Crooker v. Bureau of Alcohol, Tobacco & Firearms: A Result-Oriented Approach to FOIA Exemption 2

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CROOKER V. BUREAU OF ALCOHOL, TOBACCO & FIREARMS: A RESULT-ORIENTED APPROACH TO FOIA EXEMPTION 2

The Freedom of Information Act (FOIA), a product of ten years of congressional labor, was enacted in 1966 to assure the fullest possible public access to information held by federal agencies. The enactment of FOIA validated the philosophy that an informed public is essential for the effective operation of a democracy. FOIA requires agencies to publish certain information in the Federal Register, to make other types of information available for public inspection and copying and to provide, upon proper request, any other identifiable agency records. To balance the public interest in obtaining information against the confidentiality interests of the government agencies and individuals involved, FOIA exempts nine specific categories of documents from disclosure. Among the exemptions,

4. See S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in FOIA Source Book, supra note 2, at 38. "It is the purpose of the present bill to . . . establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." Id. For an early discussion of FOIA's impact, see generally Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761 (1967).
9. See 5 U.S.C. § 552(b) (1976). The exemptions are: (1) national defense and foreign policy secrets; (2) personnel rules and practices; (3) existing statutory exemptions; (4) trade secrets and business information; (5) governmental memoranda; (6) matters of personal privacy; (7) investigatory files; (8) financial institution reports; (9) information concerning wells. The Supreme Court has ruled that the nine exemptions are not mandatory and may be waived by an agency. Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979). See Note, Chrysler Corp. v. Brown: Seeking a Formula for Responsible Disclosure Under the FOIA, 29 Cath. U.L. Rev. 159, 174-75 (1979). The Supreme Court also has recognized a congressional intent to limit the scope of the exemptions. See, e.g., Department of the Air Force v.
subsection (b)(2) of FOIA, commonly referred to as exemption 2, provides protection for matters that are "related solely to the internal personnel rules and practices of an agency." 10

Judicial interpretation of exemption 2 has been burdened by the confusing and often contradictory legislative history surrounding the enactment of FOIA as a whole and exemption 2 in particular. 11 The House and Senate reports are generally considered to be irreconcilable with regard to exemption 2. The Senate's interpretation of the exemption limited its scope to relations between an agency and its employees. In contrast, the House extended the exemption's reach to include relations between an agency and the public. 12

In addition, the unusual legislative history of FOIA complicates judicial treatment of exemption 2. The Senate passed the bill before the House reported it out of committee. Therefore, the Senate report, with its narrow interpretation of exemption 2 was before the House when it considered the exemption. The conflicting interpretations remained intact, however, because the House committee chose not to amend the wording of the exempt-

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10. 5 U.S.C. § 552(b)(2) (1976). Although FOIA was amended in 1967 (Pub. L. No. 90-23, 81 Stat. 54), 1974 (Pub. L. No. 93-502, 88 Stat. 1561), 1976 (Pub. L. No. 94-409, 90 Stat. 1247) and 1978 (Pub. L. No. 95-454, 92 Stat. 1225), exemption 2 has remained unchanged since FOIA's enactment in 1966. At least one commentator has expressed doubt as to the exemption's worth. See Davis, supra note 4, at 786. ("No good reason for exempting internal personnel rules and practices has ever come to my attention. The exemption seems to me opposed to the basic push to let the public know what the government is doing.")

11. See Davis, supra note 4, at 809. See also Note, The Freedom of Information Act: A Critical Review, 38 GEO. WASH. L. REV. 150, 153 (1969) ("While recommending passage, the House Report differed so substantially from its Senate counterpart—so restricted the spirit of the act—that it, in effect, amended the bill" (footnotes omitted)).

12. Judicial recognition of the conflict between the House and Senate reports as to the scope of exemption 2 is substantial. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 363 (1976); Allen v. CIA, 636 F.2d 1287, 1290 (D.C. Cir. 1980); Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 655 (9th Cir. 1980); Sladek v. Bensinger, 605 F.2d 899, 904-05 (5th Cir. 1979); Cox v. Levi, 592 F.2d 460, 462 & n.6 (8th Cir. 1979); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 546 (2nd Cir. 1978); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1309 & n.12 (8th Cir. 1978); Hawkes v. IRS, 467 F.2d 787, 796 (6th Cir. 1972). Several commentators have also noted the conflict. See Project, Government Information and the Rights of Citizens, 73 Mich. L. REV. 971, 1051 (1975) ("The Senate's interpretation of exemption two is quite different from that of the House."); Note, supra note 11, at 154 ("[T]he House position on exemption 2 is diametrically opposed to that of the Senate."). See also Comment, The Status of Law Enforcement Manuals Under the Freedom of Information Act, 75 NW. U.L. REV. 734, 747 (1980); Note, The Freedom of Information Act: Shredding the Paper Curtain, 47 ST. JOHN'S L. REV. 694, 716 (1973).

13. See Davis, supra note 4, at 786.
tion to reflect its own broader interpretation. Instead, the House considered and approved the language of the exemption as originally adopted by the Senate. As a result, the outcome of an exemption 2 claim has, more often than not, hinged on a judicial determination that only one of the reports is a true reflection of congressional intent. Although the Supreme Court has expressed a preference for the Senate interpretation of exemption 2, it has also questioned whether the House report, with its broader interpretation of the exemption, is the appropriate guide for exemption 2 nondisclosure of "matters of some public interest . . . where necessary to prevent the circumvention of agency regulations . . . .".

In Crooker v. Bureau of Alcohol, Tobacco & Firearms, the United States Court of Appeals for the District of Columbia Circuit addressed the issue raised by the Supreme Court, and held that a Bureau of Alcohol, Tobacco and Firearms (BATF) agent training manual was exempt from disclosure under exemption 2. The court reasoned that the exemption permits the nondisclosure of information that relates predominantly to the internal workings of an agency which are not the subject of any substantial, valid public interest. Therefore, it concluded that exemption 2 applies if the information requested meets a test of "predominant internality" and its disclosure would pose a significant risk of circumvention of agency law.

Michael Crooker, a prisoner in a federal penitentiary, filed a FOIA request seeking disclosure of a BATF training manual for new agents. The manual instructs agents in the techniques of surveillance of premises, vehi-

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14. See infra note 40.
17. Id. at 364. For further discussion of Rose, see infra notes 60-64 and accompanying text.
19. Id. at 1057.
20. Id. at 1074.
21. FOIA entitles "any person" to obtain records from federal agencies. 5 U.S.C. § 552(a)(3). The Supreme Court has held that the benefit to be gained by the person requesting records from an agency is irrelevant. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).
cles and individuals. BATF denied Crooker access to portions of the manual, contending that disclosure would benefit those attempting to circumvent the law, and that exemption 2 permitted nondisclosure. Crooker brought an action against BATF in the federal district court seeking access to the manual in its entirety. The court held that the deleted portions properly fell within exemption 2. A panel of the United States Court of Appeals for the District of Columbia Circuit held that because exemption 2 protects only "internal housekeeping" matters, the deleted portions of the manual should be disclosed. Subsequently, the court of appeals, sitting en banc, vacated the panel opinion and affirmed the district court's holding. The court held that exemption 2 applies if materials meet a "test of predominant internality" and disclosure "significantly risks circumvention of agency regulations . . . ." The court stated that while FOIA was intended to eliminate secrecy, the need to maintain the effective operation of federal agencies must also be recognized. Judge McKinnon and Judge Mikva filed concurring opinions that were devoted primarily to a criticism of the dissent. Judge Ginsburg also concurred but questioned whether the majority reconciled successfully the Crooker rationale with the result in the District of Columbia Circuit's en banc decision in Jordan that limited the scope of exemption 2 to trivial "housekeeping" matters such as pay, vacations, and parking.

