FREEDOM OF INFORMATION—DISCLOSURE—EXEMPTION TWO OF FOIA PROTECTS LAW ENFORCEMENT MANUALS FROM DISCLOSURE—*Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981).

The Freedom of Information Act (FOIA),[1] enacted by Congress in 1966, embodies "a general philosophy of full agency disclosure."[2] Unless the information sought by an individual is clearly protected from disclosure by the statutory language,[3] it must be made available either by publication or request.[4] To insure government effectiveness certain material is protected from disclosure by exemptions contained within the statute. In *EPA v. Mink*,[5] the Supreme Court ruled that the nine exemptions in 5 U.S.C. § 552(b)[6] were limited and exclusive.[7] One of these exemptions, section 552(b)(2)(exemption two), pertaining to internal personnel rules and agency practices, has been the source of much litigation in the context of disclosure of law enforcement manuals.[8]

Pursuant to the FOIA, Michael Crooker filed a request with the Bureau of Alcohol, Tobacco, and Firearms (BATF) in mid 1978.[9] Crooker sought a copy of the training manual for BATF agents entitled "Surveillance of Premises, Vehicles and Persons—New Agent Training."[10] Initially, the BATF denied the request entirely;[11] however, after an administrative appeal the Director of BATF released the material except for one section of the manual.[12] The Director withheld this portion based on exemptions contained in the FOIA, specifically section 552(a)(2)(C), which requires the publication of adminis-

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[1] 5 U.S.C. § 552 (1976 & Supp. III 1979).

[2] S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965), *reprinted* in 1966 U.S. Code Cong. & Ad. News 2418 [hereinafter cited as SENATE REPORT].

[3] *Id.*

[4] Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1055 (D.C. Cir. 1981).

[5] 410 U.S. 73 (1973).

[6] 5 U.S.C. § 552(b) (1976).

[7] 410 U.S. at 79-80.

[8] Exemption two states: "(b) This section does not apply to matters that are—. . . (2) related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) (1976).

[9] Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1053 (D.C. Cir. 1981).

[10] *Id.*

[11] *Id.*

[12] *Id.* This portion detailed "methods and procedures for conducting surveillance of criminal suspects and contain[ed] extensive information concerning methods, strategies, techniques and guidelines to be employed by ATF special agents in performance of their duties." *Id.* at 1054 n.5.

trative staff manuals, and exemption two.[13] The BATF claimed that release of this portion would allow individuals to circumvent the law by obtaining information on agents' methods of surveillance of suspects.[14]

Dissatisfied with this result, Crooker filed a *pro se* complaint in the district court to compel the BATF to release the withheld portion.[15] Thereafter, he moved for summary judgment but failed to support the motion with affidavits or other documents.[16] The government also filed a motion to dismiss, or alternatively for summary judgment supported by the Director's affidavit and copies of the withheld portions.[17] In return, Crooker submitted a reply memorandum and renewed his claim for summary judgment.[18] In the reply memoradum Crooker asserted that the manual directly affects the public at large "[because it involves] surveillance of members of the public by federal authorities;"[19] however, he did not contest the government's claim that release of the entire manual would result in circumvention of the law.[20]

Upon examining the BATF manual *in camera*, the district court granted the government's motion for summary judgment based on exemption two,[21] citing the D.C. circuit court's decision in *Cox v. United States Department of Justice*.[22] On appeal, a three judge panel of the D.C. circuit court ruled that under the rationale of *Jordan v. United States Department of Justice*,[23] which held exemption two to be inapplicable to law enforcement manuals, the unreleased portions of the manual were not protected from disclosure by

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[13] *Id.* at 1053-54. Section (a)(2)(C) states: "(a) Each agency shall make available to the public information as follows: (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." 5 U.S.C. § 552(a)(2)(C) (1976). Although the BATF claim relied on both exemptions the only issue under consideration in *Crooker* was whether the material qualified under exemption two. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1054 n.4 (D.C. Cir. 1981).

[14] Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1054 (D.C. Cir. 1981) (citing Affidavit of G.R. Dickerson at 10).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* (quoting Reply Memorandum at 12).

[20] *Id.* As a result of Crooker's failure to contest the government's claim, the court must take the government's assertions as true for purposes of summary judgment under FED. R. CIV. P. 56(e). Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1054 (D.C. Cir. 1981).

[21] Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1054 (D.C. Cir. 1981).

[22] 601 F.2d 1 (D.C. Cir. 1979).

[23] 591 F.2d 753 (D.C. Cir. 1978)(en banc).

exemption two.[24] A majority of the full court voted to vacate the panel decision and to rehear the case *en banc*.[25] In a nine to one decision the majority upheld the government's claim that the undisclosed portion of the BATF manual was properly withheld under exemption two.[26] Writing for the majority, Judge Edwards developed a new test to determine whether requested information falls within the category of internal personnel rules of exemption two.[27] According to the holding of *Crooker v. Bureau of Alcohol, Tobacco & Firearms*,[28] if a document is "predominantly internal" and disclosure would significantly risk circumvention of the law, exemption two protects the material from disclosure.[29]

The controversy over exemption two stems from the conflicting language in the legislative reports.[30] The Senate Report limited the scope of exemption two to relations between the agency and its employees.[31] In direct contrast, the House Report stated that exemption two "would not cover all 'matters of internal management' such as employee relations," but would protect "[o]perating rules, guidelines and manuals of procedure for Government investigators or examiners."[32] As a result of this description, courts considering exemption two cases must first resolve the question of which report more accurately reflects congressional intent.[33] The overall majority of courts have adhered to the Senate interpretation.[34]

Prior to the court's opinion in *Crooker*, the D.C. Circuit had adopted the Senate Report's version as well. The first major decision within the D.C. Circuit to address the exemption two issue was *Vaughn v. Rosen*.[35] The plaintiff in *Vaughn* sought the release of certain Civil Service Commission reports on personnel manage-

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[24] Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1055 (D.C. Cir. 1981).

[25] *Id.*

[26] *Id.* at 1053.

[27] *Id.*

[28] 670 F.2d 1051 (D.C. Cir. 1981).

[29] *Id.* at 1074.

[30] *See* Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 154 (1969); Comment, *The Status of Law Enforcement Manuals Under the Freedom of Information Act*, 75 NW. U.L. REV. 734, 748 (1980).

[31] Specifically, the Senate Report states: "Exemption No. 2 relates only to 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." SENATE REPORT, *supra* note 2, at 8.

[32] H. R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1965), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2427 [hereinafter cited as HOUSE REPORT].

