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April 7, 2008

Ms. Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Al-Marri v. Pucciarelli, No 06-7427 (argued en banc Oct. 31, 2007)

Dear Ms. Connor:

Appellant al-Marri submits this letter under Federal Rule of Appellate Procedure 28(j). On April 1, 2008, the government declassified and released an Office of Legal Counsel memorandum by John Yoo dated March 14, 2003 (“the Memo”). The President relied on an OLC opinion in designating al-Marri an “enemy combatant” in June 2003, merely three months after the Memo issued, Joint Appendix 214-215, and the government says that opinion formed part of the “extremely careful[]” Executive process that produced this designation. Unofficial Oral Argument Tr. 73.¹

The Memo – later repudiated by the Justice Department, *see* Jack Goldsmith, *The Terror Presidency* 151 (2007) – further demonstrates that al-Marri’s detention lacks legal basis.

The Memo incorrectly asserts that the Fifth Amendment Due Process Clause does not restrict the President’s detention and interrogation of suspected terrorists inside the United States (pp. 6-9, 8 n.11); and that the Fourth Amendment has “no application to *domestic* military operations.” (p. 8 n.10) (emphasis in original). Appellant’s Br. 12, 26-28; Reply Br. 11, 26-27.

The Memo (pp. 4, 11-19, 74-80) also advocates detention for coercive interrogation. The Authorization for Use of Military Force, however, permits only the “necessary and appropriate” use of military force, not “indefinite detention for the purpose of interrogation.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004). As the Memo underscores, al-Marri was impermissibly transferred to military custody after he had already been detained in civilian custody for 17 months precisely so that harsh interrogation methods could be employed against him. Appellant’s Br. 13; Reply Br. 9-10; Opp. to Reh’g Pet’n 14 n.10; John Ashcroft, *Never Again: Securing America and Restoring Justice* 168-169 (2006).²

¹ Available at http://brennan.3cdn.net/e75ca720b7416fd646_bym6vjh5i.pdf.

² The government recently acknowledged the existence of recordings documenting al-Marri’s “rough treatment,” Mark Mazzetti & Scott Shane, “Pentagon Cites Tapes Showing

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In sum, the President designated al-Marri an “enemy combatant” based upon an erroneous legal analysis, and to uphold his detention is to endorse the result of an analysis that even the Justice Department has repudiated.

Respectfully submitted,



Jonathan Hafetz

cc: Gregory G. Garre, Esq.
Eric Miller, Esq.

Enc.: Office of Legal Counsel Memorandum dated March 14, 2003

Interrogations.” *N.Y. Times*, Mar. 13, 2008, which corroborates allegations made by al-Marri in a separate action challenging his abuse at the Navy brig.