dies to rights. As Professor Richard H. Fallon, Jr., writes, even though "*Marbury*'s promise of a remedy for every rights violation is better viewed as a flexible normative principle than as an unbending rule," modern law governing remedies recognizes a "quasi-managerial social interest in maintaining mechanisms of judicial oversight that are adequate to keep government generally, albeit not perfectly, within the bounds of law."[89] *Connick* thus continues a dangerous trend — and abrogates norms of constitutional remedy — by even more radically segregating rights from remedies in the context of *Brady* violations.

Rather than read *Canton* so narrowly, the Court should instead have recognized that precedent, statutory purpose, and constitutional norms all favored a finding of liability against Connick. The rhetoric of its opinion, which barely mentions that an admitted constitutional violation led to the tragedy of a wrongful conviction, reveals the Court's apparent indifference to the potential for miscarriages of justice inherent in its aggressively limited jurisprudence. Rather, the moral it takes from John Thompson's story is one of civil liability gone too far. Yet perhaps the real story — or at least the most important one — involves abdication of the judicial duty to remedy and prevent the sorts of abuses that might someday cost an innocent man his life.

B. Freedom of Information Act

Personnel Exemption. — The Freedom of Information Act[1] (FOIA) requires federal agencies to make information public upon request,[2] but FOIA also provides nine categorical exemptions to this requirement in order to prevent harmful releases of information.[3] Strangely, though, none of the exemptions explicitly protect the public safety. Courts have long worked around this problem by reading Exemption 2, which pertains "to matters that are . . . related solely to the internal personnel rules and practices of an agency,"[4] to include disclosures that would facilitate lawbreaking. Last Term, in *Milner v. Department of the Navy*,[5] the Supreme Court held that this construction is not permissible[6] and that Exemption 2 does not apply to "data and maps used to help store explosives at a naval base in Washington State."[7] Although the Court perfunctorily suggested that other exemptions might guard the data and maps sought in *Milner*, the practical effect of its

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[89] Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338 (1993).

[1] 5 U.S.C. § 552 (2006 & Supp. IV 2010).

[2] *Id.* § 552(a)(3).

[3] *Id.* § 552(b).

[4] *Id.* § 552(b)(2).

[5] 131 S. Ct. 1259 (2011).

[6] *Id.* at 1266.

[7] *Id.* at 1262.

ruling will be to leave unprotected a great deal of information that could threaten the public safety if disclosed.

Naval Magazine Indian Island (NMII) is a naval base in Puget Sound, Washington.[8] It is used to transport and store weapons and explosives for the United States military, allied forces, and federal agencies.[9] The Navy uses Explosive Safety Quantity Distance (ESQD) information to inform its assessments of how to store and transport ordnance safely.[10] ESQD information indicates the maximum amount of ordnance that can be stored at a particular location and the minimum distance it must be kept from other ordnance in order to minimize the risk of setting off chain reactions.[11] This information takes the form of either mathematical formulas or arc maps.[12]

The Ground Zero Center for Nonviolent Action (GZCNA) is a Puget Sound organization "dedicated to raising community awareness of the dangers of the Navy's activities."[13] Glen Milner, a GZCNA member, submitted a FOIA request to the Navy on December 7, 2003, and another on January 29, 2004.[14] Milner sought all documents, maps, and diagrams regarding ESQD information at NMII.[15] The Navy identified roughly one thousand pages of material that fell within the scope of Milner's requests, releasing all such material except eighty-one documents the disclosure of which the Navy believed could threaten the security of Puget Sound and NMII.[16] Milner sued under FOIA, seeking to force the Navy to disclose those eighty-one documents.[17]

The district court granted summary judgment for the Navy,[18] holding that the disputed materials were permissibly withheld under Exemption 2 of FOIA.[19] The court observed that under Ninth Circuit precedent, Exemption 2 encompassed two broad categories of material: "Low 2," which pertained to "fairly trivial matters, not likely to spark a genuine and significant public interest,"[20] and "High 2," which contained information that "if disclosed, 'may risk circumvention of agen-

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[8] *Id.* at 1263.