In a lengthy dissent, Judge Wilkey accused the majority of rewriting the legislative history of exemption 2. Judge Wilkey emphasized that the predominant internality standard lacked clarity and could not be applied by agencies or courts without abuse of discretion. He maintained that the majority should have been more concerned with construing the law than with determining what it should be.

22. FOIA provides the right to de novo review in a federal district court of an agency's decision to refuse disclosure of information within the ambit of the FOIA. 5 U.S.C. § 552(a)(4)(B) (1976).
23. FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under" subsection (b). 5 U.S.C. § 552(b) (1976).
26. 670 F.2d at 1074.
27. Id. at 1076-86 (McKinnon, J., concurring).
28. Id. at 1086-90 (Mikva, J., concurring).
29. Id. at 1090-92 (Ginsburg, J., concurring) (citing Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978)). For further discussion of Jordan, see infra notes 88-97 and accompanying text.
30. 670 F.2d at 1093-1122 (Wilkey, J., dissenting).
This Note will examine the statutory framework and the judicial interpretations of exemption 2. Particular emphasis will be placed on the legislative history of exemption 2 and its reflection in exemption 2 case law. An evaluation of the Crooker decision will suggest that the District of Columbia Circuit's interpretation of the wording and legislative history of exemption 2 was influenced more by policy considerations than by the rules of statutory construction. Finally, the Note will conclude with an analysis of Crooker's impact on future attempts to deny disclosure under exemption 2.

I. LEGISLATIVE GUIDES TO EXEMPTION 2

When faced with the issue of whether exemption 2 is applicable to a particular request for disclosure, most courts begin their analysis with an examination of the legislative history of the exemption.\(^{31}\) The specific language of exemption 2 was first introduced in the Senate during the 88th Congress\(^ {32} \) in S. 1666, a bill to amend the public information section of the Administrative Procedure Act of 1946 (APA).\(^ {33} \) Exemptions were included in three sections of S. 1666.\(^ {34} \) The section requiring information to be published in the Federal Register exempted matters relating solely to the "internal management of an agency."\(^ {35} \) Both the provision requiring agency opinions, orders, and rules to be made available for public inspection and the provision requiring an agency to disclose its records contained exemptions for matters relating "solely to the internal personnel rules and practices of any agency."\(^ {36} \) The Senate report on the bill distinguished the exemptions, maintaining that the exemptions in the public inspection and

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35. Id. at 96. The wording of this exemption was identical to the exemption 2 contained in § 3 of the APA, which required disclosure "[e]xcept to the extent there is involved ... (2) any matter relating solely to the internal management of an agency." Pub. L. No. 79-404, § 3(2), 60 Stat. 237, 238 (1946) (formerly codified at 5 U.S.C. § 1002(1) (1964)).

disclosure sections were similar to the “internal management” exemption, but were “more tightly drawn.” The principal measures introduced in the Senate (S. 1160) and in the House of Representatives (H.R. 5012) during the 89th Congress, and the legislation as enacted in 1966, contained only the exemption for matters “related solely to the internal personnel rules and practices of an agency.”

Portions of the House hearings on H.R. 5012 and the Senate hear-
ings and the House debate on S. 1160 have been of some guidance to courts in construing exemption 2. Courts confronting exemption 2 nondisclosure, however, have focused primarily on the Senate and House reports on S. 1160. The Senate report accompanying S. 1160 states that the exemption "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." The House report on exemption 2 broadened its scope to include "operating rules, guidelines, and manuals of procedure for Government investigators or examiners." The House report further states that the exemption would not include all "matters of internal management" such as employee relations and working conditions and routine administrative procedures" which already could be legally withheld.

of procedure that are handed to an examiner—a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent.

Mr. Schlei. Ah! Then the word "personnel" should be stricken. Because "personnel" I think connoted certainly to use [sic] the employee relations, employee management rules and practices of an agency. What you meant was material related solely to the internal rules and practices of any agency for the guidance of its employees—something like that.

But I think that word "personnel" does not do the job well enough, Mr. Chairman. I am sure it can be done.

Mr. Moss. We will hope to seek a way of doing the job without exempting internal rules and practices.

Mr. Schlei. I suppose that could cover quite a lot of ground, Mr. Chairman.

Mr. Moss. Because I am afraid that we would there [sic] open the barn door to everything.

Oh, we recognize the difficulty and the complexity, but we are perfectly willing to work at it.

Id. at 29-30. Mr. Kass later testified at the Senate hearings on the proposed amendments to FOIA that the House report had been an effort to change the meaning of the bill without amending it, in order to placate the bill's opponents and avoid an implied presidential veto. See Freedom of Information, Executive Privilege, Secrecy in Government: Hearings on S. 1142 et al. before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Separation of Powers of the Senate Comm. on Judiciary and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations (Vol. 2), 93d Cong., 1st Sess. 122-26 (1973) (testimony of Benny L. Kass).

42. See Senate Hearings on S. 1160, supra note 40, at 34. "The investigative manuals of the Secret Service and the Bureau of Narcotics, for example, contain information the release of which would only be of assistance to criminals . . . . Surely such information should be protected." Id. (statement of Edwin F. Rains, Assistant General Counsel, Department of the Treasury).

43. See 112 CONG. REC. 13,659 (1965).

44. See S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965), reprinted in FOIA SOURCE BOOK, supra note 2, at 43.

45. See HOUSE REPORT 1497, supra note 40, at 2428.
In addition to the legislative materials dealing specifically with exemption 2, courts have examined other legislative guides. In order to glean the legislative intent behind exemption 2, courts have looked to the legislative history of FOIA subsection (a)(2)(C),\(^46\) the 1974 amendments to FOIA exemption 7, which concerns certain investigatory files,\(^47\) and the Govern-

\(^{46}\) 5 U.S.C. § 552(a)(2)(C) (1976). Section (a)(2)(C) of the FOIA provides: “(2) Each agency, in accordance with published rules, shall make available for public inspection and copying . . . (C) administrative staff manuals and instructions to staff that affect a member of the public.” The original version of the FOIA introduced in the Senate did not contain the word “administrative.” See S. 1160, 89th Cong., 1st Sess. (1965). The term “administrative” was added by amendment and explained as follows: “The limitation of . . . [disclosure] to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action.” S. Rep. No. 813, 89th Cong., 1st Sess. 1-2 (1965), reprinted in FOIA Source Book, supra note 2, at 37. As with exemption 2, the House report gave a broader reading to § 552(a)(2)(C):

> [A]n agency may not be required to make available those portions of its staff manual and instructions which set forth criteria or guidelines for the staff in auditing or inspecting procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution or settlement of cases.

