No. 091163 MAR 22 2010

In The Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion created by some circuits but rejected by others.

PARTIES TO THE PROCEEDINGS

Petitioner Glen Milner is an individual and United States citizen who initiated the proceedings below by filing a complaint under the Freedom of Information Act against respondent United States Navy in the Western District of Washington. The District Court granted the Navy's motion for summary judgment and dismissed the case. Petitioner Milner appealed the District Court's determination to the Ninth Circuit Court of Appeals, which affirmed the District Court's grant of summary judgment. No petitioner is a publicly owned corporation.

Table of Contents

Table of Authorities

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Glen Milner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, published as *Milner v. U.S. Dept. of the Navy*, 575 F.3d 959 (9th Cir. 2009), is reprinted in the Appendix (App.) at 26. The decision of the United States District Court for the Western District of Washington, reprinted at App. 4, is not published but is available as *Milner v. U.S. Dept. of the Navy*, 2007 WL 3228049 (W.D.Wash. 2007).

JURISDICTION

Petitioner Milner's motion for reconsideration en banc was denied by the Court of Appeals by order entered on December 22, 2009. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

5 U.S.C. § 552(b) of the Freedom of Information Act ("Exemption 2") provides in pertinent part:

> (b) This section [providing for public access to government documents] does not apply to matters that are:
>
> . . .
>
> (2) related solely to the internal personnel rules and practices of an agency;

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I. INTRODUCTION AND STATEMENT OF FACTS

Exemption 2 of the Freedom of Information Act allows a government agency to withhold material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In 1976, this Court ruled that Exemption 2 allowed an agency to keep from disclosure trivial materials in which the public did not have any legitimate interest. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 96 S. Ct. 1592 (1976). Left open was the question of whether Exemption 2 also covered nontrivial materials, the release of which might risk circumvention of agency regulation. *Dep't of the Air Force v. Rose*, 425 U.S. at 369, 96 S. Ct. at 1603 (1976).

Despite the plain language of the Exemption, some circuits have created a "High 2" reading of Exemption 2. The parameters of this judicially-created expansion of the exemption vary. In this decision, the Ninth Circuit ruled that a government agency could keep secret any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d 959, 968 (9th Cir. 2009). Some circuits agree with this reading; others

have varying tests for High 2. Still other circuits limit the Exemption to the "Low 2" trivial administrative materials this Court described in *Rose*. This judicially-created High 2 reading of Exemption 2 is a significant departure from the plain language of the Exemption, and represents a departure even from the hypothetical left open in *Rose*. Appellant Glen Scott Milner asks this court to revisit the question left open thirty years ago, and resolve a split between the circuits in favor of the plain language of the Exemption and disclosure, rather than a judicially-created reading sanctioning government secrecy.

Appellant Milner is a citizen who wants to know if he is at risk from ammunition stored at the U.S. Navy's Naval Magazine Indian Island (NMII). NMII is an ammunition depot located very near the civilian communities of Port Hadlock and Port Townsend in the Puget Sound area of Washington. It is located on a small island, connected to the mainland via a public road. The Navy does not hide the presence of NMII, nor does it deny that explosives are stored there.

The Navy has calculated how far an explosion would go if a fire or accident occurred at NMII. The Navy creates and maintains Explosive Safety Quantity Distance (ESQD) data for explosives

storage facilities. An ESQD is the distance an explosion is expected to expand should a particular explosive or combination of explosives detonate. ESQD data is used by the Navy for construction purposes, and is regularly released to civilian construction crews. It is used by local fire and other safety agencies in planning for emergencies. A previous version of the exact information sought here – an ESQD map showing the blast radius of the items stored in buildings at NMII – was provided to local emergency response personnel and elected officials, and then published in a local newspaper. Appellant Milner, and other citizens, could use the information if released to make informed decisions about whether they wanted to live within a blast radius, or drive, walk, or boat through the risk arcs when travelling near NMII. Should a fire break out, publication of the explosive arcs in advance would mean that civilians would know how far away they must stay.[1] These maps also have an important political use. NMII is very near civilian communities; these communities should know

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[1] The risk of a disaster is not abstract. On October 28, 2009, Port Chicago National Magazine Memorial became the Nation's newest national park site. Port Chicago was the site of a 1944 explosion that killed 320 people at a naval magazine much like NMII.

whether NMII poses a risk to their safety, so that they may exercise their democratic rights to protest that risk.