[9] Milner v. U.S. Dep't of the Navy, 575 F.3d 959, 961 (9th Cir. 2009).

[10] *Milner*, 131 S. Ct. at 1263.

[11] *Milner*, 575 F.3d at 962.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Milner v. U.S. Dep't of the Navy, No. C06-1301-JCC, 2007 WL 3228049, at *1 (W.D. Wash. Oct. 30, 2007).

[19] *Id.* at *8.

[20] *Id.* at *6 (citing Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 655–56 (9th Cir. 1980)).

cy regulation.'"[21] The court determined that the materials Milner sought were High 2 materials,[22] and it applied the "widely accepted"[23] two-step High 2 test first announced in the 1981 D.C. Circuit case *Crooker v. Bureau of Alcohol, Tobacco & Firearms*.[24] In the court's judgment, the materials easily met the preliminary *Crooker* requirement: they had been "compiled for predominantly internal purposes."[25] The materials also fulfilled the second *Crooker* requirement — that their disclosure "would significantly risk circumvention of law"[26] — because, the court held, releasing the information could threaten the safety of people and property.[27] The court rejected Milner's argument that Ninth Circuit precedent required the court to limit the High 2 exemption to law enforcement materials.[28]

The Navy also argued that the withholdings were permissible under Exemption 7(F),[29] which permits nondisclosure of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual."[30] However, since the court held that Exemption 2 protected the withholdings, it did not reach the question whether Exemption 7(F) did likewise.[31]

The Ninth Circuit affirmed.[32] Writing for the court, Judge Tallman[33] formally adopted the *Crooker* framework.[34] In the court's view, limiting the scope of the High 2 exemption to law enforcement materials would cause "district courts to strain the logical limits of 'law enforcement' to cover otherwise valid invocations of Exemption 2."[35] Additionally, Judge Tallman found that formally adopting the *Crooker*

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[21] *Id.* (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 369 (1976)).

[22] *Id.* at *6–7.

[23] *Id.* at *6.

[24] 670 F.2d 1051 (D.C. Cir. 1981) (en banc). In that case, the Bureau of Alcohol, Tobacco and Firearms had partially denied Michael Crooker's FOIA request for disclosure of "an agency manual entitled 'Surveillance of Premises, Vehicles and Persons — New Agent Training.'" *Id.* at 1053. Sitting en banc, the D.C. Circuit held that Exemption 2 protected portions of the manual from disclosure. *Id.* at 1075.

[25] *Milner*, 2007 WL 3228049, at *7.

[26] *Id.*

[27] *Id.* at *8.

[28] *Id.* at *6–7.

[29] *Id.* at *2.

[30] 5 U.S.C. § 552(b)(7)(F) (2006 & Supp. IV 2010).

[31] *Milner*, 2007 WL 3228049, at *8.

[32] Milner v. U.S. Dep't of the Navy, 575 F.3d 959, 961 (9th Cir. 2009).

[33] Judge Tallman was joined by Judge Gould.

[34] *Milner*, 575 F.3d at 965.

[35] *Id.* at 967.

standard would further national uniformity, since *Crooker* had "become the authoritative case on Exemption 2."[36]

Judge William Fletcher dissented, arguing that although the majority was correct to endorse the *Crooker* test, the second step of that test was improperly applied to the materials Milner sought.[37] By Judge Fletcher's reasoning, Exemption 2 would not allow the Navy to withhold the ESQD materials because other cases had applied High 2 only to "documents whose release would risk circumvention *by a regulated person or entity*" — and Milner was not regulated by the Navy.[38] Therefore, unlike the majority and the district court, Judge Fletcher would have reached the Navy's contention that Exemption 7(F) also protected the withheld documents, but he would have ruled against the Navy on this point as well, because "the ESQD arc maps . . . were not 'compiled for law enforcement purposes.'"[39] Finally, Judge Fletcher asserted that if releasing the documents would have truly posed as great a threat to security as the Navy claimed, then the Navy ought to have classified them.[40] Thus, Judge Fletcher would have been willing to remand the case to the district court to allow the Navy the chance to classify the arc maps.[41] Once classified, the documents would have received the protection of FOIA's Exemption 1, which covers materials "properly classified pursuant to . . . Executive order."[42]