House Report 1497, supra note 40, at 2424-25. The conflicting interpretations given by the two houses have been noted. See K. Davis, Administrative Law Treatise § 3A.12 (1st ed. Supp. 1970).

\(^{47}\) 5 U.S.C. § 552(b)(7) (1976). Prior to the 1974 amendments to FOIA, exemption 7 had exempted from disclosure “investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.” Pub. L. No. 90-23, § 552(b)(7), 81 Stat. 54, 55 (1967). The amended version of exemption 7 reads as follows:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.


> would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures.

II. DEFINING THE SCOPE OF EXEMPTION 2

A. The Early Cases—A Narrow Interpretation

An early case recognizing the conflict between the House and Senate interpretations of exemption 2 was Hawkes v. Internal Revenue Service. In Hawkes, the United States Court of Appeals for the Sixth Circuit addressed whether exemption 2 protected portions of an Internal Revenue Service manual that described procedures for the examination of tax returns and the interrogation of taxpayers. In examining the legislative history of exemption 2, the court noted the total disagreement between the reports of the congressional committees and chose to rely on the Senate report. It reasoned that the literal wording of the exemption favored the Senate’s interpretation. The court noted that because the Senate report was before the House when it considered and approved the exemption as originally drafted, reliance on the House report would allow one house of Congress to effectively change the interpretation given to proposed legislation by the other house without amending a word of text.

In Hawkes, the government also resisted disclosure under FOIA subsec-

48. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)). The Act included the specific wording of exemption 2 of FOIA. See Pub. L. No. 94-409, § 3(a), 90 Stat. 1241, 1242 (1976). Subsection (c)(2) exempts from the Act’s open meeting requirement portions of meetings that are likely to “relate solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552b(c)(2) (1976). The accompanying House report interpreted the provision to “protect the privacy of staff members and to cover the handling of strictly internal affairs. It does not include discussion or information dealing with agency policies governing employees’ dealings with the public such as manuals setting forth job functions or procedures.” H. REP. No. 880 (Part I), 94th Cong., 2d Sess. 9 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2188, 2191. See also S. REP. No. 354, 94th Cong., 1st Sess. 21 (1975) (specifically noting the relationship between FOIA exemption 2 and 5 U.S.C. § 552b(c)(2) (1976)).

49. 467 F.2d 787 (6th Cir. 1972).


51. 467 F.2d at 797.

52. Id. The United States Court of Appeals for the Fifth Circuit applied a similar analysis in Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973) (exemption 2 does not exempt instruction and student manual used by the Occupational Safety and Health Administration).
tion (a)(2)(C), which requires the release of administrative staff manuals. The government asserted that the legislative intent behind that subsection was to exempt from disclosure staff manuals dealing with law enforcement matters. The court held that the implicit exemption in subsection (a)(2)(C) for law enforcement materials should be applied narrowly. The court reasoned that information should be protected from disclosure only if its release would significantly impede the law enforcement process.

The United States Court of Appeals for the District of Columbia Circuit gave a more extensive treatment to exemption 2 in *Vaughn v. Rosen*. The court held that Civil Service Commission reports of agency-wide personnel management evaluations were not exempt from disclosure by exemption 2. Writing for the majority, Judge Wilkey noted the conflict between the two congressional reports and, in holding that the Senate report was more reflective of congressional intent, stated that the scope of exemption 2 was limited to disclosure of "routine housekeeping matters in which it can be presumed the public lacks any substantial interest." The court noted that the Commission reports concerned compliance with regulations promulgated to promote labor-management relations, employment of Vietnam veterans, and equal opportunity programs. Because the reports had been the "focus of legitimate public interest and attention" and were related to policies and procedures common to many agencies, the court held that they were not exempt from disclosure under exemption 2. A concurrence

53. 467 F.2d at 794. *See supra* note 46 and accompanying text.
54. 467 F.2d at 795. The court felt that disclosure of the IRS manual would aid law enforcement by "encouraging knowledgeable and voluntary compliance with the law." *Id.* For support of the § 522(a)(2)(C) implicit exemption, see K. Davis, *Administrative Law Treatise* §§ 5.4, 5.30 (2d ed. Supp. 1980).
55. 523 F.2d 1136 (D.C. Cir. 1975).
56. *Id.* at 1143.
57. *Id.* at 1141. The preference in *Vaughn* for the Senate report was based on rationales that are often cited to justify a determination that the Senate view, rather than that of the House, should be adopted. These rationales include a belief that the Senate report wording is more faithful to the overall intent of FOIA and is a more workable guide for courts and agencies in deciding which information should be disclosed. Courts have also observed that the House committee was under political pressure to amend the bill to provide greater protection for law enforcement materials; that it was unable or unwilling to do so by amendment or in conference with the Senate, and instead elected to appease the bill's opponents by broadening the exemptions through language in the House report. Furthermore, courts have noted that the Senate report was the only item of legislative history before both houses of Congress. *See, e.g.*, Department of the Air Force v. Rose, 425 U.S. 352 (1976); Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir. 1978); Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972).
58. 523 F.2d at 1143. The court's characterization of the programs as the focus of legitimate public interest was based on a discussion by the Second Circuit dealing with factors relevant to a determination of the scope of exemption 2 as interpreted by the Senate report.
by Judge Leventhal suggested that the words “related solely,” which qualify the phrase “internal personnel rules and practices,” should be given the construction of “relating predominantly.” He reasoned that because the word “relating” is potentially all-encompassing and the word “solely” is potentially all-excluding, the word “predominantly” avoids either extreme.  

B. New Direction from the Supreme Court?

In Department of the Air Force v. Rose, the Supreme Court adopted the District of Columbia Circuit’s reasoning in Vaughn. The Court held that case summaries of hearings on infractions of the Honor and Ethics Code at the Air Force Academy were not exempt from disclosure by exemption 2. Writing for the majority, Justice Brennan noted that courts that had previously relied on the House report to prevent disclosure of information of some public interest did so because disclosure would risk circumvention of agency regulations. Because Rose concerned materials which, if disclosed, involved no risk of circumvention of the law, the Court declined to consider the appropriateness of the House report’s interpretation of exemption 2. Therefore, the Court held that “at least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest.”

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Id. at 1143 n.27 (citing Rose v. Department of the Air Force, 495 F.2d 261, 265 (2d Cir. 1974), aff’d, 425 U.S. 352 (1976)). In contrast to the Vaughn court, other courts have used the phrase “legitimate public interest” to connote a “lawful” or “risk-free” public interest. See infra note 103 and accompanying text. 

59. Id. at 1150-51 (Leventhal, J., concurring). In response to the majority’s assertion that the Senate report was the only report before both houses, Judge Leventhal noted that “the realities of the legislative process” make it doubtful that the Senate report was considered by the House. He also suggested that the Senate report’s examples were “illustrative, not definitional or exclusive.” Id. at 1148.

60. 425 U.S. 352 (1976).

