ORAL ARGUMENT SCHEDULED JANUARY 13, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5063
Consolidated with 04-5072

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

DEPARTMENT OF JUSTICE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE APPELLANT ELECTRONIC PRIVACY INFORMATION CENTER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

a) Parties and *Amici*. Plaintiff-appellant Electronic Privacy Information Center ("EPIC") and defendant-appellee Department of Justice ("DOJ") appeared below. EPIC is a not-for-profit District of Columbia corporation, with no publicly owned parent, subsidiary or affiliate. The following parties have appeared in this Court and indicated their intention to participate as *amici curiae* in support of EPIC: American Civil Liberties Union, American Society of Newspaper Editors, National Security Archive, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists.

b) Rulings Under Review. EPIC appeals a ruling of the Honorable James Robertson, filed on December 22, 2003, denying EPIC's motion for partial summary judgment and granting DOJ's motion for partial summary judgment. The ruling is reproduced in the Appendix at pp. 68-79 and is not published.

c) Related Cases. This case has never been before this Court or any court other than the district court. DOJ's cross-appeal, No. 04-5072, has been consolidated with this case. There are no related cases pending before any other court.

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DAVID L. SOBEL

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STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia had both subject matter and personal jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). On February 23, 2004, plaintiff filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (final order) or, in the alternative, 28 U.S.C. § 1292(a)(1) (interlocutory order refusing injunction).

STATUTES AND REGULATIONS

5 U.S.C. § 552(a)(6)(E) provides, in pertinent part:

> (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—
>
> > (I) in cases in which the person requesting the records demonstrates a compelling need; and
> >
> > (II) in other cases determined by the agency.
>
> . . .
>
> (v) For purposes of this subparagraph, the term "compelling need" means—
> . . .
>
> > (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

28 C.F.R. § 16.5(d) provides, in pertinent part:

> Expedited processing. (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:
> . . .
>
> (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; [or]
> . . .
>
> (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a requestor demonstrates an "urgency to inform the public," and is thus entitled to expedited processing of a Freedom of Information Act request, when the subject of the request involves a highly controversial public policy issue; has been the subject of extensive news media coverage; and relates to a hotly contested legislative debate pending in Congress.

2. Whether a requestor demonstrates that its request involves "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," and is thus entitled to expedited processing of a Freedom of Information Act request, when the subject of the request has received extensive and geographically diverse news media coverage; has been the topic of newspaper editorials; and has formed the basis of allegations of impropriety and potential illegality by leading newspapers and a senior member of Congress.

STATEMENT OF THE CASE

Appellant Electronic Privacy Information Center ("EPIC") brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking the expedited processing and disclosure of agency records concerning the lobbying efforts of United States Attorneys to oppose a legislative proposal to limit investigative authority granted by the USA Patriot Act.

The district court first ruled that EPIC was under no obligation to submit an administrative appeal to appellee Department of Justice ("DOJ") before filing suit to pursue its right to expedited processing. The court then held that EPIC had failed to show 1) that there was an "urgency to inform the public" about the U.S. Attorneys' lobbying activities, or 2) that the FOIA request involved "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." The

court thus found that EPIC had not demonstrated an entitlement to expedited processing, and granted partial summary judgment in DOJ's favor.

Plaintiff filed a timely notice of appeal. DOJ cross-appealed on the issue of whether EPIC failed to exhaust applicable administrative remedies.

STATEMENT OF FACTS

A. The Patriot Act, the Otter Amendment and the Lewis Memorandum

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 ("Patriot Act"). The Act contained a plethora of legislative changes that significantly increased the surveillance and investigative powers of federal law enforcement agencies. The Act also removed several of the checks and balances that traditionally safeguard civil liberties in the face of government investigative activities. *See generally, American Civil Liberties Union v. Department of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2002) (discussing enactment and effect of Patriot Act).

Reflecting Congressional concern about the scope of the Patriot Act, the House of Representatives on July 22, 2003, approved a provision that would prohibit the use of appropriated funds to implement Section 213 of the Act, which permits delayed notification of the execution of a search warrant. The provision, an amendment to the Departments of Commerce, Justice, and State, and the Judiciary, and Related Agencies Appropriations Act of 2004, H.R. 2799, 108th Cong. (2003), was sponsored by Rep. C.L. "Butch" Otter ("the Otter Amendment"). The House passed the amendment by an overwhelming 309-118 margin and

referred the legislation to the Senate.[1]

On August 14, 2003, Guy A. Lewis, director of DOJ's Executive Office for United States Attorneys, sent a memorandum to all U.S. Attorneys concerning the Otter Amendment ("Lewis memorandum"). The memorandum reportedly urged federal prosecutors to contact members of Congress who voted in favor of the Otter Amendment to explain "the potentially deleterious effects" of the measure. *See* Dan Eggen, *Prosecutors Are Urged to Press Congress*, Washington Post, Aug. 22, 2003, at A19 (quoted in App. at 23).

B. EPIC's Request For Expedited FOIA Processing

On September 10, 2003, EPIC wrote to the Executive Office for United States Attorneys ("EOUSA") to request under the FOIA agency records concerning the Lewis memorandum. App. at 22-41. In its letter to EOUSA, EPIC requested expedited processing of its request and explained the urgency of disseminating information about the Lewis memorandum to the public. Pursuant to applicable DOJ regulations, EPIC also wrote to DOJ's Director of Public Affairs in support of its request for expedition under DOJ's "government integrity" standard, attaching the letter to EOUSA and incorporating it by reference.[2] App. at 43-45.

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[1] The appropriations bill was received in the Senate on July 24, 2003, but the Otter Amendment ultimately was not included in an omnibus appropriations bill signed into law on January 23, 2004. *See* Pub. L. No. 108-99 (2004); Jesse J. Holland, *Anti-Patriot Act Measure Dropped From Bill*, Associated Press, Dec. 3, 2003.

