1   IN THE SUPREME COURT OF THE UNITED STATES

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3   GLEN SCOTT MILNER,   :

4   Petitioner   :

5   v.   :   No. 09-1163

6   DEPARTMENT OF THE NAVY   :

7   - - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Wednesday, December 1, 2010

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11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:01 a.m.   `

14   APPEARANCES:

15   DAVID S. MANN, Seattle, Washington; on behalf of

16   Petitioner.

17   ANTHONY A. YANG, ESQ., Assistant to the Solicitor

18   General, Department of Justice, Washington, D.C.; on

19   behalf of Respondent.

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1   C O N T E N T S

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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

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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
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 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

Official

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 muddied 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

Official

 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

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 1    above-entitled matter was submitted.)

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