61. Id. at 370.


63. 425 U.S. at 364.

64. Id. at 369. The public interest standard enunciated in Rose was the basis for the decision by the United States Court of Appeals for the Seventh Circuit in Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977), that administrative markings, initials, and routings stamps used in FBI files were exempt from disclosure by exemption 2. Id. at 1001-02. The court
C. The Impact of Rose

In *Cox v. United States Department of Justice*, the Justice Department argued that a Drug Enforcement Administration manual was protected from disclosure by exemption 2. Although the United States Court of Appeals for the Eighth Circuit remanded on the question of what portions of the manual were to be disclosed, it cited *Rose* and stated that subsection "(b)(2) exempts only 'housekeeping' matters in which 'the public could not reasonably be expected to have an interest.'" The court also conducted an extensive analysis of the interrelation between subsection (a)(2)(C), which provides for the inspection and copying of administrative staff manuals, and (a)(3), which provides for disclosure of agency records upon proper request. The court concluded that the specific legislative intent to exclude certain law enforcement materials from disclosure under subsection (a)(2)(C) precluded disclosure of these same materials under the general intent of subsection (a)(3) even without the aid of the specific exemption in subsection (b). In addition, the court noted that although exemption (b)(7), which relates to investigatory files, did not apply to the Drug Enforcement Administrative manual, it could be used to show Con-

reasoned that these materials were exempt because they were "matters in which the public interest is minimal." *Id.* at 1002.

A similar request for disclosure was denied by the United States Court of Appeals for the Fourth Circuit in *Nix v. United States*, 572 F.2d 998 (4th Cir. 1978). The *Nix* court granted exemption 2 withholding to a request for FBI routing stamps, initials, and file numbers because the materials were "at most routine matters of mere internal significance and, as such, [were] protected from disclosure by subsection 2." *Id.* at 1005.

65. 576 F.2d 1302 (8th Cir. 1978).
66. *Id.* at 1310 (quoting Department of the Air Force v. *Rose*, 425 U.S. 352, 369 (1976)).
67. See supra note 46 and accompanying text.
68. 5 U.S.C. § 552(a)(3) provides:
   
   (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3) (1976). While the *Cox* court relied on the discussion in *Hawkes* regarding the distinction between administrative and law enforcement matters, *see supra* notes 53-54 and accompanying text, it took the analysis one step further by noting specifically the relationship between § 552(a)(2)(C) and (a)(3). 576 F.2d at 1306-09. For a discussion of the relationship of the two sections, see K. Davis, ADMINISTRATIVE LAW OF THE SEVENTIES 56 (1976) ("Even if none of the nine exemptions applies, some records may be free from required disclosure under (a)(3) because of the legislative intent behind (a)(2)"). *See also Att'y Gen. 1974 FOIA Amendments Mem. 21-22, reprinted in FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (Pub. L. No. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER SOURCES 531-32 (Jt. Comm. Print 1975).

69. 576 F.2d at 1306-09.
gress' intent to restrict access to some law enforcement materials.70

Shortly after Cox was decided, the United States Court of Appeals for the Second Circuit developed a rationale for enlarging the scope of exemption 2 in Caplan v. Bureau of Alcohol, Tobacco & Firearms.71 The court permitted nondisclosure of a Bureau of Alcohol, Tobacco and Firearms manual dealing with raids and searches. The court reasoned that in situations in which disclosure would risk physical harm to law enforcement personnel, Rose did not foreclose adopting the House report's interpretation of exemption 2.72 The court noted that subsection (a)(2)(C) had been interpreted by other courts to provide withholding of the manual in question. The Second Circuit, however, declined to exempt the manual under this subsection. Instead, the court reasoned that the legislative intent behind exemption 2 may be gleaned by considering the Senate report in its entirety. Moreover, a reading of both the House and Senate reports on subsections (b)(2) and (a)(2)(C) evidenced an intent that the manual be withheld on the basis of exemption 2.73 Therefore, the court held that exemption 2 exempts from disclosure internal agency matters where disclosure might risk circumvention of agency law.74

The United States Court of Appeals for the District of Columbia Circuit announced two apparently contradictory decisions concerning exemption 2 in Ginsburg, Feldman & Bress v. Federal Energy Administration75 and Jordan v. United States Department of Justice.76 In Ginsburg, a three judge panel held, by a two to one vote, that Federal Energy Administration (FEA) guidelines to agency auditors concerning compliance with the agency's oil price regulations were exempt from disclosure by exemption 2.77 Judge McKinnon, writing for the majority, made a more significant attempt to justify reliance on the House report than had been made by the

70. Id. at 1308. See supra note 47 and accompanying text.
71. 587 F.2d 544 (2d Cir. 1978).
72. Id. at 547.
73. Id. at 548. The reasoning in Caplan is weak in several aspects. If § 552(a)(2)(C) indicates a legislative intent to create a complete exemption for certain law enforcement materials, the inclusion of subsection (b)(2) to also exempt these materials is superfluous. A more reasoned reconciliation of the two sections was expressed in Jordan v. United States Dep't of Justice, 591 F.2d 753, 771 (D.C. Cir. 1978). See infra note 90 and accompanying text. For a more extensive treatment of Caplan, see Comment, supra note 12, at 752-53 n.101.
74. 587 F.2d at 548.
76. 591 F.2d 753 (D.C. Cir. 1978) (en banc).
77. 591 F.2d at 730-31. The court also held that the guidelines were implicitly exempt from disclosure under § 552(a)(2)(C). Id. at 721.
Second Circuit in Caplan. The Ginsburg majority reasoned that the phrase "internal personnel rules and practices" should be read partially in the disjunctive as "internal personnel rules" and "internal practices." The court concluded that by construing the words "internal personnel" to modify only the word "rules" both reports could be given effect. The majority supported this construction by noting that the Senate report had limited itself to examples of rules, while the House report, by providing examples of practices, had in fact, narrowed the scope of the exemption by supplementing and clarifying the Senate report. The court concluded that rather than being contradictory, the two reports were complimentary. Because the House report was published after the Senate report, the majority reasoned that it was actually a more complete assessment of congressional intent. The majority asserted that even if the two reports were seen to conflict, Rose does not preclude the use of exemption 2 where disclosure would risk circumvention of agency law.