[33] Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1052 (1975).

[34] Department of the Air Force v. Rose, 425 U.S. 352, 363-64 & n.5 (1976).

[35] 523 F.2d 1136 (D.C. Cir. 1975).

ment.[36] In upholding the district court decision,[37] the majority opinion, written by Judge Wilkey, specifically rejected the House Report's interpretation of exemption two in favor of the Senate's interpretation.[38] First, the majority claimed that the legislative history of the Act indicated the broad congressional policy of disclosure and the more specific language of the Senate Report was more consistent with this goal.[39] Second, because the Senate passed the bill before the House Committee Report was issued—the Senate Report was the only report before both Houses when the final vote was taken on the bill.[40] Relying on the Senate Report, the majority in *Vaughn* drew a distinction between "minor or trivial matters" which are exempt and "those more substantial matters which might be the subject of legitimate public interest," which are not exempt.[41]

In a concurring opinion Judge Leventhal agreed with the majority that the personnel reports should be released, but his analysis of the legislative history and scope of exemption two differed completely. First, Judge Leventhal argued that the Senate Report was available to both Houses only theoretically.[42] In addition, Judge Leventhal claimed that even if the Senate Report indicated the overall need for disclosure, it did not specifically explain any particular provision.[43] After concluding that the Senate Report was not really indicative of congressional intent in this instance, Judge Leventhal analyzed the

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[36] *Id.* at 1139.

[37] Although the district court did protect some material relating to individual employers and agency officials, this issue was not before the court of appeals. Only those portions ruled not to be protected by exemptions two and five were considered by the court on appeal. *Id.*

[38] *Id.* at 1142-43. The Senate Report was considered more authoritative because it was the only report available to the members of both Houses. *Id.* at 1142. Furthermore, in favoring more disclosure than the House Report, the Senate Report was deemed to be more in accord with the FOIA. *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1142.

[42] *Id.* at 1148 (Leventhal, J., concurring). Judge Leventhal stated:

> The members of the House committee did have the Senate Report, but they departed from it. If one is to give preference to date of preparation as a crucial factor, one might just as well, or better, say that the second group had more opportunity to ponder and reflect. As to the mass of members of the House, the realities of the legislative process advise that what they had furnished to them for floor consideration is the bill (here there were no differences from the Senate bill) and the House Report. They could theoretically send for the Senate Report, but what occasion would there be for such a rare step unless they were particularly interested in the bill (though not a member of the Committee) or were alerted by constituents? Again as a matter of *the legislative reality of the legislative process, each House regards its own position as distinctive, and its members rarely if ever refer to reports of the other chamber.* House and Senate reports often are carbon copies of each other.

Id. (emphasis added).

[43] *Id.*

language of exemption two itself which exempts "matters that are . . . (2) related solely to the internal personnel rules and practices of an agency."[44] Judge Leventhal viewed the use of the word "solely" as being too restrictive.[45] Rather, he substituted the word "predominantly" as a more reasonable interpretation of congressional intent.[46] Thus, if material were related predominantly to the internal practices of an agency it would be protected from disclosure.[47]

In *Department of the Air Force v. Rose*,[48] the Supreme Court relied on the majority opinion in *Vaughn* to release information on proceedings under the Air Force Academy Honor Code.[49] While explaining the Court's preference for the Senate Report's interpretation of exemption two, Justice Brennan incorporated the majority's rationale in *Vaughn*.[50] Summarizing the Court's position on exemption two, Justice Brennan wrote that "the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public could not reasonably be expected to have an interest."[51] The interest of the public in the material sought was the qualifying factor in the *Rose* decision. Thus, if the public has no legitimate interest or no legitimate need to know of certain agency material, it need not be disclosed. The Court in *Rose* drew this distinction along the guidelines used by Judge Wilkey in *Vaughn*—substantial matters require disclosure and trivial matters do not.[52] Because the material in *Rose* was not law enforcement guidelines it was not exempt,[53] however, the Court was careful to limit its holding to situations where disclosure would not risk circumvention of agency regulations.[54]

The Supreme Court's failure in *Rose* to resolve whether exemption two will protect law enforcement manuals when circumvention is

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[44] For the text of exemption two, see *supra* note 8.

[45] 523 F.2d at 1150-51 (Leventhal, J., concurring).

[46] *Id.* at 1151 (Leventhal, J., concurring).

[47] *Id.* This standard of "predominantly internal" was adopted by the majority in *Crooker*. See *supra* text accompanying note 29.

[48] 425 U.S. 352 (1976).

[49] *Id.* at 355.

[50] See *supra* notes 35-41 and accompanying text.

[51] 425 U.S. at 369-70.

[52] *Id.* at 365.

[53] See *supra* note 41 and accompanying text.

[54] Specifically, the Court held: "For the reasons stated by Judge Wilkey, and because we think *the primary focus of the House Report was an exemption of disclosures that might enable the regulated to circumvent agency regulation*, we too 'choose to rely upon the Senate Report' in this regard." 425 U.S. at 366-67 (emphasis added). The majority in *Crooker* specifically relied on this factor and based part of its ruling on the implication that if circumvention is a possibility, the House Report may be relied on. 670 F.2d at 1066.

a possibility, has led other courts to deal with this issue in a variety of ways. Basically, there have been two statutory alternatives available in cases such as this: an exemption for law enforcement manuals based on section 552(a)(2)(C) which pertains only to administrative staff manuals;[55] and protection under exemption two which allows the exemption of internal personnel rules.[56]

The basic thrust of decisions granting protection from disclosure under section 552(a)(2)(C) is that this provision contains an "implicit exemption."[57] A reading of the legislative history of this section shows that the word "administrative" was not contained in the original bill before the Senate.[58] This word was added when the Senate Judiciary Committee expressed concern over the scope of this provision.[59] The report of this Committee indicated that only administrative manuals, not law enforcement manuals, were intended to be disclosed under section 552(a)(2)(C).[60] The major problem with using section 552(a)(2)(C) as a protection device is the language contained in section 552(a)(3), the "catch-all" provision which provides that any request for information that "(A) reasonably describes such records and (B) is made in accordance with published rules . . . ," must be complied with by the agency.[61] Therefore, courts that have

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[55] For the text of section 552(a)(2)(C), see *supra* note 13.

[56] A few circuits have not yet decided the exemption two issue. *E.g.* Ferri v. Bell, 645 F.2d 1213 (3d Cir. 1981); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978); Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977).