The Supreme Court reversed.[43] Writing for the Court, Justice Kagan[44] first traced the history and purposes of FOIA and the evolution of doctrine relating to Exemption 2.[45] She then embarked on a heavily textualist analysis of Exemption 2, citing dictionaries six times throughout her opinion.[46] She remarked that "comparatively little attention has focused on the provision's 12 simple words: 'related solely to the internal personnel rules and practices of an agency.'"[47] Identifying "personnel" as the pivotal word in that phrase, Justice Kagan explained that "when used as an adjective, as it is here . . . , that term refers to human resources matters."[48] In addition to using dictionaries to support this definition, Justice Kagan pointed to the plain meaning

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[36] *Id.*

[37] *Id.* at 976 (Fletcher, J., dissenting).

[38] *Id.* at 978.

[39] *Id.* at 979 (quoting 5 U.S.C. § 552(b)(7) (2006 & Supp. IV 2010)).

[40] *Id.* at 980.

[41] *Id.* at 980–81.

[42] 5 U.S.C. § 552(b)(1)(B).

[43] *Milner*, 131 S. Ct. at 1271.

[44] Justice Kagan was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, Alito, and Sotomayor.

[45] *See Milner*, 131 S. Ct. at 1262–63.

[46] *Id.* at 1264–65, 1265 n.4.

[47] *Id.* at 1264 (quoting 5 U.S.C. § 552(b)(2)).

[48] *Id.*

of "personnel" as used elsewhere in FOIA[49] and to the necessity of construing FOIA exemptions narrowly to further "the Act's goal of broad disclosure."[50] Exemption 2's most natural construction, she concluded, did not encompass the information Milner had requested.[51]

Justice Kagan then turned to the government's and the dissent's arguments in favor of the *Crooker* test, dismissing each one in turn. FOIA's legislative history could not rescue *Crooker*: the House and Senate Reports directly contradicted each other concerning the purpose of Exemption 2.[52] Nor was Justice Kagan impressed with the argument that Congress had codified *Crooker*'s "circumvention of the law" standard by amending Exemption 7(E) in a manner that echoed *Crooker*'s holding; after all, the question before the Court was not whether Exemption 7(E) protected the ESQD documents but rather whether Exemption 2 did.[53] And the Court was unwilling to "flout all usual rules of statutory interpretation" merely because a "bare majority" of federal circuits to consider the matter had done so.[54] The Court also rejected an alternative interpretation advanced by the government: that the plain text of Exemption 2 "encompasses records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental functions."[55] Justice Kagan reasoned that to accept such an interpretation would "strip[] the word 'personnel' of any real meaning," since all agency rules and practices instruct personnel.[56] Finally, Justice Kagan acknowledged that the Navy had a strong interest in guarding the ESQD information[57] and that the Court's decision would "upset[] three decades of agency practice relying on *Crooker*."[58] However, she noted that the Court's decision would leave a variety of tools available to the Navy for protecting such information. She suggested, for example, that the government could choose to classify it, that Congress could otherwise provide for the documents' protection, or that on remand the Navy could prevail in its contention that Exemption 7(F) protects the information.[59]

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[49] *Id.* at 1265.

[50] *Id.* (quoting Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 (1989)) (internal quotation marks omitted).

[51] *Id.* at 1266.

[52] *Id.* at 1267.

[53] *See id.* at 1267–68.

[54] *Id.* at 1269. By Justice Kagan's tally, four federal circuits had adopted the *Crooker* test, three had adopted the standard favored by the Court, and the others had either reserved judgment or not encountered the issue. *Id.* at 1268–69.