In a dissenting opinion, Judge Wilkey asserted that FOIA's remedial nature mandated a liberal reading of the disclosure sections, and a narrow construction of the exemptions. Therefore, even if the guidelines did fall under the implicit exemptions of subsection (a)(2)(C) they would still have to be disclosed under subsection (a)(3) unless a specific exemption in subsection (b) applied. With regard to exemption 2, Judge Wilkey criticized the majority's grammatical construction of the exemption. He noted that the designation of "personnel" as modifying both "rules and practices" could be traced directly to congressional dissatisfaction with the overly broad "internal management" exemption in former section 3 of the APA. He stated the reasons he had previously expressed in Vaughn for preferring the Senate report and provided evidence of "last minute chicanery by interested members of the House" to account for the conflicting reports. In addition, Judge Wilkey cited the House report on the Government in the Sunshine Act as further evidence of Congress' intent that

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78. Id. at 724.
79. Id. at 724-25.
80. Id. at 730. The Crooker majority conceded that the reports conflicted in one respect—minor employment matters—which would be exempted by the Senate and disclosed by the House report. The court concluded that “[t]he contradiction in this minor respect does not make the non-contradictory parts of the two reports become contradictory . . . .” Id. at 725 n.17.
81. 591 F.2d at 740 (Wilkey, J., dissenting).
82. Id. at 742-44. Judge Wilkey noted that the House hearings on H.R. 5012 did not reveal an intent, even by FOIA's opponents, to separate the word "personnel" from "internal practices." Id. at 742. See supra note 41 and accompanying text.
83. 591 F.2d at 745-46. See supra note 57 and accompanying text.
84. 591 F.2d at 746-47. See supra note 41.
exemption 2 be given the narrow interpretation reflected in the 1965 Senate report on FOIA. Finally, Judge Wilkey did not agree that the Rose Court implied that exemption 2 could be invoked to protect matters where disclosure may risk circumvention of the law.

The Ginsburg panel decision was subsequently vacated, and the court, sitting en banc, affirmed by a four to four decision the lower court’s judgment that FEA guidelines were exempt from disclosure under exemption 2. On the same day, the court decided Jordan v. United States Department of Justice. Judge Wilkey, who dissented in Ginsburg, was the author of the seven to two majority opinion in Jordan. The court, in an opinion substantially similar to Judge Wilkey’s dissent in Ginsburg, held that documents dealing with the prosecutorial discretion of an United States Attorney are not exempt from disclosure by exemption 2. Judge Wilkey noted that the interpretive comma found by the Ginsburg panel to separate “internal personnel rules” from “practices” was violative of basic grammar and that Congress could have added the word “the” before the word “practices” if this severance had been intended. Judge Wilkey emphasized that the word “personnel” was the major obstacle facing the government’s attempt to avoid disclosure because the guidelines were “simply not ‘personnel’ rules or practices.”

Concurring in the decision, Judge Bazelon stressed that one of the main

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85. 591 F.2d at 747. See supra note 48 and accompanying text.
86. 591 F.2d at 749.
88. 591 F.2d 753 (D.C. Cir. 1978) (en banc).
89. See supra notes 81-86 and accompanying text.
90. 591 F.2d at 771. The majority opinion also held that although material may not be disclosed under § 552(a)(2)(C), it is nevertheless disclosable under § 552(a)(3) unless one of the nine exemptions apply. Id. at 762. Judge Wilkey reasoned that Congress did not intend to give complete protection to law enforcement materials but had only intended to protect them from automatic public indexing and disclosure under § 552(a)(2) and not from disclosure on demand under § 552(a)(3). Id.
91. Id. at 763-64.
purposes of FOIA is to eliminate secret agency law and that disclosure of the documents in question would assure that prosecutorial discretion was exercised properly. Judge Leventhal, who did not participate in the en banc Ginsburg decision, also concurred but differed with Judge Wilkey's emphasis on the word "personnel." He asserted that the critical words were "solely" and "internal" and that exemption 2 applies if the information is "related solely to the internal personnel rules or to the internal practices of an agency." Judge Leventhal agreed with the majority in the vacated Ginsburg panel that the Senate report did not conflict with the House report because the Senate report only provided a nonexhaustive list of examples covered by exemption 2. Completing the conflict within the court, Judge McKinnon, the author of the majority opinion in the vacated Ginsburg panel decision, dissented, contending that subsection (a)(2)(C) completely exempted the guidelines from disclosure.

The District of Columbia Circuit attempted to reconcile its internal disagreement concerning the scope of exemption 2 in Cox v. United States Department of Justice. In a per curiam panel opinion, the court held that a United States Marshal's manual detailing methods of restraining and transporting prisoners was protected from disclosure by exemption 2. The court constructed an amalgamated rule for exemption 2 cases that would require disclosure of "secret law," but would not require either disclosure of the strategies employed by agency personnel in enforcing the law or routine internal matters in which the public lacks a legitimate interest.

93. 591 F.2d at 781 (Bazelon, J., concurring) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975)).
94. 591 F.2d at 781.
95. Id. at 782 (emphasis in original) (Leventhal, J., concurring).
96. Id. at 783. Judge Leventhal expressed sympathy for the subsection (a)(2)(C) implicit exemption for law enforcement materials in the event that exemption 2 was interpreted to be inapplicable. Id. at 784.
97. Id. at 789 (McKinnon, J., dissenting).
98. 601 F.2d 1 (D.C. Cir. 1979) (per curiam).
99. Id. at 5.
100. Id. at 4. The exemption 2 rule formulated by the Cox court combined elements of Rose, Jordan, and the vacated Ginsburg opinion. Although the court cited the majority opinion in Jordan for its discussion of secret law, id. (citing 591 F.2d at 763), only Judge Bazelon's concurrence in Jordan was concerned with secret law. 591 F.2d at 781. In addition, the Cox majority (Judges McKinnon and Robb), who had dissented in Jordan, attempted to harmonize Jordan's majority opinion with its other concurrence as well as with the en banc affirmation in Ginsburg. Id. at 5 n.2. The court reasoned that the manual at issue in Cox was more similar to the undisclosed FEA guidelines in Ginsburg than the United States Attorney's Manual that had been disclosed in Jordan. The court stated that the Cox manual did not contain "secret law" which was Jordan's primary focus and that it met the test of predominant internality suggested by Judge Leventhal in his Jordan concur-
Shortly after Cox, the District of Columbia Circuit varied the public interest standard of Rose in Lesar v. United States Department of Justice. The court held that exemption 2 applied to symbols used by the FBI to refer to its informants in records and documents dealing with the assassination of Dr. Martin Luther King, Jr. Judge Wilkey, writing for the majority, reasoned that the symbols were matters of internal significance in which the public had no substantial or legitimate interest and were therefore exempt from disclosure.

In Hardy v. Bureau of Alcohol, Tobacco & Firearms, the United States Court of Appeals for the Ninth Circuit rejected the District of Columbia Circuit's legitimate interest test articulated in Cox. The court held that portions of the Bureau of Alcohol, Tobacco and Firearms manual dealing with raids and searches, which had also been at issue in Caplan, were exempt from disclosure because they were law enforcement materials, disclosure of which may risk circumvention of agency regulations. The court reviewed the other two approaches used by the circuits to exempt law enforcement materials and rejected the approach taken by the Fifth, Sixth and Eighth Circuits as unfaithful to the structure of FOIA, which requires full disclosure except in the case of a specific exemption in subsec-

ence. Id. The court also asserted that “absent the compulsion of Jordan,” it would adhere to its view that (a)(2)(C) provided complete protection for the portions of the manual at issue. Id. at 4 n.1.

101. 636 F.2d 472 (D.C. Cir. 1980). See also Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979) (utilizing public interest standard to exempt under exemption 2 portions of DEA manual dealing with entry plans).

102. 636 F.2d at 485-86.