[57] The first case to announce this doctrine of implicit exemption was Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972), *aff'd*, 507 F.2d 481 (6th Cir. 1974) (exempting IRS tax manuals).

Other courts have followed the Sixth Circuit and relied on this exemption. *E.g.*, Cox v. Levi (*Cox II*), 592 F.2d 460 (8th Cir. 1979) (exempting FBI manual of rules and regulations); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1307-08 (8th Cir. 1978) (exempting drug enforcement manual); Benson v. GSA, 289 F. Supp. 590 (W.D. Wash. 1968); *cf.* Kuehnert v. FBI, 629 F.2d 662 (8th Cir. 1980) (court expressed doubt that FBI materials or investigative leads fell under exemption two). *But see* Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973) (OSHA manuals not exempt); *cf.* Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979) (court declined to rule on whether exemption two applies when there is possible circumvention of law if disclosure is permitted).

[58] *See* SENATE REPORT, *supra* note 2.

[59] *Id.*

[60] *See* Comment, *supra* note 30, at 738.

[61] Section 552(a)(3) reads:

> (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.

Id.

One commentator has suggested that these two sections may be reconciled by regarding section 552(a)(2) as a public disclosure provision and section 552(a)(3) as an individual disclosure provision wherein a request must be made for the material specifically. Comment, *supra* note

relied on section 552(a)(2)(C) have been forced to find an "implicit exemption" in the section's language by claiming that the language of the House and Senate Reports "predominate over the literal meaning of the statute in order to avoid a result that Congress clearly did not intend."[62]

Those courts finding that exemption two protects personnel rules have been forced to rely upon the House Report's broader interpretation of the scope of the exemption, rather than the more restrictive Senate version.[63] Early court decisions did not discuss their rationale for relying on exemption two, but merely stated that the manuals were protected, thereby presumably relying on the House Report since this information was clearly exempted by its language.[64] It was only after the decision in *Rose* that the Courts of Appeals for the Second and Ninth Circuits relied explicitly on the House Report to allow protection of law enforcement manuals under exemption two.[65]

The Court of Appeals for the District of Columbia followed neither of these alternatives. In *Jordan*,[66] Judge Wilkey, writing for

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30, at 746. Hence, if information is exempted by section 552(a)(2), the request can still be made under section 552(a)(3). Since to obtain information under section 552(a)(3) a court order will probably be necessary, disclosure would still be more limited.

[62] Comment, *supra* note 30, at 738-39; *see also* United States v. Imbrunone, 379 F. Supp. 256 (E.D. Mich. 1974), where the court relied on Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972), *aff'd*, 507 F.2d 481 (6th Cir. 1974), in holding that the IRS audit manual used to detect noncompliance with tax laws was exempt from disclosure under sections 552(a)(2)(C). 379 F. Supp. at 260.

Another decision adhering to this doctrine is City of Concord v. Ambrose, 333 F. Supp. 958 (N.D. Cal. 1971). As one commentator observed, the logic of the court's reasoning in *Ambrose* is somewhat suspect since the court concluded that sections 552(a)(2) and 552(a)(3) are mutually exclusive. There is no support for this proposition in the statute or legislative history. Comment, *supra* note 30 at 744 n.64.

Interestingly enough, the court in *Ambrose* indicated in dictum that the House Report could be relied on where circumvention of the law is a possibility.

[63] See *supra* notes 30-34 and accompanying text.

[64] Tietze v. Richardson, 342 F. Supp. 610 (S.D. Tex. 1972); Cuneo v. Laird, 338 F. Supp. 504 (D.D.C. 1972), *rev'd on other grounds sub nom.* Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973). Justice Brennan in *Rose* referred to these cases as examples of reliance on the House Report in situations where circumvention of the law had been at risk. He also indicated that "this was the primary concern of the committee drafting the House Report." 425 U.S. at 364.

[65] In Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 549 (2d Cir. 1978), the court concluded that the decision in *Rose* which implicitly relied on the House Report where circumvention of the law was a possibility, "not only does not preclude but furnishes support for holding that this exemption prevents the forced disclosure of the information in the BATF manual which is here sought." *Id.* at 547; *see also* Polymers, Inc. v. NLRB, 414 F.2d 999, 1005-06 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970). The Court of Appeals for the Ninth Circuit in Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653 (9th Cir. 1980), followed the *Caplan* rationale by relying on the implication contained in *Rose*. See *supra* note 54.

[66] The case of Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717 (D.C. Cir.), *vacated and aff'd by an evenly divided court*, 591 F.2d 752 (D.C. Cir. 1978) (en banc), was decided at the same time as *Jordan*. In the panel opinion by Judge MacKinnon, certain FEA material was exempted from disclosure based on his grammatical dissection of the language of exemption two. 591 F.2d at 723.

the majority, held that the United States Attorney's prosecutorial guidelines were not exempt from disclosure since "Exemption two was not designed to protect documents whose disclosure might risk circumvention of agency regulations."[67] The court, in an *en banc* decision, adopted the rationale of *Vaughn*, namely, that only trivial personnel matters were exempt from disclosure, and gave full support to the Senate interpretation of the scope of exemption two.[68]

In his concurrence, Judge Leventhal reiterated his "predominantly internal" standard, discussed in *Vaughn*,[69] and pursued this rationale even further. He argued that where documents consist of "internal instructions" risking circumvention of the law, "and there is no substantial, valid external interest of the community at large in revelation," exemption two will prevent disclosure.[70] This concern over public interest had been expressed by the Supreme Court in *Rose*.

Judge Bazelon also concurred in *Jordan's* result, but chose to rely on what he termed "secret law" aspects of the undisclosed material.[71] Arguing that one of the principal purposes of the FOIA was to prevent the withholding of "secret law" which affects the public but is generally unknown to them, Judge Bazelon concluded that these prosecutorial guidelines were in fact "secret law" and should be released.[72]

With *Jordan* being the only *en banc* decision, the rule in the D.C. Circuit was that exemption two was not applicable to law enforcement manuals. Yet, continuing disagreement among the judges was reflected in subsequent cases.[73]

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[67] 591 F.2d at 771. Relying on the decision in EPA v. Mink, 410 U.S. 73 (1973), the court explicitly rejected the use of section 552(a)(2)(C) as a means of exemption since it is not contained within the enumerated list of section 552(b).

The court also rejected the government's claim that the decision in *Rose* implied the Supreme Court's endorsement of exemption two as protecting law enforcement manuals. Judge Wilkey observed that all this language meant was that the Supreme Court had cautiously left open the question of what to do about any exemption "where disclosure may risk circumvention of agency regulation." 591 F.2d at 771.

