8 these documents. But it's not to distort the words  
9 "personnel practices and rules" to expand to every  
10 document that is used by personnel.

11           And that's precisely what the Navy is asking  
12 for, on page 51 of their brief, and we responded to it  
13 in our reply. They're looking for an exemption that  
14 covers a wide range of information concerning internal  
15 rules and practices where disclosure would risk  
16 circumvention and where other FOIA exemptions are  
17 unavailable. They're asking you to create for them what  
18 they -- what Congress wouldn't give them in 1964 or '66,  
19 broad discretion. And it doesn't belong. It certainly  
20 doesn't belong under the very narrow Exemption 2.

21           If there are no other questions, I'm  
22 complete.

23           CHIEF JUSTICE ROBERTS: Thank you, counsel.

24           The case is submitted.

25           (Whereupon, at 10:59 a.m., the case in the

1     above-entitled matter was submitted.)

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