[2] The DOJ regulations specify four distinct grounds for expedited processing, two of which EPIC relies upon. Where a requestor seeks expedition on the ground that it is "primarily engaged in disseminating information" and there is "[a]n urgency to inform the public about an actual or alleged federal government activity," the request must be submitted to "the component that maintains the records requested," 28 C.F.R. §16.5(d)(2) — in this case, EOUSA. Where expedition is sought on the ground that the records concern "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," the request must be directed to the Director of Public Affairs. *Id.*

In its letter to EOUSA, EPIC quoted the Washington Post article about the Lewis memorandum and stated that the subject of its FOIA request "raises serious questions" and "has received considerable media attention in recent days." App. at 23. EPIC's letter noted that a Lexis–Nexis search for articles on the subject between August 14, 2003, when the Lewis memorandum was issued, and September 10, 2003, the date of the FOIA request, produced 31 results from newspapers throughout the country. App. at 23-24.[3] The articles described the

[3] EPIC attached to its letter the Lexis-Nexis search results. App. at 27-41. The search sought newspaper articles containing the terms "Ashcroft and 'Patriot Act' and 'U.S. Attorneys' and Otter." The query yielded 31 "hits." Of these, five were duplicates, one is no longer available, and one aggregated relevant editorials from four different newspapers, yielding 28 unique, currently accessible results. These were: Brian Lazenby, *Area Lawmakers Voice Concerns for Patriot Act*, Chattanooga Times Free Press, Sept. 8, 2003, at A5; Eric Lichtblau, *Ashcroft's Tour Rallies Supporters and Detractors*, N.Y. Times, Sept. 8, 2003, at A14; Bill Rankin, *Towns Raise Eyebrows, Voices Over Patriot Act*, Atlanta Journal-Constitution, Sept. 7, 2003, at 6F; Jeff Scullin, *The Patriot Act—A Bill of Wrongs?*, The Ledger (Lakeland, FL), Sept. 6, 2003, at A1; Jerry Zremski, *Security at What Price?*, Buffalo News, Sept. 5, 2003, at A1; Kelvin Anderson, Letter, *Reasonable Travels*, The Idaho Statesman, Aug. 31, 2003, at 7; Michael Costello, *Otter Gets Ink the Way McCain Gets Air Time*, Lewiston Morning Tribune (Idaho), Aug, 30, 2003, at 10A; *Crapo Defends His Patriot Act Stance*, Associated Press State and Local Wire, Aug. 29, 2003, at BC Cycle; Editorial, *Ashcroft's Roadshow*, Bangor Daily News (Maine), Aug. 28, 2003, at A10; *Senators, Congressmen Part Ways on Patriot Act*, Associated Press State and Local Wire, Aug. 27, 2003, at BC Cycle; Gregory Hahn, *Craig, Crapo Not Sold on Otter's Patriot Act Changes*, The Idaho Statesman, Aug. 27, 2003, at 3; Angie Welling and Jennifer Dobner, *Act Called Vital Tool in War on Terror*, Deseret Morning News (Salt Lake City), Aug. 26, 2003, at A1; Gregory Hahn, *Ashcroft Defends Patriot Act in Boise*, The Idaho Statesman, Aug. 26, 2003, at 1; Editorial, *Patriot Act Requires Sober Review, Not a PR Blitz*, Philadelphia Inquirer, Aug. 21; Editorial, *John Ashcroft's Road Trip*, Milwaukee Journal Sentinel, Aug. 25, 2003; Editorial, *Ashcroft on Tour*, Dallas Morning News, Aug. 25, 2003, at 12A; Editorial, *Mr. Ashcroft's Road Show*, St. Louis Post-Dispatch, Aug. 19, 2003, at B6; Debra Saunders, Editorial, *Liberties—For Lefties Only*, The San Francisco Chronicle, Aug. 26, 2003, at A21; Betsy Russell, *Ashcroft Defends Patriot Act Before Friendly Boise Crowd*, Spokesman Review (Spokane, WA), Aug. 26, 2003, at B1; Editorial, *Don't Let Patriot Act Go Overboard*, The Atlanta Journal-Constitution, Aug. 25, 2003, at 10A; Gregory Hahn, *Ashcroft Fights for Patriot Act*, The Idaho Statesman, Aug. 25, 2003, at 1; Editorial, *Ashcroft Should Listen, Not Lecture Idahoans*, The Idaho Statesman, Aug. 25, 2003, at 6; Rebecca Walsh, *Ashcroft Drawing Fire Even in Utah*, The Salt Lake Tribune, Aug. 23, 2003, at D1; James Gordon Meek, *Ashcroft Recruits Patriot Act Squad*, Daily News (New York), Aug. 22, 2003, at 14; Gregory Hahn, *Ashcroft to Tout Patriot Act in Otter's Back Yard*, The Idaho Statesman, Aug. 22, 2003, at 1; Dan Eggen, *Prosecutors are Urged to Press Congress*, The Washington Post, Aug. 22, 2003, at A19; Editorial, *Selling the*

controversy surrounding the Patriot Act and DOJ's efforts in support of the legislation,[4] discussed the Otter Amendment,[5] and noted or raised specific questions concerning the propriety of the Lewis memorandum.[6]

Included in the search results, *inter alia*, was a New York Times article (dated two days before EPIC submitted its FOIA request) that reported on the Attorney General's then-ongoing public speaking tour in support of the Patriot Act. The campaign "produced a barrage of headlines and evening news appearances in the dozen cities he has visited in the last three weeks . . . [a]nd the 2001 Patriot Act, with his help, is perhaps among the most identifiable and hotly debated pieces of legislation in the country." Eric Lichtblau, *Ashcroft's Tour Rallies Supporters and Detractors*, N.Y. Times, Sept. 8, 2003, page A-14. App. at 47-48. The article noted that

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Patriot Act, The Commercial Appeal, Aug. 20, 2003, at B3; *Ashcroft to Defend Patriot Act*, Richmond Times Dispatch (Virginia), Aug. 19, 2003, at A1.

[4] *See, e.g.*, Jeff Scullin, *The Patriot Act—A Bill of Wrongs?*, The Ledger (Lakeland, FL), Sept. 6, 2003, at A1 ("an increasingly broad spectrum of libertarian and conservative groups, as well as elected officials on both sides of the political aisle, are challenging the cornerstone of the administration's efforts to combat terrorism at home — the USA Patriot Act"); Bill Rankin, *Towns Raise Eyebrows, Voices Over Patriot Act*, Atlanta Journal-Constitution, Sept. 7, 2003, at 6F ("The act's opposition, fueled by grass-roots campaigns with members of the Green Party and National Rifle Association working side by side, has clearly struck a nerve in the Bush administration.").

[5] *See, e.g.*, Angie Welling and Jennifer Dobner, *Act Called Vital Tool in War on Terror*, Deseret Morning News (Salt Lake City), Aug. 26, 2003, at A1 ("[Section 213] has been particularly controversial. In fact, the House of Representatives recently passed an amendment sponsored by conservative Rep. C.L. "Butch" Otter, R-Idaho, to restrict the so-called 'sneak and peek' searches."); Betsy Russell, *Ashcroft Defends Patriot Act Before Friendly Boise Crowd*, Spokesman Review (Spokane, WA), Aug. 26, 2003, at B1 ("The Otter amendment passed the House on a 309-118 vote, but no similar amendment has been introduced in the Senate, so it may not become law.").