[68] 591 F.2d at 768-71.

[69] See *supra* notes 42-47 and accompanying text.

[70] 591 F.2d at 783 (Leventhal, J., concurring).

[71] *Id.* at 781 (Bazelon, J., concurring).

[72] *Id.*

[73] *See, e.g.*, Cox v. United States Dep't of Justice, 601 F.2d 1 (D.C. Cir. 1979). *Cox* was a panel opinion by Judge MacKinnon that exempted a U.S. Marshall's Manual from disclosure under exemption two. The decision attempted to distinguish *Jordan* on the ground of "secret law." However, the secret law argument was contained only in Judge Bazelon's concurring opinion. See *supra* text accompanying notes 71 & 72.

Two other cases followed *Jordan* as well. Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980), and Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980). Although *Lesar* allowed the use of exemption two, to some extent this case is distinguishable from *Jordan* on its facts. *Allen* did follow the guidelines established by *Jordan* but also mentioned that the material involved would probably not be exempt even under the House Report's interpretation. 636 F.2d at 1290 n.20.

The arguments presented by the majority, the concurrence, and the dissent in *Crooker* encompass a variety of concerns. The structure of the court's rationale was broken down into four major topics: first, an analysis of the language of exemption two; second, a consideration of the history of the Act and its passage through Congress; third, an overview of other provisions of the Act which may lend insight into the congressional intent behind exemption two; and finally, a review of prior case law dealing with this issue.

The Language of Exemption Two

In the majority opinion, Judge Edwards noted the general philosophy of full disclosure that the Act was conceived to embody.[74] He characterized the nine exemptions in section (b) as providing the only means of shielding material from disclosure.[75] The court then stated that the language of exemption two, on its face, provided protection for the BATF manual.[76] To support this statement the court had to reject its ruling in *Jordan* that the phrase "personnel rules and practices" contained in exemption two referred only to trivial matters such as pensions, vacations and salaries.[77] Instead, the majority chose to accept the interpretation of this phrase formulated by the Second and Ninth Circuits in *Caplan v. BATF* and *Hardy v. BATF* respectively,[78] which relied on the broader interpretation of exemption two contained in the House Report. In accordance with its acceptance of the House Report's analysis of exemption two, the *Crooker* court adopted Judge Leventhal's interpretation of the phrase "related solely to" to mean "predominantly" as outlined in his concurring opinion in *Vaughn*.[79]

Judge Wilkey's dissent in *Crooker* directly challenged the majority's assertion that exemption two on its face prevented disclosure of the BATF manual. He claimed that the majority ignored the language

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[74] 670 F.2d at 1055. See *supra* note 2 and accompanying text.

[75] 670 F.2d at 1055 & n.11; *accord* EPA v. Mink, 410 U.S. 73 (1973).

[76] 670 F.2d at 1056.

[77] *Id.*

[78] *Id.* See *supra* note 65 and accompanying text. However, the majority did not explain its reason for accepting the Second and Ninth Circuits' interpretation.

[79] 670 F.2d at 1056. See *supra* text accompanying notes 45-47 where Judge Leventhal defined "solely" as the equivalent of predominantly. The court rejected the literal meaning of these terms because it would limit exemption two to matters which are of no legitimate interest to the public. Despite the fact that this is the same test devised and applied by the Supreme Court in *Rose*, see *supra* text accompanying notes 51 & 52, Judge Edwards' opinion recanted language in *Jordan* which placed the court in the role of balancing the public interest against government effectiveness. *Id.*

of *Jordan* which adopted the literal meaning of "solely" and completely disregarded its own precedent.[80] The dissent condemned the majority opinion's acceptance of the Second and Ninth Circuits' decisions for two reasons. First, the majority failed to provide any reason for adopting these decisions, and secondly, the weight of federal authority directly contradicted this interpretation of exemption two's language.[81] Not only did Judge Wilkey dispute the majority's disregard of *Jordan's* holding, but he also claimed that the majority failed to address the real issue of *Jordan* which Judge Wilkey perceived as being the interpretation of the word "personnel" in exemption two.[82] While the majority in *Crooker* determined that "personnel" must be widely construed to cover a variety of matters, the dissent alleged that this interpretation was clearly disapproved by the Supreme Court in *Rose,* which ruled that only trivial personnel matters were protected by exemption two.[83] Judge Wilkey pointed to the fact that when the Supreme Court adopted the *Vaughn* majority opinion, it approved of the distinction made between exempt minor or trivial matters and nonexempt substantial matters as a guide for the courts.[84] Therefore, according to the dissent, the majority's reliance on Judge Leventhal's concurring opinion in *Vaughn,* which substituted "predominantly" for "solely," clearly clashed with the Supreme Court's decision in *Rose.*[85] Furthermore, the dissent claimed that the stricter construction of "personnel" by the Court in *Rose* led the *Jordan* court to reject the standard of "predominantly internal" urged by Judge Leventhal, and led the Court to instead adopt the *Vaughn* majority standard of minor versus substantial matters.[86] In sum, the dissent charged that the majority had simply ignored the analysis of exemption two contained in *Jordan* and substituted a novel construction.[87]

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[80] 670 F.2d at 1094 (Wilkey, J., dissenting).

[81] *Id.*

[82] *Id.* at 1094-95 (Wilkey, J., dissenting).

[83] *Id.* at 1095 (Wilkey, J., dissenting).

[84] *Id.* See *Rose,* 425 U.S. at 365 (quoting Vaughn v. Rosen, 523 F.2d at 1142). See also *supra* text accompanying note 41.

[85] 670 F.2d at 1095. Judge Wilkey also pointed out that while the majority accepted Judge Leventhal's definition of "predominant internality" over the literal meaning of "solely," it rejected the essence of Judge Leventhal's standard: that exemption two is applicable " 'where there is no substantial valid external interest of the community at large in revelation.' " *Id.* (Wilkey, J., dissenting)(quoting *id.* at 1057).

[86] *Id.* There is one other interpretation given to the term "personnel." Judge MacKinnon, concurring in *Crooker,* relied on his statement in *Jordan* and *Ginsburg* that "personnel" only modifies the word "rules" and not "practices." *Id.* at 1078 (MacKinnon, J., concurring). See *supra* note 66 and accompanying text.

[87] 670 F.2d at 1096 (Wilkey, J., dissenting).