103. Id. Judge Wilkey’s opinion was based more on policy considerations than a strict reading of exemption 2. The symbols’ only real value lies in their use as a mechanism to control the internal and external dissemination of the actual identities of FBI informants. Since the public has no legitimate interest in gaining information that could lead to the exposure of confidential sources referred to in criminal investigative files, we uphold the claimed exemption. Id. at 486 (footnote omitted). The “legitimate public interest” standard is a useful rationale for withholding by a court that is unsympathetic to the House interpretation but not unaware of the risks involved in disclosure of certain “quasi-personnel” information.

104. 631 F.2d 653 (9th Cir. 1980).

105. Id. at 656. The court asserted that although the result reached by employing the legitimate interest standard might not differ from its own, the standard “places courts in the difficult position of determining when the interest of the public . . . is ‘legitimate.’” Id.

106. Id. at 657. The court reasoned that “materials instructing law enforcement agents on how to investigate violations concern internal personnel practices.” Id. at 656. The court also indicated that exemption 7 provided support for its exemption 2 interpretation. (“This exemption [7] would be pointless unless the manual instructing agents in those techniques and procedures were also exempt from disclosure.”) Id.

107. Cox v. United States Dep’t of Justice, 576 F.2d 1302, 1307-09 (8th Cir. 1978); Stokes
tion (b). Aligning itself with the Second Circuit’s reasoning in Caplan, the court asserted that the decision in Rose did not foreclose reliance on the House report to use exemption 2 to withhold materials that could aid in the circumvention of the law.  

The District of Columbia Circuit revived its emphasis on the meaning of the word “personnel” in exemption 2 in Allen v. Central Intelligence Agency. The court held that portions of documents containing filing and routing instructions were not exempt from disclosure by exemption 2. The court referred to the Senate report and noted that filing and routing instructions “are plainly not included in that narrow category of administrative personnel rules and are totally unlike any of the examples cited” in the Senate report.  

The Supreme Court’s decision in Rose and the federal courts of appeals’ decisions concerning exemption 2 thus demonstrate that courts have used a variety of approaches in defining the scope of exemption 2. Within the District of Columbia Circuit alone, each approach has surfaced at one time or another. Therefore, it was not surprising that the United States Court of Appeals for the District of Columbia Circuit recognized a need to clarify and refine its position on exemption 2.

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108. 631 F.2d at 656-57. See 5 U.S.C. § 552(a)(3) (1976), supra note 68; 5 U.S.C. § 552(c) (“This section [of FOIA] does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section . . . “). See also S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965), reprinted in FOIA SOURCE BOOK, supra note 2, at 45 (“The purpose of [§ 552(c)] is to make it clear beyond doubt that all materials of the Government are to be made available to the public . . . unless explicitly allowed to be kept secret by one of the exemptions in subsection [(b)]]” (emphasis in original)).

109. See supra notes 71-74 and accompanying text.

110. 631 F.2d at 657.

111. 636 F.2d 1287 (D.C. Cir. 1980).

112. Id. at 1290.

113. Id.

III. Crooker v. Bureau of Alcohol, Tobacco & Firearms

A. Judicial Legislation or Statutory Interpretation?

In Crooker v. Bureau of Alcohol, Tobacco & Firearms, the United States Court of Appeals for the District of Columbia Circuit addressed whether disclosure of material that might risk circumvention of agency regulations was included within the scope of exemption 2. Although it ruled that exemption 2 is applicable where a document meets a test of predominant internality and its disclosure would significantly risk circumvention of agency law, the court failed to provide persuasive reasoning for this interpretation of the exemption's scope.

Writing for the majority, Judge Edwards examined the scope of exemption 2 by noting the interpretation of the language of the exemption proposed by Judge Leventhal in his concurring opinions in Vaughn and Jordan. The court agreed that the word "solely" should be given the construction of "predominantly" and that exemption 2 exempts internal personnel rules and internal practices of an agency from mandatory disclosure. The court held that the protection from disclosure afforded by the exemption is not limited to minor employment matters. According to the court, the exemption also protects other rules and practices that govern agency personnel, including training manuals for agency law enforcement personnel.

The court then proceeded to examine the legislative history of FOIA in general and exemption 2 in particular. In addition to a philosophy of full agency disclosure, the majority found a concern for confidentiality in both the Senate and House legislative history on FOIA. With regard to exemption 2, the court noted statements in the House hearings, report, and debate that exemption 2 was intended to protect internal instructions to law enforcement agents from mandatory disclosure. The court asserted that this intent was not contradicted by the Senate report, which gave only a nonexclusive list of materials falling within exemption 2. Therefore, the

116. Id. at 1074. The court stressed that the addition of the word "significantly" would insure a narrow interpretation of the scope of exemption 2. Id.
118. 591 F.2d 753, 782 (D.C. Cir. 1978) (en banc) (Leventhal, J., concurring). See supra note 95 and accompanying text.
119. 670 F.2d at 1056-57 (citing Vaughn v. Rosen, 523 F.2d 1136, 1150-51 (D.C. Cir. 1975) (Leventhal, J., concurring) and Jordan v. United States Dep't of Justice, 591 F.2d 753, 783 (D.C. Cir. 1978) (Leventhal, J., concurring)).
120. 670 F.2d at 1056.
court concluded that because the Senate report had been silent on the issue, both houses had agreed that materials that might aid in the circumvention of agency regulations were exempt.\textsuperscript{121}

Almost as an afterthought, the court concluded that not only were the House and Senate interpretations not contradictory concerning disclosure of sensitive law enforcement materials, but that the two reports were totally reconcilable. The court determined that although the Senate report dealt with minor matters and the House report focused on more substantial concerns, both reports revealed an intent to exempt from disclosure internal personnel matters that lacked a legitimate public interest. The court then rejected a judicial application of the legitimate public interest test, stating that by enacting FOIA, Congress had already determined what constituted a legitimate public interest.\textsuperscript{122} The court also indicated that the wording and legislative history of subsections (a)(2)(C) and (b)(7)(E) further demonstrate a legislative concern for the protection of law enforcement materials.\textsuperscript{123}

In reviewing the case law on exemption 2, the court asserted that the Rose Court substantiated the claim that exemption 2 was intended to protect internal agency materials where disclosure might risk circumvention of agency law.\textsuperscript{124} The court traced the treatment of the exemption in the District of Columbia Circuit. It concluded that the Vaughn interpretation of exemption 2 was too superficial, and that Jordan did not concern documents which, if disclosed, would risk circumvention of the law. The court noted that the result in Cox, nondisclosure of a United States Marshal's manual dealing with restraint and transportation of prisoners, was inconsistent with the Jordan rationale which limited exemption 2 to minor "housekeeping" matters.\textsuperscript{125} The Crooker court examined the case law in the other circuits that dealt with disclosure of investigative manuals. The majority asserted that while the Sixth and Eighth Circuits rejected exemption 2 as a vehicle to exempt materials where disclosure might risk circumvention of the law, the two circuits exempted these materials under subsection (a)(2)(C). The court concluded that such a treatment of subsection (a)(2)(C) directly supported its own belief that Congress did not intend to disclose law enforcement materials.\textsuperscript{126} The court also noted that

\textsuperscript{121} Id. at 1058-61.
\textsuperscript{122} Id. at 1065-66.
\textsuperscript{123} Id. See also supra notes 46-47 and accompanying text.
\textsuperscript{124} 670 F.2d at 1066. The Supreme Court in Rose noted three district courts that followed the House report. 425 U.S. at 364. See supra note 62 and accompanying text.
\textsuperscript{125} 670 F.2d at 1067-69.
\textsuperscript{126} Id. at 1070-71. The Crooker court rejected the rationale that § 552(a)(2)(C) completely exempts the BATF manual from disclosure. It left undisturbed the Jordan holding
the Second and Ninth Circuits determined that exemption 2 applies to disclosure of sensitive law enforcement material. The court then asserted that with the exception of the District of Columbia Circuit in Jordan, every federal circuit court that has considered the release of documents which might aid in circumvention of the law has denied disclosure.