[6] *See, e.g.*, Editorial, *Ashcroft's Roadshow*, Bangor Daily News (Maine), Aug. 28, 2003, at A10 (Congressional aide says that "directing U.S. attorneys to perform a political act — lobbying members of Congress — is objectionable"); James Gordon Meek, *Ashcroft Recruits Patriot Act Squad*, Daily News (New York), Aug. 22, 2003, at 14 (lobbying directive "comes close to crossing an ethical line").

"[s]o far, 160 communities, including three states, have voted in objection to the [Patriot Act] because opponents believe it gives the government too much power." App. at 48. The Times article specifically addressed the controversy surrounding the Otter Amendment and other Congressional efforts related to the Act:

> [T]he event that most worried the Justice Department and helped send Mr. Ashcroft on the road, officials said, was a Congressional vote in July that got little attention at the time.
>
> By a 309 to 118 vote, the House voted to repeal a provision of the law allowing officials to execute search warrants secretly and to delay notifying the target. The repeal of that provision was sponsored by a conservative Republican, Representative C. L. Otter of Idaho. Lawmakers have also proposed other measures aimed at chipping away at the law, and some Democrats say they want to scale it back even further when crucial parts come up for renewal in 2005.

App. at 48.

In its letter, EPIC also quoted two editorials questioning the propriety of the DOJ lobbying campaign generally, and the Lewis memorandum specifically. A New York Times editorial that EPIC cited noted:

> [o]ne member of Congress, Representative John Conyers Jr., a Michigan Democrat, has charged that Mr. Ashcroft's lobbying campaign, in which United States attorneys have been asked to participate, may violate the law prohibiting members of the executive branch from engaging in grassroots lobbying for or against Congressional legislation . . . . Instead of spin-doctoring the problem, Mr. Ashcroft should work with the [Patriot Act's] critics to develop a law that respects Americans' fundamental rights.

App. at 24 (quoting Editorial, *An Unpatriotic Act*, N.Y. Times, Aug. 25, 2003, at A14). EPIC also quoted a Washington Post editorial that said:

> [T]here's something a little unsettling about this mass deployment. Perhaps it's the wholesale and seemingly involuntary nature of the enterprise: the U.S. attorneys aren't requested to contact lawmakers or hold public meetings but instructed to do so, and given a handy form on which to report on their sessions with members . . . . Perhaps it's the sense that the prosecutors, while political and a part of a Republican administration, also ought to be at some remove from partisan politics . . . . Perhaps it's that the administration hasn't been nearly so

> accommodating about the importance of educating lawmakers and the public when it involves folks on the other side . . . . This campaign . . . uncomfortably blurs the line between law and politics.

App. at 24-25 (quoting Editorial, *Mr. Ashcroft's Foot Soldiers*, Washington Post, Aug. 23, 2003 at A22).

In support of its assertion that it is "primarily engaged in disseminating information" within the meaning of the FOIA and DOJ regulations, EPIC addressed its news collection and dissemination activities and noted that the district court had held that EPIC is a "news media" requester under the FOIA's fee provisions. App. at 25-26 (citing *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)).

C. DOJ's Denial of EPIC's Expedition Request

By letter to EPIC dated September 22, 2003, EOUSA denied EPIC's request for expedited processing, on behalf of both EOUSA and the Director of Public Affairs.[7] App. at 52-53. The letter stated that the Office of Public Affairs had found that

> the subject of your request is not one of exceptional media interest, nor does it raise any questions about the government's integrity which might affect public confidence. Furthermore . . . [y]our letter does not support a finding that there is an urgency to inform the public about an actual or alleged federal government activity (28 C.F.R. 16.5(d)(1)(ii)). Therefore, in the absence of any such justification, I must deny your request for expedited treatment.

App. at 52. Beyond its recitation of the applicable statutory and regulatory standards, DOJ did not specifically address the merits of EPIC's expedition request.

D. The District Court's Decision

EPIC filed suit on October 14, 2003, challenging DOJ's determination. EPIC moved for partial summary judgment on the issue of expedited processing on November 4, 2003, and DOJ

[7] EPIC never received a response to its expedition request directly from the Director of Public Affairs.

cross-moved for summary judgment on November 18, 2003. The district court heard oral argument on December 10, 2003, and issued an order denying EPIC's motion for partial summary judgment, and granting DOJ's motion for partial summary judgment, on December 22, 2003.

The district court first held that EPIC was not required to submit an administrative appeal to DOJ before filing suit to pursue its right to expedited processing.[8] The court then found that EPIC had failed to show 1) that there was an "urgency to inform the public" about the U.S. Attorneys' lobbying activities, or 2) that the FOIA request involved "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." The court thus held that EPIC had not demonstrated an entitlement to expedited processing. This appeal followed.

SUMMARY OF THE ARGUMENT

The record demonstrated EPIC's entitlement to expedited processing, and the district court clearly erred in holding that the FOIA request met neither the statutory standard nor DOJ's own regulatory standard for expedited treatment.

EPIC's request involved DOJ's lobbying and public relations efforts to defend the USA Patriot Act, perhaps the most controversial public policy issue in recent memory. The DOJ activity was the subject of extensive news media coverage at the time EPIC submitted its request, and the legislation that was the focus of DOJ's efforts was pending before Congress. In finding there was no "urgency to inform the public" about the subject, and hence no entitlement to expedited processing, the district court misconstrued this Court's relevant precedent and

[8] DOJ has cross-appealed on the exhaustion issue. EPIC submits that the district court correctly construed the statute's plain language on the question of jurisdiction and will address the issue more fully in response to DOJ's brief.

disregarded the extensive, well-documented public and media interest in the matter. The court entirely failed to address the likely consequences of delaying response to EPIC's request, which were substantial given the pendency of legislation to limit the government's Patriot Act authorities – the very legislation that formed the basis of EPIC's request.

The district court similarly erred in finding that EPIC's request did not involve "[a] matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." The court again gave short shrift to the extensive and geographically diverse news coverage, and failed to acknowledge that *actual* questions of integrity – not merely the requisite "possible" questions – had been raised about the DOJ activity at issue.