LEGISLATIVE HISTORY OF EXEMPTION TWO

The majority in *Crooker* chose to rely on the House Report's more expansive explanation of exemption two. Although the court briefly considered the Senate Report, it concluded that the Senate provided "little enlightenment as to Congress' intent concerning [E]xemption [two]."[88] The description contained in the Senate Report was perceived by the majority as giving only some of the personnel rules which should not be disclosed.[89] The majority largely ignored the Senate Report but made several references to "cross-currents" of concern contained in the report's language.[90] These "cross-currents" were implied from comments of Senators expressing concern that the government might be hampered by full disclosure.[91] These alleged inadequacies of the Senate Report provided the impetus for the majority's reliance on the House Report, which Judge Edwards claimed contained a wealth of information on congressional intent.[92]

Several bills dealing with the FOIA were introduced into the House. The majority relied in part on H.R. Rep. No. 5012[93] which contained language identical to the language of exemption two in the Senate bill later enacted as law. The court also referred to a comment made by Congressman Moss, the principal sponsor of the bill, who had stated that exemption two was intended to cover "manuals of procedure."[94] The majority also relied on the House Report of S. 1160,[95] later enacted as the FOIA.[96] In conclusion, the majority asserted that these indications of the House's concern, coupled with the significant fact that these statements were not challenged and the bill was passed, showed that the two reports were not contradictory but merely covered different areas of concern.[97]

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[88] *Id.* at 1058. The majority based its conclusion on the lack of any comments or objections by the Senate to witnesses' statements on the scope of exemption two contained in the record.

[89] *Id.* See *supra* note 31. Specifically, the majority stated that these "examples" contained in the Senate Report did not limit the scope of exemption two to minor employment matters. Therefore, material in the House Report which granted a wider scope to exemption two was not contradictory; the Senate was merely silent on the issue of risk of circumvention of the law. 670 F.2d at 1061. Thus, in reality, the majority determined that the House and Senate Reports may be reconciled. *Id.* at 1065. See *infra* note 98. Judge MacKinnon concurred in the majority's interpretation of the Senate Report. 670 F.2d at 1078 (MacKinnon, J., concurring).

[90] 670 F.2d at 1058, 1061, 1063.

[91] The section of the Senate Report relied on by the majority, however, was construed in the context of examining the general purpose of the Act, not in a specific discussion of exemption two.

[92] 670 F.2d at 1061.

[93] 89th Cong., 1st Sess. (1965).

[94] *Id.* at 1059. The full text of Congressman Moss's statement is reprinted in *Crooker*. *Id.* at 1059 n.24.

[95] 89th Cong., 1st Sess. (1965).

[96] *Id.* at 1060. *See* HOUSE REPORT, *supra* note 32.

[97] 670 F.2d at 1059-61, 1065.

In direct response to these allegations, the dissent countered that the House and Senate Reports were irreconcilable and that the Senate Report's description was exclusive.[98] Judge Wilkey took further exception to the majority's reliance on the House Report.[99] The dissent discredited the remarks made by Congressman Moss, in reference to H.R. 5012, by accusing the majority of taking them out of context.[100] Judge Wilkey then went on to introduce testimony given by other witnesses in the House hearing to support his claim that exemption two was never intended to protect law enforcement manuals.[101] Testimony from the Senate hearings to the same effect was also quoted.[102]

The dissent also repudiated the majority's reliance on the House Report of S. 1160.[103] Judge Wilkey accused the House Committee members of indulging in "last minute chicanery" when they inserted the provisions on law enforcement manuals in the House Report to avoid amending the bill.[104] As Judge Wilkey pointed out, the House Report on S. 1160 "was prepared only *after* the Senate had unanimously adopted the FOIA."[105] Thus, as a result of the House passing the Senate bill without amendment, the Senate was denied an opportunity to consider the House Report, in which members of the House Committee had inserted their choices as to the scope of exemption two.[106] Therefore, there was only one report before both Houses of

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[98] *Id.* at 1097 (Wilkey, J., dissenting). Judge MacKinnon responded to this claim of the dissent by alleging that Judge Wilkey misread the statement in the Senate Report. In actuality, Judge MacKinnon pointed out that the report states: "Exemption No. 2 relates *only* to the internal personnel rules and practices of any 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." *Id.* at 1083 (MacKinnon, J., concurring)(emphasis added). The dissent completely disagreed with the majority that the House and Senate Reports may be reconciled. Judge Wilkey pointed to the general consensus that these reports are totally incompatible. See *supra* note 30 and accompanying text.

[99] The dissent was disturbed by what it termed a total "repudiation" of the Senate Report by the majority, and referred to the Supreme Court reliance on the Senate Report in *Rose*. 670 F.2d at 1098 (Wilkey, J., dissenting). See *supra* note 54.

[100] 670 F.2d at 1101 (Wilkey, J., dissenting).

[101] *Id.* at 1102-03 (Wilkey, J., dissenting).

[102] *Id.* at 1103 (Wilkey, J., dissenting).

[103] *Id.* at 1104-05 (Wilkey, J., dissenting).

[104] 670 F.2d at 1099 (Wilkey, J., dissenting). Judge Wilkey made the same claim against the House in his opinion in *Jordan*, 591 F.2d at 768. Judge Mikva took offense at these allegations. He claimed that Judge Wilkey attributed to Congress an "obstinate irrationality" since it is clear that Congress would not reasonably require disclosure of information which would impede law enforcement. In response to the claim of chicanery, Judge Mikva found in this "a lamentable tendency to scorn the legislative process." 670 F.2d at 1087 (Mikva, J., concurring).

[105] 670 F.2d at 1098 (Wilkey, J., dissenting)(emphasis in original).

[106] *Id.* Judge MacKinnon responded that: "[t]here was no "chicanery" since the House Report, which issued *after* the Senate had passed the bill, indicated the *same intent* with respect to

Congress, namely the Senate's, which provided the true indication of congressional intent.[107]

Judge Wilkey considered the majority's reliance on statements made by certain representatives in the House debates an attempt to characterize them as expressions of the entire House "when actually the *majority* of persons who spoke on the subject before the House indicated their belief that Exemption 2 did *not* cover law enforcement manuals."[108]

The majority justified its position by emphasizing that the court's role was not "to apply individual provisions of the statute woodenly,"[109] but to "interpret the law as we believe Congress meant it to be read."[110] Judge Wilkey responded that the court's role was not to amend legislation, but merely to enforce the law as Congress wrote it.[111]

Additional Provisions of the FOIA

The majority provided additional support for its interpretation of personnel rules and agency practices of exemption two by examining two other provisions of the FOIA, section 552(a)(2)(C) and section 552(b)(7)(E) (exemption seven),[112] which protect investigatory material such as FBI records from disclosure. Relying on the maxim that a statute must be read as a whole to understand its true meaning,[113] the court stated that these two provisions "reinforce the conclusion that Congress was aware of the need to protect investigative techniques from disclosure."[114] Referring to the addition of the word "administrative" to modify staff manuals in section 552(a)(2)(C),[115] the court concluded that this evidenced the congressional "cross-currents" of

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Exemption two as Congressman Moss had stated publicly at the very first hearing which antedated the Senate hearings and the Senate Report." *Id.* at 1084 (MacKinnon, J., concurring).