Appellant Milner has obtained, through FOIA requests, ESQD maps from the Navy showing the blast radius of explosives stored at nearby Bangor submarine base – a facility that, unlike NMII, also stores nuclear weapons. Inexplicably, the commander of NMII denied Mr. Milner's FOIA request for its maps, claiming in a declaration that he believed release of the maps to Mr. Milner "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act." ER 0075; 77.

Mr. Milner brought suit under FOIA, and the District Court affirmed the Navy's denial, relying exclusively on the "High 2" reading of 5 U.S.C. § 552(b)(2). In a 2-1 split, a panel of the Ninth Circuit affirmed the District Court's decision, and dramatically expanded the reach of Exemption 2 beyond even other circuits that have created a High 2 reading. The Ninth Circuit's decision allows an agency to keep from disclosure any document "if it is predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d 959, 968 (9th Cir. 2009). The *Milner* court expanded the scope

of High 2 as adopted by the D.C. Circuit and previous Ninth Circuit decisions by allowing the Navy to assert a risk from any person, rather than limiting the exemption to risks presented by the subjects of agency regulation. The Ninth Circuit further abandoned any pretext of reliance on a specific law or regulation, instead allowing the Navy to rely on hypothetical general safety concerns.

Glen Milner asks this Court to decide the question left open in 1976 in favor of disclosure rather than secrecy, resolve the split among circuits regarding the existence and scope of a "High 2" exemption, reject the judicial creation of an exemption that goes beyond the statute, and hold that Exemption 2 is limited to trivial administrative materials, and is not a catch-all for any information a government agency speculates may risk harm to agency operations.

II. ARGUMENT

A. Review is Necessary to Resolve an Important Question of Federal Law.

1. Strict construction of FOIA mandates that Congress, not the

courts, decide whether to broaden Exemption 2.

The High 2 reading of Exemption 2 was created by the courts, not Congress, and goes far beyond the exemption's plain language of protecting government from having to release purely administrative matters. This Court's guidelines suggest review of a decision the resolution of which would resolve an important question of federal law. Sup. Ct. R. 10(c). The purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 2327 (1978). FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose,* 425 U.S. at 360-61, 96 S. Ct. 1592 (quoting S.Rep. No. 813-89, at 3 (1965)).

As this Court has noted, FOIA's exemptions were "explicitly made exclusive, and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79, 93 S. Ct.

827, 832 (1973). The delineated exemptions "are to be interpreted narrowly." *Lahr v. NTSB,* 569 F.3d 964, 973 (9th Cir. 2009) (internal citation omitted). The narrow wording of each exemption was explicitly designed by Congress to counteract the "vague phrases, such as that exemption from disclosure any function of the United States requiring secrecy in the public interest" of FOIA's predecessor. *Mink*, 410 U.S. at 79, 93 S. Ct. at 832.

In *Department of the Air Force v. Rose*, *supra*, this Court considered Exemption 2 in the context of a request for disciplinary records of Air Force cadets. 5 U.S.C. § 552(b)(2) provides that an agency may exempt from disclosure under the Freedom of Information Act only records that are "related solely to the internal personnel rules and practices of an agency." In *Rose*, the Court ordered that Air Force disciplinary records be released to a law review author, holding that Exemption 2 allowed an agency to keep secret trivial matters, but that FOIA mandated disclosure of matters of genuine public interest. *Dep't of the Air Force v. Rose,* 425 U.S. at 364, 96 S. Ct. at 1600. The Court declined to decide the issue of whether Exemption 2 might also allow some materials of genuine public interest to remain secret, noting that courts:

> [P]ermitting agency withholding of matters of some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function. Moreover, the legislative history indicates that this was the primary concern of the committee drafting the House Report. We need not consider in this case the applicability of Exemption 2 in such circumstances, however, because, as the Court of Appeals recognized, this is not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards."