Aligning itself with the reasoning of the Second and Ninth Circuits, the court held that portions of the BATF manual were exempt from disclosure under exemption 2. In support of its holding, the court asserted that its decision was "hardly surprising" because Congress certainly did not intend that FOIA undermine federal "criminal statutes and the effectiveness of law enforcement agencies." Finally, the court rejected the Jordan interpretation of exemption 2, contending that it did not "appear to comport with the full congressional intent underlying FOIA." The court stressed, however, that the result in Jordan would be the same under the two-prong test for materials that are predominantly internal and whose revelation may risk circumvention of the law. The court reasoned that exemption 2 would not apply to the prosecutorial guidelines in Jordan which were a source of "secret law" and were not predominantly internal even if they might have given some aid to those wishing to circumvent the law.

Judge Ginsburg's concurring opinion criticized the majority's adherence to the result in Jordan. Ginsburg argued that in order to justify the result in Jordan, the Crooker majority either determined that the prosecutorial guidelines were not predominantly internal or that their disclosure would not significantly risk circumvention of the law. Because the district court in Jordan had made no factual determination of the latter, the result in Jordan would have to rest on a determination that, unlike the BATF manual, the guidelines were not predominantly internal. Judge Ginsburg, however, stated that she would find no distinction between the two types of material, as both instructed agency personnel in performance of their duties. She suggested that the majority's inclusion of "secret law" as a factor distinguishing Jordan from Crooker could be a viable basis for reconciling the two opinions. Nevertheless, she criticized the majority for not elaborating on this point, and for failing to provide courts with satisfactory

that a specific section (b) exemption must apply for complete nondisclosure. 670 F.2d at 1055 n.11 (citing Jordan v. United States Dept of Justice, 591 F.2d 753, 760-63 (D.C. Cir. 1978) (en banc)).

127. 670 F.2d at 1072.
128. Id. at 1072-73.
129. Id. at 1074.
130. Id. at 1075.
131. Id.
guidelines to determine whether cases are governed by the *Crooker* reasoning or the *Jordan* result.132

In his dissent, Judge Wilkey asserted that the majority's repudiation of the *Jordan* rationale was not based on any new information uncovered in the legislative history of exemption 2, but instead on "a great deal of new interpretation."133 Judge Wilkey accused the majority of assuming the role of a congressional conference committee in order to "work out a compromise which it thinks years after the event might have been acceptable to both houses."134 He emphasized that, in fact, with the passage of the Government in the Sunshine Act in 1976, a legislative compromise had been reached. Judge Wilkey noted that, in explaining the Sunshine Act's own identically worded exemption 2, the House report to the Sunshine Act adopted the 1966 Senate report's interpretation of FOIA's exemption 2.135

Judge Wilkey maintained that the majority's interpretation of exemption 2 neglected to attach any significance to the word "personnel" or to refute *Jordan*'s holding that the word is critical to an exemption 2 determination. In addition, he noted that *Rose* endorsed the *Vaughn* majority's interpretation of exemption 2 and therefore impliedly rejected the construction offered by Judge Leventhal's concurring opinion in *Vaughn*.136 The dissent criticized the majority's attempt to reconcile the House and Senate reports' treatment of exemption 2 and noted that even the Second and Ninth Circuits, with which the majority agreed as to the scope of the exemption, did not attempt to deny the conflict in the reports.137 He asserted that the Senate and House hearings and the House debate merely provide evidence of dissatisfaction with the wording of the exemption, not an "unequivocal" indication that those testifying before the committees believed that the exemption was to cover law enforcement materials.138

Judge Wilkey also criticized the majority's emphasis on a legislative concern for law enforcement materials. He asserted that subsections (a)(2)(C) and (b)(7) revealed no more than a congressional intent to provide limited protection to certain types of information, and only in very specific settings.139 With regard to the majority's analysis of the case law on exemption 2, Judge Wilkey criticized its result-oriented approach and

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132. *Id.* at 1090-92 (Ginsburg, J., concurring).
133. *Id.* at 1093 (Wilkey, J., dissenting) (emphasis in original).
134. *Id.* (emphasis in original).
135. *Id.* at 1093-94. *See supra* note 48 and accompanying text.
136. 670 F.2d at 1094-95.
137. *Id.* at 1097 & n.24.
138. *Id.* at 1103. *See supra* notes 41-43 and accompanying text.
139. 670 F.2d at 1105-11.
noted that only the Second and Ninth Circuits had exempted law enforcement materials under exemption 2.140

Judge Wilkey then focused on the majority's new two-prong standard for exemption 2 withholding. He asserted that the predominant internality standard not only lacks clarity, but forces judges to make an assessment of public interest which the majority claimed had already been assessed by Congress. He asserted that if a document is predominantly internal, then its impact on the public is slight. This impact can only be determined by a judicial assessment that the public has no significant interest in disclosure. Because both prongs of the test must be met before a court denies disclosure, Judge Wilkey suggested that the standard could never be met. He reasoned that if information is sufficiently substantial to enable persons to circumvent the law, then it necessarily has an impact on the public. Consequently, the information would not meet the predominant internality test. A judge would then have to choose between the two standards. Judge Wilkey predicted that this requirement of judicial discretion would be embraced only by those judges who prefer public policy choices to be made by the judiciary rather than the legislature.141 Finally, Judge Wilkey accused the majority of rewriting FOIA. He asserted that the majority, by basing its interpretation of exemption 2 on its "own vision of appropriate policy" and ignoring the en banc decision in Jordan, adopted an approach which could only diminish public trust in the judiciary.142

B. The Demise of a Narrow Interpretation of Exemption 2

The Crooker majority stated that its interpretation of exemption 2 was "hardly surprising" based on the wording of exemption 2, its legislative history and its treatment by the Supreme Court and the other circuits. The Crooker interpretation can also be easily traced to the District of Columbia Circuit's prior treatment of exemption 2. The construction given the literal wording of the exemption appeared, with minor variations, in the vacated Ginsburg panel decision as well as in the Vaughn143 and Jordan144 concurring opinions. Ginsburg also proposed that the examples listed in the Senate report were nonexclusive. Unlike the Crooker court which attempted a total reconciliation between the reports, the Ginsburg court reconciled the reports as to substantive matters. The predominant internality standard, as the majority noted, was first seen in Judge Leventhal's concur-

140. Id. at 1114.
141. Id. at 1114-15.
142. Id. at 1121.
143. See supra note 59 and accompanying text.
144. See supra note 95 and accompanying text.
ring opinion in *Vaughn*. In addition, the circumvention of risk standard previously appeared in *Cox* in the guise of a legitimate public interest test. The court's adherence to the result in *Jordan* was based on Judge Bazelon's "secret law" concurrence in *Jordan*, which *Cox* asserted had been *Jordan*’s primary focus. Finally, in considering the nondisclosure of a BATF manual, the court adhered to the decisions in which the Second and Ninth Circuits had previously determined that disclosure would risk circumvention of agency regulations and applied exemption 2.