STANDARD OF REVIEW

In *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 308-309 (D.C. Cir. 2001), the Court noted that a requestor's entitlement to expedited FOIA processing "may perhaps best be classified as a mixed question of law and fact," and observed that "[t]he appropriate standard of appellate review for such mixed questions is often difficult to determine." (citations omitted). Finding it unnecessary to resolve the issue because, *inter alia*, "we would reach the same conclusion . . . regardless whether we review the [district] court's determination deferentially or *de novo*," the Court "analyze[d] the case using the standard most favorable to the plaintiffs – *de novo* review." *Id.* at 309 (footnote omitted); *see also National Security Archive v. Department of Defense*, 880 F.2d 1381, 1383 (D.C. Cir. 1988), *cert. denied*, 494 U.S. 1029 (1990) (In FOIA fee category case, court "need not resolve this dispute" because either standard would yield same result, but "[a]ssum[es] that our review is *de novo*."). The Court should do likewise here, as the district court's decision cannot be sustained under either standard.

ARGUMENT

In support of its request for expedited processing of documents concerning the Lewis memorandum, EPIC presented clear evidence of its entitlement to expedition under both the statutory "urgency to inform" standard and DOJ's regulatory "government integrity" standard. The agency articulated no rationale for its adverse determinations, and the district court ratified those decisions in an opinion that contained virtually no analysis and misconstrued this Court's relevant precedent. Upon review of that determination, this Court should reverse.

I. The District Court Erred in Holding That EPIC's FOIA Request Failed to Meet The "Urgency to Inform" Standard

This Court has had only one previous opportunity to consider the FOIA's expedited processing provisions. In *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300 (D.C. Cir. 2001), the requestors sought information concerning the automobile accident that killed Princess Diana and Dodi Al-Fayed in Paris in 1997. The relevant FOIA requests, which sought expedited processing, were submitted to various federal agencies in 2000. *Id.* at 302.

In its review of the requestors' entitlement to expedited processing under the "urgency to inform" standard, the Court reviewed the legislative history and articulated the following test:

> in determining whether requestors have demonstrated "urgency to inform," . . . courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.

Id. at 310. The Court concluded that "[p]laintiffs' claim of urgency founders upon the first of these factors," noting that "[a]ll of the events and alleged events occurred two to three years before plaintiffs made their requests for expedited processing." *Id.* at 311.

This case presents facts that stand in stark contrast to those of *Al-Fayed*. EPIC's FOIA request involved official DOJ action that occurred less than a month prior to the submission of

the request and that was the subject of coverage and commentary in the nation's leading newspapers just days earlier. The subject of the request implicated legislation – the USA Patriot Act – that has engendered some of the most heated national debate in recent memory. EPIC's request clearly met the criteria set forth by this Court in *Al-Fayed*.[9]

A. EPIC's Request Clearly Concerned "A Matter of Current Exigency to the American Public"

The district court's analysis was limited solely to the question of whether EPIC's request "concern[ed] a matter of current exigency to the American public," and, in finding that it did not, the court misconstrued *Al-Fayed*. The court stated that, in *Al-Fayed*, "[t]he Court of Appeals did not hold that 'substantial . . . interest on the part of the American public or the media' amounts to 'exigency.'" App. at 75. In fact, that is precisely what this Court held:

> . . . [P]laintiffs' claims do not meet the standard of "urgency to inform." Even if the information sought is properly characterized as "current," it cannot fairly be said to concern a matter of "exigency to the American public." There is no evidence in the record that there is substantial interest, either on the part of the American public or the media, in this particular aspect of plaintiffs' allegations. Indeed, the record does not contain any news reports on the subject . . . .

254 F.3d at 311 (footnote omitted). Indeed, while it is not necessarily the *sole* means of determining whether a particular matter is of exigency to the public, "substantial" news media interest, as this Court recognized, is often the best evidence that a requestor can provide.

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[9] FOIA provides, in pertinent part, that "compelling need" means "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v). EPIC's status as "a person primarily engaged in disseminating information" has never been at issue in this case. *Cf. Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) (holding that EPIC qualifies as a "representative of the news media" under FOIA's fee provisions).

Here, it is beyond dispute that EPIC presented clear evidence of "substantial interest . . . on the part of the American public [and] the media" in efforts to revise the Patriot Act and DOJ's attempts to counter those efforts.

As an initial matter, it is worth noting that EPIC never asserted that the Lexis-Nexis search results it provided to DOJ were an all-inclusive compendium of *all* relevant new coverage. Even in today's digital world, it is unlikely that any search methodology could produce such a comprehensive list.[10] Nonetheless, the type of results that EPIC presented have long been recognized as accurate indicia of public interest in a particular subject or issue and have been employed by the courts and legal scholars. *See, e.g., Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1179 n.11 (2d Cir. 1996) (describing a Lexis news search as support for the court's assertion that popular press devoted attention to sexual harassment in the early 1990s); *Meyers v. City of Cincinnati*, 979 F.2d 1154, 1159 n.2 (6th Cir. 1992) (including the results of a Nexis news search to illustrate the court's assertion that the issue of affirmative action in urban police and fire departments commanded "intense public scrutiny and debate"); Jay Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L. Rev. 298, 338 n.235 (January 1998) (citing a Lexis search as evidence that controversial constitutional issues had attracted increased press coverage); Ethan Zuckerman, *Global Attention*

[10] Lexis-Nexis database searches are known to understate the full spectrum of media coverage. *See, e.g.*, Daniel Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 Ind. L.J. 315, 315 n.1 (Spring 2001) (supporting assertion that national attention was given to the murder of Megan Kanka: "[a] search of the LEXIS, News Library . . . produced sixty-four hits. . . . Given the limited scope of the LEXIS database, as well as both the textual and date limits of the search, this number grossly underestimates the total extent of the incident's coverage); Newton Minow and Fred Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 Am. U.L Rev. 631, 636 n.22 (Winter 1991) (describing public inundation with defense lawyer claims of unfair trials due to pre-trial publicity, citing the size of a Nexis news search and cautioning that "it is reasonable to anticipate that far more claims would be reported by regional and local press — most of which are not included in databases").

Profiles at http://h2odev.law.harvard.edu/ezuckerman/ (last visited July 7, 2004) (utilizing search requests of news sources and news aggregators such as Google News to compare media interest in different countries).

While it is unclear whether the district court reviewed the full text of the news articles cited in the Lexis-Nexis search results,[11] even the cursory review that the court apparently did conduct clearly established that EPIC's request concerned "a matter of current exigency." The court wrote:

> The Lexis-Nexis printout does not include all the words of the stories to which it refers, but only (apparently) lines of text including some number of words on either side of one of the search strings. Of the thirty-one "hits," three appear to be duplicates. Of the remaining twenty-eight, five reflect stories that were written before the Washington Post first reported the matter that is the subject of EPIC's search. The August 22 Washington Post story (and the follow-up editorials in the Post and the New York Times) focuses on the alleged misuse of U.S. Attorneys to lobby for the Patriot Act. The rest of the stories generally concern the Attorney General's whistle-stop tour to defend the Patriot Act. A disproportionate number of the "hits" (ten, by my count) are from Idaho. And, apart from the Post and Times editorials, only six of the news stories that follow the first Post story on August 22 even mention the marshaling of the U.S. Attorneys for a lobbying effort.