Dep't of the Air Force v. Rose, 425 U.S. at 364, 96 S. Ct. at 1600 (internal citations omitted). As the Ninth Circuit recognized in this decision, this Court has left open the scope of Exemption 2 since *Rose* was decided in 1976. *Milner v. U.S. Navy*, 575 F.3d 959, 964 n. 2 (9th Cir. 2009).

In holding that Exemption 2 covered trivial materials but leaving open the question of whether the exemption might have a broader reach, this Court noted that the legislative record reflected a split between the Senate and the House on the scope of the exemption. In enacting Exemption 2, the Senate noted that:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965), as quoted in *Rose*, 425 U.S. at 363. The House Report provides that Exemption 2 was to be applied to:

> Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all

> "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.

H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965), as quoted in *Rose*, 425 U.S. at 363. As this Court has noted, the Senate Report is the more authoritative. *Rose*, 425 U.S. at 366-67. But the presence of two competing versions of what Exemption 2 means in the legislative record has led to discord among the circuits, and an ever-broadening definition of Exemption 2 that threatens in some circuits to swallow FOIA itself. Resolution of the debate is long-due.

In adopting a High 2 reading of Exemption 2, courts have broadened the phrase "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), to mean any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner v. U.S. Navy*, 575 F.3d at 968. As described below, the Ninth Circuit in this matter is not the only circuit to have gone down the dangerous path of expanding Exemption 2; the Ninth Circuit's decision represents the capstone of a

long process of judicial expansion of Congress' narrow wording in some circuits. Although lip service is still paid by most courts to the word "personnel," in this case the Ninth Circuit has sanctioned nondisclosure of a map showing how far an explosion will go, regardless of its complete lack of application to any personnel issues other than that it was used by government employees. This creates the vague and undefined exemption FOIA was enacted to eliminate. The Ninth Circuit's decision allows a government agent to keep secret any document, as long as it was not designed for public release nor widely released, and can be shown to create any level of risk to any type of agency operation.

The failure to adhere to FOIA's plain language has far-reaching implications. The slippery slope of the High 2 exemption is patent. There is little data that does not have some potential impact on an agency's operation, and could thus be used to help a potential wrongdoer interfere with an agency's regulations or the law. The hours of the Navy museum gift shop indicate when it is supervised and therefore the best time to burglarize it. How much the Navy pays for baked beans could allow triangulation of price to the supplier, and increase the risk of poisoning. High 2, as the decision of the

Ninth Circuit in this matter has interpreted it, means that anything that is not designed by the agency for public disclosure can be kept secret if the agency can come up with a creative reason explaining why a rule might be circumvented if data is released. But FOIA was designed to take this very discretion away from agencies. The broad reading of Exemption 2 adopted by the Ninth Circuit leads to exactly the unbridled and illogical discretion demonstrated by the Navy in this case: one agency employee, the commander at Bangor submarine base, where nuclear weapons are maintained, decided to release ESQD maps. A different agency commander, at NMII, weighed what he believed were the political benefits to releasing the maps, decided that release "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act," and kept them secret. Allowing Exemption 2 to expand as far as the Ninth Circuit has done in this case sends the message to agency employees that the bad old days of the Administrative Procedure Act have returned, and that they have sole discretion to decide what the public can know about government operations.