Nevertheless, the extent to which *Crooker* manipulated the wording, legislative history, and case law on exemption 2 is unique. While reaching a result that is not without some merit, the majority’s analysis of the wording of exemption 2 failed to comment on the word “personnel” or explain its presence in the language of the exemption. The interpretation adopted by the majority reflects a policy judgment that circumvention of agency regulations would be fostered by disclosure of certain law enforcement materials. Although well-intentioned, this interpretation is not suggested by the literal wording of the exemption.

The majority’s assertion that the legislative history of exemption 2 provides a basis for withholding law enforcement materials is also weak. Because objection to a narrow reading of exemption 2 emanated primarily from the House and was never embodied in an amendment to the exemption, the intent found by the majority reflects no more than the unfulfilled desires of FOIA’s opponents to protect law enforcement materials. Perhaps cognizant of the need to base congressional intent on the manifestations of both houses, the court attempted to reconcile the Senate and House reports concerning disclosure of sensitive law enforcement information. As the dissent noted, the majority’s contention also runs counter to the maxim of statutory interpretation that the expression of one thing implies the exclusion of another. It is unlikely that the Senate report intended to include law enforcement materials within its listing of examples.

145. *See supra* note 59 and accompanying text.
146. *See supra* note 93 and accompanying text.
147. *See supra* notes 71-74 and accompanying text.
148. *See supra* notes 104-110 and accompanying text.
149. *See supra* notes 41-45 and accompanying text.
151. *See K. Davis, Administrative Law Treatise* § 3A.31 (1st ed. Supp. 1970) (“The basic principle is quite elementary: The content of the laws must depend upon the intent of both Houses, not of just one.”).
152. 670 F.2d at 1061.
153. *Id.* at 1097 n.23 (citing C.D. Sands, 2A Sutherland Statutes and Statutory Construction § 47.24 (4th ed. 1973)).
which included "parking facilities . . . lunch hours . . . sick leave, and the like." Law enforcement materials are, after all, totally unlike the examples cited. Even more implausible is the majority's assertion that it rejected the legitimate public interest standard. This standard was embraced by Judge Leventhal in his Jordan concurrence, which the Crooker majority specifically adopted in defining the literal wording of exemption 2.

The majority's treatment of the case law is further evidence of its result-oriented approach. The court divided its analysis into two parts: cases that relied on subsection (a)(2)(C) to exempt materials which, if disclosed, would aid in the circumvention of the law, and those cases that relied on exemption 2 to exempt these materials. While both subsections have resulted in nondisclosure of law enforcement materials, the underlying rationales of the decisions are totally different. Moreover, each of the circuits that has relied on subsection (a)(2)(C) to exempt law enforcement materials viewed exemption 2 as limited to minor employment-related matters. The Crooker court, however, rejected the argument that subsection (a)(2)(C) provides an implicit exemption. At present, only two circuits are philosophically aligned with Crooker—the Second and the Ninth—both of which have utilized exemption 2 to deny disclosure of a BATF manual. Unlike the state of the case law suggested by the majority's treatment, the Crooker rationale has limited circuit-wide support and may be derived more from an emotional response to disclosure of material used by BATF than a principled determination of the scope of exemption 2.

The majority also chose to disregard evidence that the Senate report should be adopted. By glossing over Congress' clarification of FOIA exemption 2 in the House Report on the Government in the Sunshine Act of 1976, the majority again appears to have chosen result over reason. As

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155. 670 F.2d at 1065-66.
156. Id. at 1057 ("Exemption 2 is applicable where . . . disclosure would permit circumvention of the law, and there is no substantial, valid external interest . . . .") (quoting Jordan v. United States Dep't of Justice, 591 F.2d 753, 783 (D.C. Cir. 1978) (Leventhal, J., concurring)).
157. 670 F.2d at 1070-72.
158. See, e.g., Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir. 1978); Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973); Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972).
159. 670 F.2d at 1055 n.11.
161. 670 F.2d at 1062 n.30. See supra note 48.
one commentator has noted, it is an established principle that courts may consult subsequent legislation as an aid in the clarification of earlier legislation dealing with the same or similar subject.162

Finally, the majority’s new test fails to provide a workable standard for courts. The predominant internality standard is ambiguous at best and, as Judge Wilkey suggests, the two prongs of the test may well cancel each other out.163 If the predominant internality standard proves unworkable, then the potential for abuse is great. Judges will be tempted to glide over the first prong of the test, and project their own biases into the second. It is also questionable whether abuse will be prevented by the burden of proving “significant” risk.164 If a court is predisposed to deny disclosure based on a requester’s status, the burden will be illusory.

IV. Conclusion

In Crooker v. Bureau of Alcohol, Tobacco & Firearms, the United States Court of Appeals for the District of Columbia Circuit ruled that exemption 2 applies if the material meets a test of predominant internality and its disclosure would significantly risk circumvention of agency regulations. The new two-prong test for exemption 2 may prove to be more of an obstacle to disclosure than was former section 3 of the APA. Crooker can be most strongly criticized for its disregard of FOIA’s true purpose, full agency disclosure. By means of “cross currents” of concern, Crooker has transformed a congressional commitment to disclosure into a delicate balance of the public’s right to know, and the government’s need for secrecy. This balance can now be easily tipped in favor of nondisclosure.

Courts that have been attentive to the years of congressional struggle to enact FOIA will reject the Crooker standard. Even a court that is sensitive to the need for public access to government information may feel constrained to permit disclosure of material that risks circumvention of the law. A determination of exemption 2 nondisclosure, nevertheless, should be grounded in firm principles that do not erode the vitality of FOIA. The suggestion that agencies and courts should turn to subsection (a)(2)(C) for limited protection for law enforcement materials may prove to be a viable solution. Although the material would still be available under subsection (a)(3), which provides for disclosure of agency records upon request, the

163. 670 F.2d at 1115.
164. Id. at 1074.
protection afforded by subsection (a)(2)(C) would be sufficient in most contexts. The danger in interpreting either subsection (a)(2)(C) or subsection (b)(2) as affording complete protection for law enforcement materials far outweighs the danger inherent in releasing these materials. Denying disclosure is in direct opposition to the purpose and language of FOIA, whereas risking the occasional disclosure of sensitive law enforcement materials is a limited price to pay for securing public access to government information. Until Congress chooses to cut back on the FOIA's breadth, courts should be wary of superimposing judicial discretion on expressions of congressional policy.

_Marnie Joy Carro_