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VIA ELECTRONIC FILING

May 17, 2011

Mr. Mark J. Langer
Clerk of the United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

RE: *American Civil Liberties Union, et al. v. U.S. Dep't of Justice,*
Nos. 10-5159 & 10-5167 (argued on Feb. 8, 2011, before
Ginsburg, Garland and Williams, JJ.)

Dear Mr. Langer:

Pursuant to Fed. R. App. P. 28(j), defendant-appellee/cross-appellant United States Department of Justice ("DOJ") hereby responds to the 28(j) letter filed on May 16, 2011 by plaintiffs-appellants/cross-appellees American Civil Liberties Union, *et al.* ("Pl. May 16 Letter").

Plaintiffs assert that a press release recently issued by the U.S. Attorney's Office for the Southern District of Florida "belies [the government's] argument, in this appeal, that individuals who have been openly indicted have a privacy interest that trumps the public's compelling interest in learning about the government's warrantless cell phone tracking through the disclosure of criminal case docket information." Pl. May 16 Letter 2. We have already refuted this argument in our reply brief and at oral argument. *See, e.g.,* DOJ Reply Br. 4 ("But the fact that the government voluntarily chooses to inform the public of certain prosecutorial activities

that it deems newsworthy does not mean that it is insensitive to the FOIA privacy interests of the individuals it prosecutes. This is an utterly false dichotomy.”). In its capacity as prosecutor, the government plainly has an interest in informing the public about noteworthy prosecutorial activities -- just as in its capacity as custodian of government records under FOIA, it has an obligation to protect the privacy interests of individuals. *See, e.g., Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996) (recognizing that only individual with privacy interest in information could waive that interest for purposes of FOIA Exemption 7(C)); *Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 363-64 (5th Cir. 2001) (acknowledging same principle in FOIA Exemption 6 context); *see generally U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-65 (1989) (recognizing that the privacy interest at stake in FOIA personal privacy exemption analysis belongs to the individual, not the agency holding the information).

Please provide copies of this letter to the panel. Thank you very much for your assistance.

Sincerely,

/s/ John S. Koppel

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2011, I caused a copy of the foregoing letter to be filed electronically with the Court using the Court's CM/ECF system, and also caused hard copies to be delivered to the Clerk of the Court by hand delivery within two business days. Service will be made automatically upon the following CM/ECF participants:

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