The "mosaic approach" to High 2 adopted by some district courts exacerbates the discretion

afforded to government agents to decide which documents the public may see. Under the "mosaic approach," government agents can withhold documents that are not intrinsically likely to cause circumvention of agency regulation, but if combined with similar documents might create such a risk. *L.A. Times v. Dep't of the Army*, 442 F.Supp.2d 880, 900-01 (C.D. Cal. 2006) (Allowing withholding of the names of private security contractors, on a theory that these names could be used with data from incident reports to target companies working on the Iraq reconstruction); *see also James Madison Project v. CIA*, 605 F.Supp.2d 99, 111-12 (D.D.C. 2009) (Authorizing withholding of seemingly "harmless" CIA training materials on a fear that foreign intelligence services might employ a mosaic approach with undescribed other data to cause harm).

The problem of unregulated discretion is substantial. The vast majority of FOIA requests are resolved by government agents without any judicial oversight; only a very small percentage of FOIA cases are ever litigated in court. In fiscal year 2008, the Navy alone received 14,405 FOIA requests.[2] Other agencies received thousands more, but

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[2] http://www.foia.navy.mil/foia/2008FinalReportl.pdf .

reported decisions on FOIA matters are relatively sparse, and several circuits have never addressed whether High 2 exists. Significantly, in providing guidance to Federal agencies, the Department of Justice has emphasized the D.C. Circuit's version of High 2 set forth in *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051, 1062 (D.C. Cir. 1981), while failing to adequately acknowledge that other circuits have either not addressed the issue, or disagree with it. *See* United States Dep't of Justice, *Guide to the Freedom of Information Act* (June 2009) at 184-85.

Judicially created limits on High 2 have failed to limit High 2's reach. This Court's comment that it is undecided whether Exemption 2 may include documents the release of which might risk "circumvention of agency regulation" has been used to steadily expand increasing secrecy in a manner that frustrates both the language and intent of FOIA. *Dep't of the Air Force v. Rose,* 425 U.S. at 364, 96 S. Ct. at 1600. Initially applied only to law enforcement documents in cases such as *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051, High 2 next expanded to administrative regulations, *Dirksen v. Dep't of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986), then to any document the release of which would render the

document "operationally useless" and documents the release of which might give some entity a competitive advantage, *National Treasury Employees Union v. U.S. Customs Svc.*, 802 F.2d 525, 529-31 (D.C. Cir. 1986), and now to the instant case wherein a hypothetical security risk from a hypothetical lawbreaker to a non-regulatory agency is sufficient to trigger Exemption 2's protection.

The D.C. Circuit has attempted to limit the reach of High 2 by adding the word "significantly" to the risk of circumvention requirement. *Crooker,* 670 F.2d at 1074. This effort to restrain misuse of Exemption 2 has been unsuccessful, even within the D.C. Circuit. This "significantly risks" test also appears to have been later abandoned by the D.C. Circuit, and either abandoned or never adopted by the Ninth Circuit. In *National Treasury Employees Union v. U.S. Customs Svc.*, 802 F.2d 525 (D.C. Cir. 1986), the D.C. Circuit allowed the Customs Service to keep secret the criteria for promoting employees, claiming that release might make it "more difficult correctly to evaluate job candidates" based on the court's speculation that some candidates might be advantaged by having access to the criteria while other candidates without access would be unable to prepare to the same level, or that candidates might artificially inflate some areas of their resumes if they

knew what criteria would be applied. The Ninth Circuit in this matter accepted a naval commander's declaration that it was possible to reverse-engineer ESQD to identify the locations where the most explosives were stored, without any discussion of the possibility that such a reverse-engineering would take place, or whether it was practically possible to use the information in such a manner.[3]

Moreover, as the dissent in this matter notes, the requirement that an agency must identify a risk from the subjects of agency regulation has been abandoned by the Ninth Circuit. *Milner v. U.S. Dept. of the Navy,* 575 F.3d at 977-78. Under the Ninth Circuit's version, any hypothetical risk is enough to allow nondisclosure. In this case, the Navy asserts that a lawbreaker might "reverse-engineer" the maps to be able to discern which buildings store the most explosives. Carrying the Navy's reasoning not much further, a hypothetical report disclosing

