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May 13, 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:

Pursuant to FRAP 28(j), Appellant informs the Court of the government's recent filing in which it belatedly admits destroying recordings of al-Marri's interrogations conducted after his transfer to military custody and "other notes and working papers associated with those [interrogations]." Defendants' Response to Motion for Preservation Order 8-9, *Al-Marri v. Gates*, No. 2:05-cv-2259.<sup>1</sup>

By confirming that al-Marri was repeatedly interrogated following his transfer to military custody in June 2003 until around October 2004, during which time he was held *incommunicado*, the filing further demonstrates that al-Marri was designated an "enemy combatant" for that purpose after he refused to "provid[e] information" during his criminal prosecution. John Ashcroft, *Never Again* 168-69 (2006).

The filing thus supports al-Marri's position that *even if* the President otherwise could designate as an "enemy combatant" a lawful resident arrested in the United States who was not part of the armed forces of an enemy government, never directly participated in hostilities, and was never on or near a battlefield, Appellant's Br. 12-36; *Ex parte Milligan*, 71 U.S. 2 (1866), the President's designation of al-Marri—who had *already* been detained in civilian custody for eighteen months—was still illegal because it was for the illegitimate purpose of interrogation. Appellant's Br. 13; Reply Br. 9-10; Opp. to Reh'g Pet'n 14 n.10. As the panel noted, "subject[ing] [al-Marri] to indefinite military detention . . . in order to interrogate him without the strictures of criminal process . . . would contravene [the Supreme Court's] injunction that 'indefinite detention for the purpose of interrogation is not authorized.'" *Al-Marri v. Wright*, 487 F.3d 160, 187 n.16 (4th Cir. 2007) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004)).<sup>2</sup>

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<sup>1</sup> The filing, in which the government opposed a motion to preserve recordings concededly still in existence, was in al-Marri's separate action challenging his conditions of confinement.

<sup>2</sup> The government's interrogation of al-Marri was brutal, and included complete isolation and sensory deprivation, sleep deprivation, stress positions, exposure to extremely cold temperatures, and threats of violence and death. Plaintiff's Objections to Magistrate Judge's

Respectfully submitted,



Jonathan Hafetz

Encl.: Defendants' Response to Plaintiff's Motion for Preservation Order *Al-Marri v. Gates*, No. 2:05-cv-2259 (dkt. no. 51)

Plaintiff's Objections to Magistrate Judge's Report and Recommendation Denying Motion for Interim Relief, *Al-Marri v. Gates*, No. 2:05-cv-2259 (dkt. no. 52)

cc: Gregory G. Garre, Esq. (w/o encl.)  
Eric Miller, Esq. (w/o encl.)

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Report and Recommendation Denying Motion for Interim Relief 2-6, *Al-Marri v. Gates*, No. 2:05-cv-2259 (describing interrogations).