[55] *Id.* at 1269 (quoting Brief for the Respondent at 20, *Milner*, 131 S. Ct. 1259 (No. 09-1163), 2010 WL 4088839, at *20) (internal quotation marks omitted).

[56] *Id.*

[57] *Id.* at 1270.

[58] *Id.* at 1271.

[59] *Id.*

Justice Alito concurred in order to underscore the strengths of the Navy's argument that Exemption 7(F) protects the ESQD information.[60] First, he argued that "law enforcement purposes involve more than just investigation and prosecution," encompassing such objectives as "terrorism prevention and national security measures."[61] Second, Justice Alito observed that "[t]his Court has given a fairly broad meaning to 'compiled' under § 552(b)(7)," permitting information not originally compiled for law enforcement purposes nevertheless to "satisfy Exemption 7's threshold requirement" so long as it was *assembled* for law enforcement purposes at some later point.[62]

Justice Breyer dissented. Appealing to a need for consistency, he insisted that the *Crooker* test's thirty-year history of acceptance in federal circuit courts should have been reason enough to justify its endorsement by the Court in *Milner*.[63] Furthermore, he felt that "*Crooker*'s analysis was careful and its holding reasonable."[64] Finally, Justice Breyer disputed the majority's characterization of classification as an effective or worthwhile alternative to *Crooker* withholdings. In particular, he called attention to congressional findings that "suggest . . . it is 'over-classification,' not *Crooker*, that poses the more serious threat to the FOIA's public information objectives."[65]

The late twentieth century witnessed a profound shift in attitudes toward the relationship between the text of a statute and the purposes that undergird it, both in the legal academy and on the bench. In general, it became less acceptable for judges to deviate from the clear meaning of a statute's text regardless of whether a failure to do so might frustrate effectuation of that statute's purpose as revealed by its legislative history.[66] Indeed, textualists often argued that any attempt at finding a unified legislative purpose was a meaningless exercise.[67] Although there is some debate today over the degree to which textualism and purposivism have come to resemble each other,[68] textualism's

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[60] *Id.* at 1271–73 (Alito, J., concurring).

[61] *Id.* at 1272.

[62] *Id.* at 1273 (citing John Doe Agency v. John Doe Corp., 493 U.S. 146, 154–55 (1989)).

[63] *Id.* at 1273–74 (Breyer, J., dissenting).

[64] *Id.* at 1275.

[65] *Id.* at 1277.

[66] *Cf.* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624–25 (1990) (discussing the impact on the Court of Justice Scalia's "new textualism").

[67] *See generally, e.g.*, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (using public choice theory to argue that it is impossible to divine a singular legislative intent from a statute).

[68] *Compare* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30 (2006) (arguing that textualism has influenced purposivists so heavily that the two camps are no longer distinguishable), *with* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) (arguing that while textualists look to semantic context for meaning, purposivists look to policy context).

ascendancy and the persistence of its impact on jurisprudence and the judiciary are indisputable.[69] In one sense, then, (textualist) *Milner*'s abrogation of (purposivist) *Crooker* was a predictable outcome. But by expressing its cognizance of the potential threat to public safety posed by its decision,[70] the Court conceded the perils of strict textualism. And the Court's hasty discussion of alternative means for protecting the arc maps glossed over significant problems with each solution.

The Court suggested that Exemption 7 might provide a basis for withholding the ESQD information — a point Justice Alito's concurrence developed at length. However, there are serious weaknesses to this approach that the Court did not adequately consider. Justice Alito correctly noted that the Court had previously interpreted "compiled" expansively,[71] but it is difficult to see how such an expansive construction can be squared with the reasoning of the *Milner* majority opinion, which made much of the need to give all FOIA exemptions a "narrow compass."[72] And while the protection of public safety does seem much more easily classified as a "law enforcement purpose" than as a task related to "agency personnel," a better fit does not guarantee that this purpose will fit within a sufficiently narrow construction.