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[3] It is extremely unlikely that even being able to reverse-engineer the maps would aid a lawbreaker – the record demonstrated that the Navy constantly moves ammunition and explosives around the facility, while the maps are "snapshots" of a particular moment in time – useful for gauging the general risk to the area as a whole should a disaster happen, but no more useful to pinpoint the most explosives at any particular moment than just picking one of the ammunition storage buildings at random, or waiting for a ship to dock and then targeting the transfer wharf. ER 0076.

corruption in a government agency's purchasing decisions could be kept secret, because it could theoretically be used to discern and exploit purchasing guidelines for commercial gain. Creative minds can always find ways to misuse information; creative government agency minds can now use any hypothetical misuse of data to keep secret virtually anything and everything they want to keep from the public eye.

Disturbingly, the D.C. Circuit has also suggested that the correct inquiry under both Low 2 and High 2 is whether the requested material is the subject of legitimate public interest. *Crooker*, 670 F.2d at 1065. Although the *Crooker* court disclaimed the impact of this proposed inquiry test by noting that it was "not for courts to decide what matters are of legitimate public interest," *id.* at 1065-66, later decisions return to the theme. In *National Treasury Employees Union*, the D.C. Circuit quoted *Crooker's* "lack of public interest" standard to hold that "the appointments of individual members of the lower federal bureaucracy is primarily a question of "internal" significance for the agencies involved," even while acknowledging that "appointment decisions, like any government activity, have some impact upon the public[.]" *National Treasury Employees Union v. U.S. Customs Svc.,* 802 F.2d at

531. While this is the correct inquiry under Low 2 because a matter is trivial only if there is no legitimate public interest, High 2 purports to allow agencies to decide whether there is a public interest in disclosure of admittedly nontrivial documents. This weighing of the democratic merit of a request for information on the part of government bureaucrats is what FOIA was designed to prevent – it is for the citizens, not government employees, to decide what is important to view.

The High 2 reading of Exemption 2 is unnecessary to protect the interests of government, given the protections afforded by other exemptions. Other FOIA exemptions protect the national security interest tenuously asserted by the Navy here. Exemption 1 allows the Navy to protect any document it believes will endanger our nation's defense by classifying it. 5 U.S.C. § 552(b)(1). Similarly, Exemption 3 protects documents that are exempt from disclosure by statute. 5 U.S.C. § 552(b)(3). Moreover, law enforcement materials, the protection of which many of the circuits adopting the High 2 reading of Exemption 2 have relied upon to justify the expansion, are also protected by Exemption 7. 5 U.S.C. § 552(b)(2)(7); *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 888-89 (7th Cir. 1988); *PHE, Inc. v. U.S. Dep't of Justice*,

983 F.2d 248, 251 (D.C. Cir. 1993). *See also* United States Dep't of Justice, *Guide to the Freedom of Information Act,* p. 203 ("there is a great deal of overlap between the coverage of "high 2" and Exemption 7(E).").

Crucially, unlike other exemptions protecting safety or operations, Exemption 2 contains no safeguards or balancing tests beyond the bare assertion that there is a risk of harm. In *Crooker*, the D.C. Circuit noted that "[i]t is not up to this court to balance the public interest in disclosure against any reason for avoiding disclosure." *Crooker*, 670 F.2d at 1074; *see also Gordon v. FBI*, 388 F.Supp.2d 1028, 1036-37 (N.D. Cal. 2005).[4]

Other exemptions contain balancing. Exemption 7 expressly requires balancing. 5 U.S.C. § 552(b)(7); *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171, 124 S. Ct. 1570, 1580 (2004). Exemptions 1 and 3 require decisions from either the Executive or Congress, and are inherently balanced by the political process as well as by judicial review of the Executive Order or statute in question. But with the High 2 interpretation of

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[4] The Seventh Circuit has held that "the purpose of the document must be legitimate and the document must not constitute 'secret law,'" but beyond this basic requirement no circuit appears to have adopted a balancing test for High 2. *Kaganove v. Environmental Protection Agency*, 856 F.2d at 889.