App. at 76.

The court's analysis (which, as noted, was tainted by its misreading of *Al-Fayed*) unduly restricted the scope of the relevant inquiry to "the marshaling of the U.S. Attorneys for a lobbying effort." An assessment of "substantial interest" in the subject of EPIC's request necessarily required consideration of the larger context in which the Lewis memorandum arose –

[11] The full text of the relevant articles, through citation, are part of the record. Just as litigants and the courts cite judicial authorities in support of propositions, so too do they cite newspaper articles by name of publication, title and date. *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1139, 1140 n.12 (D.C. Cir. 1998); *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 n.39 (D.C. Cir. 1981); *Independent Bankers Assoc. v. Conover*, 603 F. Supp. 948, 950 n.2 (D.D.C. 1985) (all citing newspaper articles). Such materials are not obscure; they are readily available through Lexis-Nexis and other search tools, and the actual search results, with complete citations, were provided to both DOJ and the district court. App. at 27-41.

the ongoing national debate on the Patriot Act and DOJ's efforts to defend the legislation. Thus, the fact that the majority of the cited articles "concern the Attorney General's whistle-stop tour to defend the Patriot Act" supports a finding of "substantial interest" and thus "current exigency." Indeed, seven of the cited articles discuss DOJ's mobilization of U.S. Attorneys within the context of general reporting on the Patriot Act and/or the Attorney General's speaking tour.[12] An additional 13 articles discuss the pendency of the Otter Amendment,[13] and only four articles address the Attorney General's speaking tour without reference to the Lewis memorandum or the Otter Amendment.[14] Thus, no fewer than twenty of the cited articles

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[12] Editorial, *Ashcroft's Roadshow*, Bangor Daily News (Maine), Aug. 28, 2003, at A10; Editorial, *Don't Let Patriot Act Go Overboard*, The Atlanta Journal-Constitution, Aug. 25, 2003, at 10A; Gregory Hahn, *Ashcroft Fights for Patriot Act*, The Idaho Statesman, Aug. 25, 2003, at 1; Editorial, *Ashcroft Should Listen, Not Lecture Idahoans*, The Idaho Statesman, Aug. 25, 2003, at 6; Rebecca Walsh, *Ashcroft Drawing Fire Even in Utah*, The Salt Lake Tribune, Aug. 23, 2003, at D1; Editorial, *Selling the Patriot Act*, The Commercial Appeal, Aug. 20, 2003, at B3; *Ashcroft to Defend Patriot Act*, Richmond Times Dispatch (Virginia), Aug. 19, 2003, at A1.

[13] Brian Lazenby, *Area Lawmakers Voice Concerns for Patriot Act*, Chattanooga Times Free Press, Sept. 8, 2003, at A5; Eric Lichtblau, *Ashcroft's Tour Rallies Supporters and Detractors*, N.Y. Times, Sept. 8, 2003, at A14; Bill Rankin, *Towns Raise Eyebrows, Voices Over Patriot Act*, Atlanta Journal-Constitution, Sept. 7, 2003, at 6F; Jeff Scullin, *The Patriot Act—A Bill of Wrongs?*, The Ledger (Lakeland, FL), Sept. 6, 2003, at A1; Jerry Zremski, *Security at What Price?*, Buffalo News, Sept. 5, 2003, at A1; Kelvin Anderson, Letter, *Reasonable Travels*, The Idaho Statesman, Aug. 31, 2003, at 7; Gregory Hahn, *Craig, Crapo Not Sold on Otter's Patriot Act Changes*, The Idaho Statesman, Aug. 27, 2003, at 3; Angie Welling and Jennifer Dobner, *Act Called Vital Tool in War on Terror*, Deseret Morning News (Salt Lake City), Aug. 26, 2003, at A1; Gregory Hahn, *Ashcroft Defends Patriot Act in Boise*, The Idaho Statesman, Aug. 26, 2003, at 1; Editorial, *Patriot Act Requires Sober Review, Not a PR Blitz*, Philadelphia Inquirer, Aug. 21, 2003; Debra Saunders, Editorial, *Liberties—For Lefties Only*, The San Francisco Chronicle, Aug. 26, 2003, at A21; Betsy Russell, *Ashcroft Defends Patriot Act Before Friendly Boise Crowd*, Spokesman Review (Spokane, WA), Aug. 26, 2003, at B1; Gregory Hahn, *Ashcroft to Tout Patriot Act in Otter's Back Yard*, The Idaho Statesman, Aug. 22, 2003, at 1.

[14] Michael Costello, *Otter Gets Ink the Way McCain Gets Air Time*, Lewiston Morning Tribune (Idaho), Aug. 30, 2003, at 10A; Editorial, *John Ashcroft's Road Trip*, Milwaukee Journal Sentinel, Aug. 25, 2003; Editorial, *Ashcroft on Tour*, Dallas Morning News, Aug. 25, 2003, at 12A; Editorial, *Mr. Ashcroft's Road Show*, St. Louis Post-Dispatch, Aug. 19, 2003, at B6.

discussed the Lewis memorandum and/or the Otter Amendment as part of a larger story – the heated public debate over the Patriot Act. In addition, the Washington Post and the New York Daily News carried articles devoted exclusively to the Lewis memorandum,[15] and the Washington Post and the New York Times criticized the directive in editorials.[16]

The district court's approach – viewing the Lewis memorandum in isolation and disregarding its relationship to the controversy surrounding the Patriot Act – was clearly inappropriate. While DOJ lobbying efforts on an obscure piece of legislation that generated no documented public interest might not warrant expedited processing, such was not the case here. Rather, as DOJ surely knew (as evidenced by the Attorney General's unprecedented public relations campaign), the Patriot Act "is perhaps among the most identifiable and hotly debated pieces of legislation in the country." Eric Lichtblau, *Ashcroft's Tour Rallies Supporters and Detractors*, N.Y. Times, Sept. 8, 2003, at A-14. App. at 47-48. *See also ACLU*, 265 F. Supp. 2d at 24 ("Ever since it was proposed, the Patriot Act has engendered controversy and debate."). It is beyond serious dispute that the record before the district court demonstrated the requisite "current exigency."