Justice Scalia's dissent in *John Doe Agency v. John Doe Corp.*[73] illuminates these points. Contesting the Court's holding that Exemption 7's use of the word "compiled" means "assembled,"[74] Justice Scalia observed that FOIA's text permits withholding of "information that 'could reasonably be expected to endanger the life or physical safety of any individual' . . . only if it has been 'compiled for law enforcement purposes.'"[75] Protecting the lives or physical safety of individuals is clearly an act of preserving the peace. Thus, if Justice Alito were correct that "preserv[ing] the peace" is a "law enforcement purpose" under Exemption 7,[76] then the "law enforcement purpose" requirement would never do any limiting work with regard to the "endanger . . . any individual" subsection. And this situation would run afoul of the rule of statutory construction that courts "must give effect to

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[69] *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 67 (2010).

[70] *See Milner*, 131 S. Ct. at 1270–71.

[71] *Id.* at 1273 (Alito, J., concurring) (citing John Doe Agency v. John Doe Corp., 493 U.S. 146, 154–55 (1989)).

[72] *Id.* at 1265 (majority opinion) (quoting Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 (1989)) (internal quotation mark omitted).

[73] 493 U.S. 146.

[74] *Id.* at 161–63 (Scalia, J., dissenting).

[75] *Id.* at 164 (quoting 5 U.S.C. § 552(b)(7), (b)(7)(F) (2006 & Supp. IV 2010)).

[76] *Milner*, 131 S. Ct. at 1272 (Alito, J., concurring) (quoting BLACK'S LAW DICTIONARY 796 (5th ed. 1979)) (internal quotation mark omitted).

every word of a statute wherever possible"[77] — especially since narrower interpretations of "law enforcement purpose" are plausible.

A separate point that Justice Scalia made much more directly in *John Doe Agency* is that the word "compiled" is ambiguous because it can refer not only to the process of gathering but also to the process of creating or generating.[78] The former construction is more expansive than the latter and therefore is in tension with the Court's "narrow construction" requirement. Stretching the scope of Exemption 7 further still by piling a newly expanded construction of "law enforcement purposes" on top of the already expansive definition of "compiled" could well be a step too far for the Court to take, were it ever to find itself squarely confronted with the question. After all, *John Doe Agency* was decided twenty-two years ago — in the same year as the Court's last explicit profession of willingness to enforce the spirit over the letter of the law.[79] It would be perplexing, to say the least, for the current Court to replace a spurious construction of one FOIA exemption with a dubiously expansive interpretation of a different one in order to effectuate essentially the same purpose. Such a course of action would accomplish the unenviable feat of being simultaneously inefficient from a purposivist perspective *and* unprincipled from a textualist perspective. Some members of the Court may harbor concerns over *Milner*'s elimination of certain public safety protections, but Exemption 7 offers them no succor without costs to the Court's legitimacy.

The Court also suggested that the Navy could simply classify the arc maps in order to shield them under Exemption 1. But as with the Exemption 7 suggestion, this alternative is much more problematic than the Court seemed to recognize — for reasons beyond the potential exacerbation of the overclassification trend highlighted in Justice Breyer's dissent. There does not appear to be any legal obstacle to classification of ESQD data. Military operational information may be classified if its release "could reasonably be expected to cause identifiable or describable damage to the national security . . . and [if] it pertains to . . . vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security."[80] And as noted by both Justice Kagan[81] and Judge

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[77] Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) (citing Duncan v. Walker, 533 U.S. 167, 174 (2001)).

[78] *John Doe Agency*, 493 U.S. at 161 (Scalia, J., dissenting).

[79] Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 455 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress's intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" (quoting Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928))).

[80] Exec. Order No. 13,526, § 1.4(g), 75 Fed. Reg. 707, 709 (Jan. 5, 2010).

[81] *Milner*, 131 S. Ct. at 1271.