Exemption 2, *any* risk to agency regulation or operations, no matter how trivial or remote, will exempt from disclosure even a document in which there is a compelling public interest. There is no need for a balancing test for Low 2 information: the public simply has no need to know (for example) the parking regulations at NMII, and a request for that data merely wastes taxpayer money and government resources in responding. But members of the public do have a need to know if they will be caught in a fireball if they live, work, or recreate too close to NMII, and a need to have the information necessary to effectively exercise their right to free speech and petition in protesting the Government's decision to put an ammunition storage depot right next to a populated area.

The High 2 reading has created the very situation FOIA was enacted to prevent, wherein government agents are empowered to decide which documents citizens are allowed to see. There is a very real danger that a broad reading of Exemption 2 may lead to the denial of information for improper reasons. In this case, the petitioner is an anti-war activist. The Navy commander who denied his request for blast maps did so because that particular commander believed that giving Mr. Milner the maps "would do little or nothing to

promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act."[5] But government agents are not supposed to be deciding whether withholding documents promotes their personal beliefs as to what benefits democracy, and the Ninth Circuit's broad reading of Exemption 2 misreads the statute to do exactly that.

Moreover, High 2 can endanger rather than protect safety. Information that is classified or protected by statute must be kept secret by all, or sanctions apply. By contrast, High 2 does nothing to regulate information that somehow makes it outside the confines of the agency. In this case, the Navy asserts that the ESQD maps at question must be kept secret or the safety of one of the nation's three naval magazines is endangered. But the Navy gave a prior version of the ESQD maps to a local politician and local emergency response agencies, and someone gave it to a newspaper which published it. There are no sanctions for doing so – Exemption 2 is a shield to the government providing information, not a mandate that anyone who receives it keep it secret. If this information were really dangerous to public safety, classifying it or seeking statutory protections from Congress would

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[5] The quotation is from a declaration submitted by the Navy to the District Court, contained at ER 0075; 77.

have meant that whoever provided the map to the newspaper did so only on peril of prosecution and imprisonment. Allowing government agencies to short-cut the classification or statutory protection process through a reliance on an overbroad Exemption 2 places us all at risk that a person who obtains actually dangerous documents may freely disseminate them.

B. Review is Necessary to Resolve a Conflict between the Circuits.

This Court's guidelines suggest review of a decision that conflicts with decisions reached by other circuits. Sup. Ct. R. 10(a). Such a conflict is present here. The Sixth and Eighth Circuits hold that High 2 does not exist. In *Hawkes v. Internal Revenue Svc.*, 467 F.2d 787 (6th Cir. 1972), the Sixth Circuit considered a request for IRS manuals. The Sixth Circuit noted that the difference between the House and Senate reports was "total" and that the Senate's limited reading of Exemption 2 was before the House when the House issued its contradictory report. *Id.* at 796-97. Noting further that the Senate's version was in accord with the "the plain import" of the language of Exemption 2, the court held "[f]or all of these reasons we believe that the

internal practices and policies referred to in (b)(2) relate only to the employee-employer type concerns upon which the Senate Report focused." *Id.* at 797; *see also Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075 (6th Cir. 1998); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 549 (6th Cir. 2001).

Similarly, the Eighth Circuit relied on the Senate report in holding that Exemption 2 "exempts only 'housekeeping' matters." *Cox v. Levi*, 592 F.2d 460, 462-63 (8th Cir. 1979). Later, in *Kuehnert v. FBI,* 620 F.2d 662, 667 (8th Cir. 1980), the Eighth Circuit remanded for in camera inspection FBI documents described as containing "investigative leads" and withheld pursuant to Exemption 2, holding that Exemption 2 "authorizes nondisclosure only of housekeeping matters in which the public could not reasonably be expected to have an interest." (internal citations and quotations omitted).