The flaws in the lower court's analysis were exacerbated by its observation that "[a] disproportionate number of the 'hits' . . . are from Idaho." App. at 76. The particularly strong interest in Idaho should not have been surprising, given that Rep. Otter represents the western

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[15] James Gordon Meek, *Ashcroft Recruits Patriot Act Squad*, Daily News (New York), Aug. 22, 2003, at 14; Dan Eggen, *Prosecutors are Urged to Press Congress*, The Washington Post, Aug. 22, 2003, at A19.

[16] Editorial, *An Unpatriotic Act*, N.Y. Times, Aug. 25, 2003, at A14; Editorial, *Mr. Ashcroft's Foot Soldiers*, Washington Post, Aug. 23, 2003 at A22. Interestingly, neither of these editorials was included in the Lexis-Nexis search results, but both were cited (and quoted) in EPIC's letter to DOJ. App. at 24-25. Their absence from the search results underscores the fact that those results reflected only a portion of the news media coverage discussing the Lewis memorandum.

half of the state and that the Attorney General brought his campaign in support of the Patriot Act to Boise during the period covered by the Lexis-Nexis search. Even if the public interest in the matter had been restricted to a particular state or region, there is nothing in *Al-Fayed* or the legislative history to suggest that such localized interest would not be adequate to establish "current exigency." But the Court need not address that issue here; the record shows that, in addition to Idaho, the cited news coverage appeared in California, Florida, Georgia, Maine, Missouri, New York, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, DC, Washington State and Wisconsin. In addition, several of the articles and editorials recited the fact that communities throughout the country had enacted local measures critical of the Patriot Act. *See, e.g.*, Editorial, *Don't Let Patriot Act Go Overboard*, The Atlanta Journal-Constitution, Aug. 25, 2003, at 10A (criticizing the Lewis memorandum and noting that "[a]lready, 150 communities across the country have passed local legislation opposing portions of the law").

Finally, the district court appears to have articulated a test for entitlement to expedited processing that misconstrues *Al-Fayed* (on a second point) and flies in the face of common sense. In denying EPIC's entitlement to expedited processing, the court somewhat cryptically concluded that "[t]he appearance of thirty-one newspaper articles does not make a story a matter of 'current exigency.' The U.S. Attorney mobilization story apparently did not have 'legs.'" App. at 77.

First, it is unclear what quantum of news coverage the court would have found adequate and, as we have explained, the articles that EPIC presented were a sampling of the sort that is commonly accepted by courts and researchers to demonstrate public interest. *See* pp. 13-14, *supra*. Second, it is difficult to reconcile the court's conclusion that the "story apparently did not have 'legs'" with this Court's observation in *Al-Fayed* concerning "events [that] occurred two to

three years before" the request for expedited processing: "Although these topics may continue to be newsworthy, none of the events at issue is the subject of a currently unfolding story." 254 F.3d at 311. If the district court meant to equate having "legs" with being "the subject of a currently unfolding story," then EPIC's request clearly met the test. If, on the other hand, the court was suggesting that "[t]he U.S. Attorney mobilization story," after receiving preliminary news media coverage and critical comment in some of the nation's leading newspapers, had not been fully developed at the time of EPIC's request, then the court fundamentally misconstrued the purpose of expedited processing.

It is precisely in a case such as this, where basic questions about government activity remain unanswered after the activity has been the subject of demonstrated public interest, that expedited processing is required. If all relevant information was already known, and all that could be written had already been published, there would be no need for the expeditious processing that Congress envisioned. Even if the story had no "legs" at the time of EPIC's request – a conclusion the record belies – it likely would have acquired (or re-acquired) that status if the details of the DOJ lobbying effort had been disclosed in a timely fashion, while public attention was focused on the Attorney General's campaign in support of the Patriot Act.

In sum, this case is a far cry from *Al-Fayed*, where the Court emphasized that

> [a]ll of the events and alleged events occurred two to three years before plaintiffs made their requests for expedited processing, . . . none of the events at issue [was] the subject of a currently unfolding story, . . . [and] the record [did] not contain any news reports on the subject . . . .

254 F.3d at 311. The record here clearly demonstrated that the subject of EPIC's FOIA request concerned "a matter of current exigency to the American public."

B. Delay in Response to EPIC's Request "Would Compromise a Significant Recognized Interest"

Relying wholly upon its flawed conclusion that the subject of EPIC's request was not a matter of "current exigency," the district court did not address the second prong of the *Al-Fayed* test – "whether the consequences of delaying a response would compromise a significant recognized interest." *Id*. at 310.[17] Given the critical role that the timely disclosure of the requested information likely would have played in an important and ongoing Congressional debate, EPIC's request clearly met that standard.

In assessing the consequences of delay, it is important to consider the nature of the information at issue. EPIC sought the text of the Lewis memorandum and any attachments; any assessments of possible legal restrictions on contacts by U.S. Attorneys with members of Congress; all records submitted by U.S. Attorney's Offices in response to the memorandum (including meeting schedules and reports); and all records concerning any contacts that U.S. Attorney's Offices may have had with members of Congress as a result of the memorandum. App. at 22. The request thus covered the kind of material that would reveal the nature and scope of DOJ's "grassroots" efforts to prevent Congressional adoption of the Otter Amendment. It would include, for instance, the names of legislators contacted and reports on how they reacted to the Department's overtures.

There is no question that DOJ itself considered the Otter Amendment – and the ensuing debate over its fate – to be a matter of the highest priority. As one news article (published just three days before EPIC submitted its request) reported,

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[17] Quoting from the legislative history, the Court further noted that expedited processing is appropriate where "a delay in obtaining information *can reasonably be foreseen* to cause a significant adverse consequence to a recognized interest." *Id*., quoting H.R. REP. NO. 104-795, at 26 (1996) (emphasis added).

> A startling setback [to DOJ] occurred this summer when the House voted 309-118 to repeal the act's covert "sneak and peek" provisions. "Sneak and peek" permits investigators to execute search warrants without having to notify the subject of the search right away. The repeal measure, sponsored by Rep. C.L. "Butch" Otter (R-Idaho), would prohibit use of federal funds to execute such warrants. . . .
>
> In recent weeks, the Justice Department has responded.

Bill Rankin, *Towns Raise Eyebrows, Voices Over Patriot Act*, Atlanta Journal-Constitution, Sept. 7, 2003, at 6F. A key component of DOJ's response was the Lewis memorandum:

> Ashcroft's office promptly sent out a memo to all 93 U.S. attorneys asking them "to call personally or meet with . . . congressional representatives" to discuss "the potentially deleterious effects" of the Otter amendment.
>
> Attached was a list of U.S. representatives with an asterisk next to each who had voted for Mr. Otter's repeal measure. . . . The memo also asked the U.S. attorneys to hold community meetings to press the virtues of the Patriot Act.