[107] This viewpoint was enunciated in *Vaughn* and adopted by the Supreme Court in *Rose*, but with a qualification. See *supra* note 54 and accompanying text.

[108] 670 F.2d at 1105 (Wilkey, J., dissenting)(emphasis in original).

[109] *Id.* at 1065.

[110] *Id.* at 1066. Judge Mikva also emphasized this role in his concurring opinion. Specifically, he stated that the court must "interpret the results of the legislation process as reasonable and not ridiculous." *Id.* at 1088 (Mikva, J., concurring).

[111] *Id.* at 1121 (Wilkey, J., dissenting). In his concurring opinion Judge Mikva spoke at some length on the topic of judicial versus legislative roles. In his view, the courts have a duty to society to interpret the law reasonably. *Id.* at 1089 (Mikva, J., concurring).

[112] For the text of section 552(a)(2)(C), see *supra* note 13. Exemption seven provides: "(b) This section does not apply to matters that are—(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (E) disclose investigative techniques and procedures." 5 U.S.C. § 552(a)(2)(C)(1976).

[113] 670 F.2d at 1062. (quoting Richards v. United States, 369 U.S. 1, 11 (1962)).

[114] *Id.*

[115] See *supra* text accompanying notes 58 & 59.

concern over the impact of full disclosure on government effectiveness.[116] As for exemption seven, which was amended in 1974 to limit the scope of the release of investigative techniques and procedures, the majority relied on the Senate debate to clarify the original intent of Congress when considering the FOIA.[117]

Judge Wilkey claimed in his dissent that the reliance placed by the majority on these sections was misplaced. While the majority explicitly affirmed the ruling in *Jordan* that section 552(a)(2)(C) does not protect law enforcement manuals, the court argued that this section provided insight into exemption two.[118] The dissent claimed that this reliance on the addition of the word "administrative" in section 552(a)(2)(C) showed how easily Congress could have changed the wording of exemption two if it had chosen to do so.[119] The dissent further dismissed the majority's reliance on exemption seven by arguing that the 1974 amendments to exemption seven and the ensuing debate cited by the majority were actually a response by Congress "to amend . . . in favor of more disclosure.[120] Furthermore, the use of the term "investigative techniques" in exemption seven implies that exemption two was not intended to cover law enforcement manuals since this would make the enactment of exemption seven redundant.[121]

Another point significant to the dissent's argument was the enactment by Congress of The Government in the Sunshine Act.[122] This Act contained an exemption identical to the language of exemption two in the FOIA.[123] The dissent pointed out that the House Report on the Sunshine Act reiterated the narrow interpretation given to exemption two by the Senate in the FOIA.[124] Unfortunately, the majority addressed this issue only peripherally: "We note that we do

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[116] 670 F.2d at 1063.

[117] *Id.* at 1065.

[118] 670 F.2d at 1105 (Wilkey, J., dissenting).

[119] *Id.*

[120] *Id.* at 1110 (Wilkey, J., dissenting).

[121] *Id.*

[122] 5 U.S.C. § 552(b) (1976).

[123] 670 F.2d at 1107-08 (Wilkey, J., dissenting).

[124] *Id.* Specifically the House Report states:

> (2) This exemption includes meetings relating solely to an agency's internal personnel rules and practices. It is intended to protect the privacy of staff members and to cover the handling of strictly internal matters. It does not include discussions or information dealing with agency policies governing employees' dealings with the public, such as manuals or directives setting forth job functions or procedures. As is the case with all of the exemptions, a closing or withholding permitted by this paragraph should not be made if the public interest requires otherwise.

H.R. REP. No. 880, 94th Cong., 2d Sess. 3 (1976).

not find it particularly significant that Congress enacted in 1976 a provision in the Government in the Sunshine Act identically worded to Exemption 2 of FOIA."[125] Yet, the dissent observed that the Senate Report to the Sunshine Act explicitly noted the relationship-: "This wording parallels the Freedom of Information Act, 5 U.S.C. § 552(b)(2).[126] The dissent argued that the existence of four Committee Reports on the same statutory language, with the two Senate Reports and the 1976 House Report in agreement, indicated that the House in 1976 had retreated from its position on the FOIA in 1966, and now recognized that exemption two did not apply to law enforcement manuals.[127]

CASE LAW

Inevitably the court turned to precedent to further establish its claim. Although the court referred to various cases, it relied primarily on *Rose, Vaughn* and *Jordan*. As the majority noted, the Supreme Court's decision in *Rose* did not address the issue of the scope of exemption two presented in *Crooker*.[128] The majority opinion, however, emphasized the implication in *Rose* that where circumvention of the law is a possibility, exemption two as defined in the House Report may be invoked to prevent disclosure.[129] Next, the *Crooker* decision focused on the predominantly internal standard of Judge Leventhal in *Vaughn* because he had taken notice of the "cross-currents" of congressional concern.[130] Finally, the majority considered its recent decision in *Jordan*. In an attempt to lessen the impact of *Jordan* that exemption two does not apply to law enforcement manuals, the court discredited the supposed "majority" which had upheld *Jordan*.[131] Judge Edwards noted that Judge Bazelon's concurring opinion had

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[125] 670 F.2d at 1062 n.30. Judge MacKinnon noted that the House Report on the Sunshine Act appears to define two categories: (1) strictly internal matters, and (2) directions of job functions. He claimed that this division reflected the same point as Judge Leventhal's interpretation of "predominant internality" in *Jordan* by stating its intent "to cover the handling of *strictly internal matters.*" *Id.* at 1080 (MacKinnon, J., concurring)(emphasis in original).

[126] *Id.* at 1109 (Wilkey, J., dissenting)(citing S. REP. No. 354, 94th Cong., 1st Sess. 21 (1975)).