The Fifth Circuit appears to have left the question open. The Fifth Circuit, noting a "definite conflict" between the House and Senate reports, has held that the "better reasoned decisions hold that the Senate Report more accurately interprets the language of the statute" and declined to exempt from disclosure a staff manual for compliance and safety officers with the Department of Labor. *Stokes v. Brennan*, 476 F.2d 699, 702-03 (5th Cir. 1973).

Despite this holding, a later case claimed in dicta that "there is no need for us to choose" whether the circuit should adopt a High 2 reading. *Sladek v. Bensinger*, 605 F.2d 899, 902 (5th Cir. 1979).

The Tenth Circuit has declined to either adopt or reject the High 2 analysis, instead applying a narrow reading of the term "personnel" to any claim that Exemption 2 exempts material from disclosure. *Audubon Soc'y v. U.S. Forest Svc.*, 104 F.3d 1201, 1204 (10th Cir. 1997).

Four circuits hold that High 2 exists, but have varying tests for its application. In *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, at 547-549 (2d Cir. 1978), the Second Circuit relied on the House report in finding a High 2 exemption, claiming that this Court "expressed a general preference for the Senate Report" in *Rose*, but that the House report's broader reading of Exemption 2 applied in any case wherein disclosure may risk circumvention of agency regulation. The Second Circuit allowed High 2 to be used to keep secret an Alcohol, Tobacco, and Firearms Training Manual, holding that Exemption 2 "includes internal material such as the withheld portions of the BATF manual where disclosure may risk circumvention of agency regulation." *Id.* at 548.

The District of Columbia Circuit initially adopted the view that Exemption 2 was limited only to the trivial materials held exempt from disclosure in *Rose*, but then reversed course and adopted a High 2 reading. In *Vaughn v. Rosen*, the D.C. Circuit mandated disclosure of Office of Personnel Management documents. *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975). The *Vaughn* court expressly rejected a High 2 reading, noting that "Congress intended that Exemption 2 be interpreted narrowly and specifically. In our view, the House Report carries the potential of exempting a wide swath of information under the category of operating rules, guidelines, and manuals of procedure" and that "we choose to rely upon the Senate Report" and exempt only "house-keeping matters such as parking facilities, lunchrooms, sick leave, and the like." *Id.* at 1143 (internal quotations and citations omitted); *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc). But in 1986, confronted with a demand that the Bureau of Alcohol, Tobacco, and Firearms release training manuals for ATF agents and noting that "Congress believed that FOIA would not mandate release of materials containing law enforcement investigative techniques," the court abandoned *Vaughn* and *Jordan* and adopted a High 2 reading. *Crooker v.*

Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051. In *Crooker*, the court attempted to reconcile the House and Senate reports:

> The so-called contradiction between the House and Senate Reports, however, exists only with respect to the exemption of trivial employment matters. The House Report's statement that Exemption 2 permits exemption of more substantive matters-such as manuals of procedure for Government investigators or examiners-is uncontroverted by the Senate Report.

Id. at 1061. This holding directly contradicts this Court's observation in *Rose* that "[t]he House and Senate Reports on the bill finally enacted differ upon the scope of the narrowed exemption," *Rose*, 425 U.S. at 363, 96 S. Ct. at 1600, and with other circuits, including the Sixth Circuit's statement that the difference between the House and Senate Reports was "total." *Hawkes v. Internal Revenue Svc.,* 467 F.2d at 796-97; *see also Cox v. Levi*, 592 F.2d at 462-63.

The D.C. Circuit further added a "predominantly internal" reading to Exemption 2,

holding that Exemption 2's "related solely to internal personnel" requirement should be interpreted to mean "predominantly" internal materials. *Crooker*, 670 F.2d at 1056. The *Crooker* court limited its version of High 2 to materials "that public disclosure [of] would risk circumvention of agency regulations." *Id.* at 1073.