Editorial, *Ashcroft's Roadshow*, Bangor Daily News (Maine), Aug. 28, 2003, at A10.

Indeed, DOJ had reason to consider the matter urgent; shortly before EPIC submitted its FOIA request, it was reported that "[t]he Senate may vote on a similar bill later this month." Jeff Scullin, *The Patriot Act—A Bill of Wrongs?*, The Ledger (Lakeland, FL), Sept. 6, 2003, at A1. *See also* Dan Eggen, *Prosecutors are Urged to Press Congress*, The Washington Post, Aug. 22, 2003, at A19 ("The [Lewis] memo . . . underscores the extent of the concern within Justice over the Otter legislation.").

Disclosure of the requested information on an expedited basis would have enabled those members of the public who supported the Otter Amendment to make their views known to the legislators contacted by U.S. Attorneys, and to counter the arguments made during the personal calls and meetings that were prompted by the Lewis memorandum. At the time of EPIC's request, the Otter Amendment was under active legislative consideration and very much "in

play." As such, there was a limited time window during which the requested information could potentially influence the ongoing Congressional debate.

A separate, but related, consequence of delay, at the time that EPIC submitted its request, concerned the alleged impropriety of DOJ's use of federal prosecutors in support of its lobbying efforts. *See* Sec. II, *infra*. Full disclosure of the facts surrounding DOJ's deployment of federal prosecutors, which was already the subject of critical editorial comment and Congressional questions concerning its legality, also would have contributed to public understanding and debate of the merits of DOJ's efforts (and tactics) to prevent enactment of the Otter Amendment.

Informed public participation in a pending debate on a controversial policy issue clearly constitutes "a significant recognized interest." The Supreme Court has long recognized our democracy's interest in "the 'uninhibited, robust, and wide-open' debate about matters of public importance that secures an informed citizenry." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 815 (1985), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Board of Education v. Pico*, 457 U.S. 853, 876 (1982) ("the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs"). Indeed, it is difficult to identify a more significant interest in the context of expedited FOIA processing.[18] In the midst of Congressional consideration of the Otter Amendment, it was reasonably foreseeable that delay in the disclosure of the information EPIC sought would

[18] The legislative history notes that "[t]he public's right to know, although a significant and important value, would not by itself be sufficient to satisfy [the 'urgency to inform'] standard." H.R. REP. NO. 104-795, at 26 (1996); quoted in *Al-Fayed*, 254 F.3d at 310. Here, of course, the interest at issue is not merely "the public's right to know," which would arise in any FOIA case, but rather the "significant recognized interest" in informed public participation in a policy debate pending before Congress.

adversely affect that interest. As such, DOJ and the district court erred in concluding that EPIC had not demonstrated the requisite "urgency to inform."[19]

II. The District Court Erred in Holding That EPIC's FOIA Request Failed to Meet DOJ's "Government Integrity" Standard

The FOIA directs agencies to promulgate regulations providing for expedited processing not only in cases involving "compelling need," but also "in other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(i). Pursuant to that authority, DOJ adopted regulations in 1998 that provide for "expedited treatment" when, *inter alia*, a request involves "[a] matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv). DOJ denied EPIC's entitlement to expedited processing under its "government integrity" standard and the district court, in a cursory, one-paragraph discussion, upheld that determination.

In *Al-Fayed*, this Court suggested that where an agency's "regulations expand the criteria for expedited processing beyond 'compelling need,'" the courts should consider whether the agency "reasonably determined that [the request] did not meet the expanded criteria." 254 F.3d at 307 n.7.[20] Here, the Court can easily find that DOJ's determination was not reasonable.

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[19] There is no question that EPIC's request "concern[ed] federal government activity," the final prong of the *Al-Fayed* test under the "urgency to inform" standard.

[20] The district court applied a "reasonableness" standard: "It appears that I should review the agency's application of its 'government integrity' standard for 'reasonableness' rather than *de novo*. *Al-Fayed*, 254 F.3d at 307 n.7. Either way, EPIC has failed to establish its right to expedition." While we agree that there is some lack of clarity concerning the applicable standard of review in this case, *see* p. 10, *supra*, we submit that the question need not be resolved here because, contrary to the district court's formulation, DOJ's determination must be *rejected* under either a *de novo* or a reasonableness standard.

A. EPIC's Request Involved "A Matter of Widespread and Exceptional Media Interest"

The first prong of DOJ's "government integrity" standard requires consideration of both the quantitative and qualitative nature of news media coverage devoted to the subject of a request; such coverage must be both "widespread" and "exceptional." Here, the record establishes that EPIC's request met both criteria. As we have shown, the relevant coverage was extensive and geographically diverse, with articles appearing during a short period in California, Florida, Georgia, Idaho, Maine, Missouri, New York, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, DC, Washington State and Wisconsin. *See* p. 17, *supra*. By any reasonable measure, the "media interest" clearly was "widespread."

From a qualitative perspective, the media interest was also "exceptional." While a fair number of policy issues may generate widespread news coverage, it is only a small percentage that also attract editorial comment in newspapers large and small. Such attention is "exceptional," *i.e.*, not the norm. *See* Merriam-Webster's Collegiate Dictionary at 404 (10th ed. 1998) ("deviating from the norm"). Here, the record includes editorial discussion of the Lewis memorandum in not only two of the nation's leading newspapers, the New York Times and the Washington Post,[21] but also in the Commercial Appeal (Memphis, TN), the Idaho Statesman, the Atlanta Journal-Constitution, and the Bangor Daily News.[22] EPIC's request thus involved a matter of both widespread and exceptional media interest.

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[21] Editorial, *An Unpatriotic Act*, N.Y. Times, Aug. 25, 2003, at A14; and Editorial, *Mr. Ashcroft's Foot Soldiers*, Washington Post, Aug. 23, 2003 at A22.

[22] Editorial, *Selling the Patriot Act*, The Commercial Appeal, Aug. 20, 2003, at B3; Editorial, *Ashcroft Should Listen, Not Lecture Idahoans*, The Idaho Statesman, Aug. 25, 2003, at 6; Editorial, *Ashcroft's Roadshow*, Bangor Daily News (Maine), Aug. 28, 2003, at A10; and Editorial, *Don't Let Patriot Act Go Overboard*, The Atlanta Journal-Constitution, Aug. 25, 2003, at 10A.