[127] *Id.* (Wilkey, J., dissenting).

[128] The majority briefly considered the decisions of the Sixth and Eighth Circuits which relied on section 552(a)(2)(C) to prevent disclosure. Although rejecting the rationale of these cases that exemption two does not protect law enforcement manuals, *id.* at 1070-71, the court cited them as indicative of Congress' intent to prevent disclosure of law enforcement manuals. *Id.* at 1071. See *supra* note 57 and accompanying text.

The court also surveyed the Second and Ninth Circuits' decisions withholding BATF manuals based on exemption two. See *supra* note 65 and accompanying text.

[129] See *supra* note 54 and accompanying text.

[130] 670 F.2d at 1066.

[131] *Id.* at 1067.

emphasized the secret law aspect of the prosecutorial guidelines,[132] while Judge Leventhal and Chief Judge Robinson had relied on the concept of "predominantly internal."[133] Thus, out of a five judge majority only two judges actually agreed with both the result and the rationale of *Jordan*.

The dissent did not refute these claims at great length. Judge Wilkey's discussion of *Rose* concentrated on the Supreme Court's adoption and endorsement of the majority opinion in *Vaughn*, choosing the literal meaning of the term "solely."[134] In response to the implication in *Rose* that the House Report may be relied on where circumvention of the law is a possibility, the dissent answered that "the Supreme Court quite clearly intended to avoid altogether the issue of which report should control in a case of circumvention of agency regulations."[135] The dissent further stated that the decisions in both *Vaughn* and *Jordan* had determined that the Senate Report was more indicative of congressional intent.[136]

ANALYSIS

Based on its analysis of the language of the Act, legislative history, and case law, the court devised a new test to deal with exemption two cases. It relied on the standard of predominant internality formulated by Judge Leventhal in *Vaughn* and emphasized the necessity of preventing possible circumvention of the law.[137] This two prong test framed by the majority was an attempt to find a solution to a complex and confusing area of litigation.[138] The court's decision was too result-oriented; clearly, the majority interpretated the law to reach a decision which it viewed as desirable, regardless of the language or history of the statute involved. This approach may be valid in an area of law that is not governed by statute, but in this case the scope of exemption two is restricted by congressional mandate. Disclosure is the key aspect of the FOIA, and however legitimate the court's interest is in protecting government effectiveness, the judiciary's primary concern must be to enforce the laws as *Congress* has seen fit to enact them.[139]

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[132] *Id.* at 1068.

[133] *Id.* See *supra* notes 69-71 and accompanying text.

[134] 670 F.2d at 1111 (Wilkey, J., dissenting).

[135] *Id.*

[136] *Id.* at 1111-12 (Wilkey, J., dissenting).

[137] *Id.* at 1074. See *supra* text accompanying notes 44-47.

[138] 670 F.2d at 1114 (Wilkey, J., dissenting). There is at present an effort in Congress to revise the FOIA, including exemption two, to solve these problems. *Id.* at 1119 (Wilkey, J., dissenting).

[139] The role of the judiciary was one of the disputed points between the dissent and Judge Mikva's concurring opinion. Judge Wilkey regarded the duty of a judge as objectively interpret-

This result-oriented approach of the court was most apparent from the majority's treatment of the *Jordan* case. The decision in *Jordan* was completely opposite to that of *Crooker*, despite remarkably similar facts. Thus, the court's assertion that the result in *Jordan* would remain unchanged is extremely perplexing. The majority claimed that the material in *Jordan* was not "predominantly internal" in nature but was really "secret law" as Judge Bazelon had claimed.[140] The majority distinguished the guidelines in *Jordan* from the BATF manual in *Crooker* by defining the guidelines as "instructions to agency personnel . . . on how to regulate members of the public."[141] In contrast, the court claimed that the BATF manual was not "concerned with regulating the behavior of the public, but consist[ed] *solely* of instructions to agency personnel."[142] Thus, the material in *Jordan* had to be released, whereas the manual in *Crooker* did not. Secondly, the majority reasoned that there were no facts in *Jordan* which indicated that the material could be used to circumvent the law, while in *Crooker* there was sufficient indication of possible circumvention.[143] According to this rationale the result in *Jordan* under the new test would be unchanged.

Judge Ginsberg's concurring opinion in *Crooker* directly rebutted the majority's assertion. To claim that the result in *Jordan* would be the same under the new test the court had to determine that either (1) the *Jordan* guidelines were *not* used for predominantly internal purposes, or (2) circumvention of the law was *not* a significant possibility.[144] The majority could not reach a decision on the second factor because the *Jordan* court had not determined whether a risk of circumvention existed. Accordingly, the *Crooker* court had to conclude

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ing and enforcing the law. *Id.* at 1121 (Wilkey, J., dissenting). Judge Mikva took the view that if the results of a strict application of a statute would be absurd then some "latitude of construction" must be used. *Id.* at 1089 (Mikva, J., concurring). See *supra* note 110.

[140] 670 F.2d at 1075. See *supra* text accompanying notes 71-72. The court's emphasis on the secret law aspect of *Jordan* was echoed by Judge MacKinnon who found it "clear that decisive votes in *Jordan* really turned on the secret law and predominant internality aspects of the facts in that case." 670 F.2d at 1077 (MacKinnon, J., concurring). Judge Wilkey viewed the sudden acceptance of a single concurring judge's opinion as ridiculous. The majority opinion in *Jordan* contained no reference to secret law, nor did Judge MacKinnon's dissent in *Jordan* ever refer to this concept. *Id.* at 1117-18 (Wilkey, J., dissenting).

[141] 670 F.2d at 1075.

[142] *Id.* The court's distinction seems dependent on the public interest test of *Rose*, yet the court has specifically mandated that it is not the place of the court to determine what is and what is not in the public interest. *Id.* at 1074. This standard of public interest was also the crux of Judge Leventhal's test in *Vaughn*. As Judge Wilkey pointed out, the rejection of this portion of Leventhal's test and the retention of only the "predominantly internal" portion rendered application of the test untenable. *Id.* at 1119 (Wilkey, J., dissenting).

[143] *Id.* at 1075. *Crooker* agreed that circumvention was a possibility.