The D.C. Circuit recently confronted a High 2 challenge factually similar to the 9th Circuit's decision in this matter, and affirmed the USDA's failure to disclose blueprints of buildings on USDA property. *Elliot v. United States Dep't of Agriculture*, ___ F.3d ___, 2010 WL 668876 (D.C. Cir. Feb. 26,. 2010). The *Elliot* court noted arguments made by the citizen requester on appeal relating to whether blueprints could be personnel documents, and whether the risk of harm posed by disclosing blueprints of buildings was sufficient to trigger High 2 protection under the *Crooker* test, but declined to reach them since they had not been preserved in argument to the District Court.

The Seventh Circuit adopted and broadened the D.C. Circuit's *Crooker* holding, applying High 2 to any material that was predominantly internal, and disclosure of which made it "obsolete for the purpose for which [it was] designed," regardless of whether any law or regulation might be broken

following its release. *Kaganove v. Environmental Protection Agency,* 856 F.2d 884, 889 (7th Cir. 1988) (Applying Exemption 2 to E.P.A. personnel documents that rated applicants for promotion).

The Ninth Circuit initially limited High 2 to law enforcement materials, without the *Crooker* "predominantly internal" expansion. In *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980), the Ninth Circuit ruled that ATF manuals were exempt from disclosure, because "[m]aterials that solely concern law enforcement are exempt under Exemption 2 if disclosure may risk circumvention of agency regulation." Similarly, in *Dirksen v. Dep't of Health and Human Services*, 803 F.2d 1456 (9th Cir. 1986), the Ninth Circuit held that claims processing guidelines used by HHS employees to determine which reimbursement claims should be analyzed for law violations were exempt from disclosure. The court noted that these guidelines were "exempt law enforcement material." *Id.* at 1459. By contrast, prior to this case, even non-trivial personnel information which was not clearly related to a law enforcement function was held outside of Exemption 2's ambit. *Maricopa Audubon Soc'y v. U.S. Forest Svc.,* 108 F.3d 1082, 1087 (9th Cir. 1997). In *Maricopa*, the Ninth Circuit held that nest maps were not law enforcement material even

though the Forest Service used them to enforce endangered species laws. The court noted that "[the requested information does not tell the Forest Service how to catch lawbreakers; nor does it tell lawbreakers how to avoid the Forest Service's enforcement efforts. In sum, we hold that goshawk nest-site information does not constitute "law enforcement material," and was therefore unprotected by Exemption 2. *Id.* at 1087.

In this case, the majority adopted the *Crooker* test for predominant internality and eliminated the law enforcement limitation, holding that "a personnel document is exempt as "High 2" if it is predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner*, 575 F.3d at 968. Significantly, the *Milner* court also redefined "circumvention of agency regulation" to mean "circumvention of the law." *Id.* at 972. As the dissent explained:

> The majority does not acknowledge the limited sense in which circumvention of agency regulation is used in the case law interpreting Exemption 2. The majority has cited no case-and can cite no case-in which Exemption 2 was applied more broadly than in the cases I

> have just described. In all of the reported cases dealing with the issue, Exemption 2 applies only to documents whose release would risk circumvention *by a regulated person or entity.* Exemption 2 does not apply in this case because there is no such person or entity. The Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside the Navy itself.

Id. at 978 (Fletcher, J., dissenting) (emphasis in original).

The Ninth Circuit has gone far afield in this matter from even those other circuits that have adopted the High 2 reading. Under the current state of affairs, a citizen in Cincinnati could receive more information from the Navy than one residing in D.C.; for their part, the D.C. resident could receive more information from the Navy than a citizen in San Francisco. This Court should accept review to resolve this significant conflict between the circuits, and resolve it in favor of disclosure rather than secrecy.

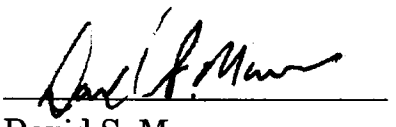
III. CONCLUSION

For the foregoing reasons, Glen Milner respectfully requests that this Court grant the petition for certiorari.

Dated this 22nd day of March, 2010.

Respectfully submitted,

GENDLER & MANN, LLP

By: 

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