B. EPIC's Request Involved "A Matter . . . in Which There Exists Possible Questions About the Government's Integrity"

Incredibly, both DOJ and the district court failed to acknowledge that EPIC's FOIA request involved a matter in which there were not only "possible" questions concerning government integrity, but *actual* questions. EPIC cited two editorials that raised pointed questions about the propriety of the Lewis memorandum, one of which specifically cited allegations of potential illegality that had been raised by Rep. John Conyers, Jr., the Ranking Member of the House Judiciary Committee.

In its letter to DOJ, EPIC quoted the two editorials. The New York Times editorial that EPIC cited noted that "[o]ne member of Congress, Representative John Conyers Jr., a Michigan Democrat, has charged that Mr. Ashcroft's lobbying campaign, in which United States attorneys have been asked to participate, may violate the law prohibiting members of the executive branch from engaging in grassroots lobbying for or against Congressional legislation." The editorial went on to suggest that "[i]nstead of spin-doctoring the problem, Mr. Ashcroft should work with the [Patriot Act's] critics to develop a law that respects Americans' fundamental rights." App. at 24 (quoting Editorial, *An Unpatriotic Act*, N.Y. Times, Aug. 25, 2003, at A14).[23]

EPIC's letter to DOJ also quoted a Washington Post editorial that said:

> [T]here's something a little unsettling about this mass deployment. Perhaps it's the wholesale and seemingly involuntary nature of the enterprise: the U.S. attorneys aren't requested to contact lawmakers or hold public meetings but instructed to do so, and given a handy form on which to report on their sessions with members . . . . Perhaps it's the sense that the prosecutors, while political and a part of a Republican administration, also ought to be at some remove from partisan politics . . . . Perhaps it's that the administration hasn't been nearly so accommodating about the importance of educating lawmakers and the public

[23] Similarly, another editorial (in the Bangor Daily News) noted that an aide to a local member of Congress believed that "directing U.S. attorneys to perform a political act — lobbying members of Congress — is objectionable." Editorial, *Ashcroft's Roadshow*, Bangor Daily News (Maine), Aug. 28, 2003, at A10.

> when it involves folks on the other side . . . . This campaign . . . uncomfortably blurs the line between law and politics.

App. at 24-25 (quoting Editorial, *Mr. Ashcroft's Foot Soldiers*, Washington Post, Aug. 23, 2003 at A22). It is thus clear that the record contained actual questions of integrity – questions raised not by EPIC, but by leading newspapers and a senior member of Congress.

The district court, however, dismissed those questions:

> As for "possible questions about the government's integrity," moreover, EPIC placed nothing before [DOJ] except a New York Times editorial stating that Representative Conyers had charged that the Attorney General's lobbying campaign, in which U.S. Attorneys have been asked to participate, "may violate the law prohibiting members of the Executive Branch from engaging in grass roots lobbying," and a Washington Post editorial opining that the lobbying campaign "uncomfortably blurs the line between law and politics." There is nothing in the record reflecting precisely what Representative Conyers said, or where, or when, nor was EPIC's counsel able at oral argument to provide specific information about the "law prohibiting members of the Executive Branch from engaging in grass roots lobbying" or to say how it might have been violated by a directive from the Attorney General to U.S. Attorneys, who are political appointees.

App. at 77-78.

First, we submit that the New York Times' recitation of the fact that Rep. Conyers alleged that the Lewis memorandum "may violate the law prohibiting members of the Executive Branch from engaging in grass roots lobbying," standing alone, was sufficient to establish that the matter was one in which "possible questions" existed. It is unclear how the court's analysis might have been aided by "precisely what Representative Conyers said, or where, or when" – the fact of the allegation *exceeded* the requirements of DOJ's standard, and the agency never challenged the accuracy of the Times' reporting. In any event, the record contained more than the Conyers reference cited by the court; the Washington Post, in the article EPIC cited in its request letter, reported:

> Justice officials said they believe the [lobbying] effort does not violate the Anti-Lobbying Act, which generally prohibits government employees from lobbying for or against legislation. But Rep. John Conyers Jr. (Mich.), the ranking Democrat on the House Judiciary Committee, wrote a letter to Attorney General John D. Ashcroft yesterday questioning whether a current speaking tour by Ashcroft and contacts between U.S. attorneys and members of Congress amount to a violation of the law.

Dan Eggen, *Prosecutors Are Urged to Press Congress*, Washington Post, Aug. 22, 2003, at A19 (cited in App. at 23, 39). Thus, the record did describe "precisely what Representative Conyers said, [and] where, [and] when."[24]

Having ignored the presence of actual – not merely possible – "questions about the government's integrity," the district court then imposed a requirement that finds no support in the plain language of DOJ's regulation. The regulation required EPIC to show that there were "possible questions" concerning government integrity – not, as the court suggested, to show "how [the Anti-Lobbying Act] might have been violated by a directive from the Attorney General to U.S. Attorneys, who are political appointees." While such an explanation might be appropriately required where the only source of an allegation is the requestor, such was not the case here. The allegations of possible impropriety were made by Rep. Conyers and several newspapers, not by EPIC, so it was unreasonable to require EPIC to demonstrate the likelihood of an actual violation of law. In any event, it would be impossible to conclusively answer the

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[24] Although EPIC did not provide the actual text of the Conyers letter to DOJ, the agency (as the recipient) was well aware of its contents. Thus, if there was any doubt as to its contents, the letter would be an appropriate subject of judicial consideration. *See National Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C. Cir. 1987) (where "reasonableness of the agency's [action under FOIA] depends on the information before it at the time of its decision . . . courts should [not] ignore otherwise admissible evidence . . . that was not submitted to the agency, . . . since such evidence may apprise the court of a controversy already known to the agency"). Rep. Conyers' letter to the Attorney General is available at Press Release, Congressman John Conyers, Jr., Conyers Criticizes Ashcroft's Public Relations Campaign, (Aug. 21, 2003) at http://www.house.gov/ judiciary_democrats/aglobbyltrpr82103.pdf (last visited July 7, 2004).

question the court posed prior to the release of the information that was the subject of the FOIA request, and any potential answer would be speculative. Putting the cart before the horse in such a manner would render the "government integrity" standard meaningless.

EPIC clearly demonstrated that its request for information concerning the Lewis memorandum involved "[a] matter of widespread and exceptional media interest in which there exist[ed] possible questions about the government's integrity which affect public confidence." As such, it was entitled to expedited processing.

CONCLUSION

The decision of the district court on EPIC's entitlement to expedited FOIA processing should be reversed.

Respectfully submitted,

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