Fletcher,[82] the government may classify information after a FOIA request for its disclosure has been filed.[83] Judge Fletcher even wrote that "[i]f the disclosure of the ESQD arc maps is as dangerous as Commander Whitbread claims, the Navy is acting irresponsibly by not classifying them."[84]

However, neither Justice Kagan nor Judge Fletcher acknowledged the Navy's argument that "classification would trigger special access and handling requirements unworkable here."[85] Specifically, the government maintained:

> [T]o prepare appropriately for emergency response contingencies, the Navy requires the flexibility to share certain ESQD information on a confidential basis with non-federal personnel who lack the necessary security clearances and facilities, *i.e.*, local first responders who might be called upon (and must plan) to access NMII in an emergency.[86]

The Navy's concerns might be unfounded.[87] But its argument is hardly frivolous, and the Court should have engaged it.

Yet regardless of whether classification would be an appropriate means of protecting the arc maps sought in *Milner*, it is not an adequate substitute for the *Crooker* protections that the Court has now discarded. Consider, for example, a case cited in passing in Justice Breyer's dissent.[88] In *Miller v. Department of Justice*,[89] the federal district court for the District of Columbia relied on *Crooker* in holding that Exemption 2 protected from public disclosure a Bureau of Prisons manual containing "internal procedures for security of prison control centers."[90] In the post-*Milner* era, the Bureau of Prisons would not be able to rely on Exemption 2 in the face of a FOIA request; descriptions of "chemical spray (mace-type) dispensers for controlling dangerously violent inmates" and "security safeguards and precautions employed at the front and rear entrances"[91] of prisons do not have any reasonable

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[82] Milner v. U.S. Dep't of the Navy, 575 F.3d 959, 980–81 (9th Cir. 2009) (Fletcher, J., dissenting).

[83] Exec. Order No. 13,526, § 1.7(d), 75 Fed. Reg. at 711.

[84] *Milner*, 575 F.3d at 980 (Fletcher, J., dissenting).

[85] Brief for the Respondent, *supra* note 55, at 53.

[86] *Id.* at 54.

[87] The executive order governing classification procedures permits disclosure to individuals otherwise ineligible for access "[i]n an emergency . . . or in defense of the homeland." Exec. Order No. 13,526, § 4.2(b), 75 Fed. Reg. at 721–22. Furthermore, the section of the U.S. Code governing military information sharing states that "sensitive but unclassified homeland security information in the possession of the Department of Defense that is shared . . . with State and local personnel . . . shall not be subject to disclosure under [FOIA] by virtue of the sharing of such information with such personnel." 10 U.S.C. § 130d (2006). The arc maps may well meet the statutory definition of "homeland security information" by virtue of "improv[ing] the response to a terrorist act." 6 U.S.C. § 482(f)(1)(D) (2006).

[88] *See Milner*, 131 S. Ct. at 1276 (Breyer, J., dissenting).

[89] No. 87-0533, 1989 WL 10598 (D.D.C. Jan. 31, 1989).

[90] *Id.* at *1.

[91] *Id.*

relationship to human resource files. But because it is unlikely that disclosure of the information sought in *Miller* would threaten national security, such documents probably cannot be classified.[92]

Of course, the information sought in *Miller* still probably would not be disclosed, since maintenance of order within prisons likely falls within the ambit of "law enforcement purposes" regardless of how that category is precisely circumscribed. And surely the documents sought in *Miller* were "compiled" for such purposes regardless of whether "compiled" is understood to mean "assembled" or "generated." But suppose, for example, that instead of a prison it were a hospital managed by the Department of Veterans Affairs whose "security safeguards and precautions employed" for storage of pharmaceuticals and medical equipment were being sought pursuant to a FOIA request. Such information would not implicate national security, nor could it be described as having been "compiled for law enforcement purposes" without encountering the difficulties attendant on Justice Alito's construction of that phrase. Yet the Court's holding in *Milner* would require disclosure of that information regardless of the clear threat such disclosure would pose to the physical safety of patients in the hospital.