[144] *Id.* at 1091 (Ginsburg, J., concurring).

that the prosecutorial guidelines in *Jordan* were not predominantly internal,[145] and therefore could be released. This distinction between the guidelines in *Jordan*—of non-internal concern—and the manual in *Crooker*—of internal concern—was unclear and artificial. As Judge Ginsberg observed, the guidelines in *Jordan* did not in reality tell the public how to behave, rather they were intended to aid *agency personnel* in the performance of their jobs.[146] Where, then, is the distinction between the agent's instructions in *Crooker* and the personnel guidelines in *Jordan*? It would seem that if the court's new test were applied to *Jordan*'s facts the result, as well as the rationale, would be changed. Judge Wilkey claimed that the overturning of *Jordan* would lessen the credibility of the court since "if this court can switch its interpretation of Exemption two so completely in three years, it would not be difficult to switch back again in, say, ten years."[147] Perhaps the court attempted to justify its result in *Jordan* so as to disguise the true reason for the court's sudden abandonment of its prior ruling. In reality, the court wished to achieve a specific result in *Crooker* and did so, despite the cost to credibility, precedent, or upholding of the law.

These flaws in the court's rationale are the result of inherent problems in the test itself. The first standard, whether or not the material is predominantly internal, includes no guidelines as to its scope. For example, the court determined that the BATF manual in *Crooker* did not embody instructions on how to regulate the public, but merely on how to observe it,[148] and were intended only for agency personnel. Yet, as Judge Wilkey observed, the material in *Crooker* detailed surveillance techniques to be used *on the public.*[149] The importance of this distinction is that the court had to make a value judgment on whether or not this information in the BATF manual was of interest to the public;[150] the majority had firmly maintained that it was not within the role of the judiciary to make such a determination.[151] The application of this standard entails difficulties, such as inconsistent decisions within the judicial system, since the determination whether or not the public has an interest in the information will depend on each judge's discretion.[152]

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[145] *Id.*

[146] *Id.* at 1091 (Ginsburg, J., concurring).

[147] *Id.* at 1118 (Wilkey, J., dissenting).

[148] *Id.* at 1075.

[149] *Id.* at 1115 (Wilkey, J., dissenting).

[150] *Id.*

[151] *Id.* at 1056 n.12.

[152] *Id.* at 1115 (Wilkey, J., dissenting). There is one additional problem that is raised by the dissent. If the definition of predominantly internal means that the information was developed for

Problems also exist with the second standard of the test—the possibility of circumvention of the law. Before the exemption can be applied *both* aspects of the test must be met. However, if something is predominantly internal, how could it possibly be used to circumvent the law? It would seem that logically these two standards are contradictory[153] and that the test is a failure. Because the test provides for judicial discretion, however, it does allow the court to achieve whatever result it desires. From the majority's view this makes the test successful.

Before condemning the majority's effort, however, it is important to consider what alternatives are available. As previously outlined there are basically two statutory provisions used by the courts to exempt law enforcement manuals: section 552(a)(2)(C), and exemption two.[154] While the language and legislative history of section 552(a)(2)(C) provides some support for the conclusion that only administrative staff manuals and not law enforcement manuals must be disclosed, there are several problems with this approach.[155] First the "catchall" provision of section 552(a)(3) has not been adequately dealt with even by the implicit exemption doctrine.[156] The second difficulty with section 552(a)(2)(C) is the Supreme Court's decision in *EPA v. Mink*, which held that the only exemptions under the FOIA are those enumerated in section 552(b).[157] Therefore, the use of an "exemption" found in subsection (a) directly conflicts with the Supreme Court's ruling.

As with section 552(a)(2)(C), the use of exemption two as a means of preventing disclosure is open to much debate. This is readily apparent from the discussion in *Crooker*. The language and legislative history as interpreted by the dissent did not indicate any intention on the part of Congress to provide protection for law enforcement manuals. Indeed, for the majority to rely on exemption two it was necessary to adopt a new standard. If Congress had intended to endow exemption two with such powers of protection it would clearly have stated as much in the language of the Act. The fact that only two circuits, aside from the D.C. Circuit, have chosen to rely on exemp-

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internal use as the majority suggests, then every document prepared by an agency and used by its employees to a certain extent will be exempt. Judge Wilkey argues that this will render the FOIA virtually useless. *Id.* at 1115 n.109 (Wilkey, J., dissenting).

[153] Judge Wilkey takes this claim even further and accuses the majority of being concerned with only the second standard while the "predominant internality" standard is simply manipulated to support the desired result. *Id.* at 1115 (Wilkey, J., dissenting).

[154] See *supra* text accompanying notes 57-60.

[155] See *supra* notes 61 & 62 and accompanying text.

[156] See *supra* note 62 and accompanying text.

[157] See *supra* text accompanying notes 5-7.

tion two supports the proposition that there is no "law enforcement manual" exemption.[158]

The nonstatutory alternative which seems to be the most viable is the public interest test, first advocated by Judge Leventhal in his concurring opinion in *Vaughn*.[159] This concept of whether the public has a legitimate interest in the material sought to be protected was further developed by Judge Leventhal in *Jordan*, and incorporated by the Supreme Court in *Rose*.[160] Unfortunately, the court in *Crooker* repudiated the public interest element of Judge Leventhal's argument. Without this guideline the predominantly internal test cannot function since there is no standard built into the test.

In issues such as this the court is obligated to balance the competing interests of the public's right to know certain information and the effective functioning of government. The court in *Crooker* must choose between the two: either it must accept the fact that exemption two does not provide protection, as is strongly demonstrated by the dissent, or it must accept the use of judicial discretion in balancing competing interests. The court's attempt to employ a "half way" test further evidences the fact that the court was merely concerned with reaching a result, rather than a viable, clear solution to this issue.

The court's reluctance to adopt this public interest test expressly is understandable, as it would undeniably set up an explosive situation between the judiciary and the legislature.[161] A judge would still have no set standard or guide to follow and no way to be certain of not overstepping the boundaries of his role. The difficulties of these alternatives show that the issue in *Crooker* is unable to be resolved by the court. However, the problem could easily be resolved by congressional amendment to exemption two providing for the protection of law enforcement materials. It is the role of the legislature to write the laws, not the role of the court to write *into* the laws.

Laura Anne Chip

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[158] Judge Wilkey also cites this fact as further evidence of the result orientated approach of the majority. 670 F.2d at 1112-13 (Wilkey, J., dissenting).

[159] See *supra* notes 44-47 and accompanying text.

[160] See *supra* notes 51 & 52 and accompanying text.

[161] Both Judge Mikva and Judge Wilkey expressed an awareness of these conflicting roles. 670 F.2d at 1090 (Mikva, J., concurring); *id.* at 1121 (Wilkey, J., dissenting). See *supra* notes 110 & 136.