In an earlier era, the Court might have considered avoiding an outcome with such troubling implications by invoking the absurdity doctrine — in other words, by concluding that a disclosure that significantly threatens public safety would be so contrary to public policy that Congress could not possibly have intended to require it.[93] This is not to say that all members of an earlier Court would ultimately have found the absurdity doctrine an appropriate tool for this case.[94] But it is indicative of just how complete textualism's triumph has become[95] that not a single member of the Court in *Milner* saw fit even to enter-

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[92] *See* Exec. Order No. 13,526, § 1.7, 75 Fed. Reg. at 710–11.

[93] A classic formulation of the absurdity doctrine can be found in *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868), which stated that "[t]he common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit." *Id.* at 487; *see also* Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 455 (1989).

[94] After all, there are legitimate public goods to be realized from a robust norm favoring disclosure of agency information — the very reason that FOIA was enacted in the first place. *See generally* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650–54 (1984) (discussing the enactment of FOIA and the democratic values reinforced by such enactment).

[95] In the recent past, even textualists were not uniformly aligned against use of the absurdity doctrine. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391–92 (2003) ("[E]ven the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine. The Supreme Court, at least until recently, has followed suit." (footnote omitted)). *But see* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 459–62 (2002) (rejecting petitioner's argument that unambiguous text of statute would produce absurd result).

tain consideration of the absurdity doctrine.[96] When the text of a statute is clear and unambiguous, a sizeable majority of the present Court does not seem interested in squarely confronting and grappling with the real costs to society entailed by a strict textualist approach.

Thus, only Congress is left to prevent the disclosure of information that would threaten public safety where such information is not already protected by other FOIA exemptions. Congress can go about this task in either of two ways: it can amend FOIA, or it can exempt individual pieces of information on a piecemeal basis.[97] There is already movement afoot in Congress to do the latter with regard to the arc maps sought in *Milner*.[98] Congress is very busy, though; in the long run, it might be much more practical simply to add a new general exemption to FOIA that permits agency withholdings of information when disclosure would threaten public safety.

C. Patent Act of 1952

Standard of Proof. — The U.S. patent system is failing to adequately promote innovation.[1] Common criticisms include that the U.S. Patent and Trademark Office (PTO) is understaffed and underfunded,[2] and that an increase in the number of "patent trolls" — entities that do not innovate but instead buy and assert patents in court — has impeded innovation.[3] Despite these problems, Congress for many years left maintenance of the patent system to the Supreme Court,[4] which

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[96] This shift has become more pronounced within just a few years: as recently as 2007, Justice Stevens wrote in a concurring opinion that he would have sided with the majority even if a "literal reading of the statutory text" would have dictated the opposite result, simply because his understanding of congressional "intent" on the matter would have necessitated such an outcome. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106–07 (2007) (Stevens, J., concurring).

[97] Exemption 3 purports to provide Congress with authority to "specifically exempt [information] from disclosure by statute" so long as certain conditions are met, 5 U.S.C. § 552(b)(3) (2006 & Supp. IV 2010), but it is doubtful that this exemption is either necessary or binding, since a more recently enacted statute would presumptively govern regardless.

[98] *See* Letter from Glen Milner to Sen. Patty Murray (June 16, 2011), *reprinted in Perspective: Navy Seeks New Exemption for Indian Island Information*, PORT TOWNSEND & JEFFERSON COUNTY LEADER (Wash.), June 22, 2011, http://ptleader.com/main.asp?SectionID=5&SubSectionID=5&ArticleID=29484.

[1] *See* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 5 (2003). *See generally* ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT (2004).

[2] *See* Mark A. Lemley, Essay, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1496 (2001); *see also id.* at 1500 ("The *total* average time the examiner spends on all [patent-evaluation] tasks over the two- to three-year prosecution of the patent is eighteen hours.").

[3] *See* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2009–10 (2007).

[4] However, after the conclusion of the most recent Supreme Court Term, Congress did pass a law making sweeping changes to the patent system. *See* Leahy-Smith America Invents Act, H.R. 1249, 112th Cong. (2011) (enacted).