No. _____

In The
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DAVID A. BERKEBILE, Warden, ADX-Florence,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Executive, consistent with the Constitution and laws of the United States, seize and subject to indefinite military detention, without criminal charge or trial, a person lawfully residing in the United States based on government assertions that he supported terrorist activities; and if not, is that person entitled to a remedy that redresses the constitutional violation by ensuring that he is not deprived of his liberty any longer than would a defendant who had lawfully served his entire sentence in lawful pretrial detention?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are listed in the caption except for Blake Davis, who previously served as the Warden of ADX-Florence and was the Respondent in the District Court and the Appellee in the Court of Appeals. His successor in office is David A. Berkebile, who has been automatically substituted as the Respondent pursuant to Rule 35.3.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ali Saleh Kahlah al-Marri respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1-13, is reported at 714 F.3d 1183 (10th Cir. 2013). The district court opinions, App. 14-15, 16-19, are not reported.*

JURISDICTION

The judgment of the court of appeals was entered April 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution, which provides that "No person shall . . . be deprived of life, liberty, or

* All cites to Petitioner's appendix are denoted by "App." All cites to Petitioner's appendix filed below in the Court of Appeals are denoted by "Appellant App."

property, without due process of law." U.S. Const. amend. V.

STATUTORY PROVISIONS INVOLVED

The Good Conduct Time statute, 18 U.S.C. § 3624(b), is set forth at App. 20-21. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at note following 50 U.S.C. § 1541), is set forth at App. 22.

STATEMENT OF THE CASE

This case raises the important question whether the Executive can, consistent with the Constitution and laws of the United States, seize and subject to indefinite military detention, without criminal charge or trial, a person lawfully residing in the United States based on government assertions that he supported terrorist activities. This is the second time that Petitioner al-Marri has sought review of this fundamental question by this Court. In 2008, the Court granted certiorari to review whether his then-ongoing military detention was constitutional. That matter was rendered moot when al-Marri's case was transferred to the United States District Court for the Central District of Illinois, where al-Marri ultimately entered a plea of guilty and was sentenced, in October 2009, to a term of 100 months' imprisonment beyond the 71 months he had already served – first

for three months as a material witness, and then for 68 more months in military custody as an enemy combatant.

This petition provides the Court with another opportunity to address the lawfulness of the government's decision to subject al-Marri to military detention. That issue arises here because al-Marri's sentence is now prolonged specifically because 68 months of it were served in military custody, rather than in pretrial detention pursuant to a lawful order of the United States District Court; for those 68 months, al-Marri has been deemed ineligible for good conduct time credits. If, as al-Marri asserts, his military detention violated the Constitution, he is entitled to a remedy that redresses that constitutional violation by ensuring that he is not deprived of his liberty any longer than would a defendant who had lawfully served his entire sentence in lawful pretrial detention.

This Court should, then, grant this petition not in order to address the arcane question of whether good conduct time credits should have been awarded under the terms of the relevant statute, 18 U.S.C. § 3624(b), but in order to settle, finally, whether the Constitution and laws of the United States permit the Executive to remove an individual who had been lawfully residing in the United States from the civilian system of criminal justice and to place him in indefinite military detention, without charge or trial; and, if so, whether the procedure that was afforded to al-Marri to challenge his detention comported with the demands of the Due Process Clause.

Petitioner's Arrest and Initial Federal Criminal Prosecution

On December 12, 2001, Federal Bureau of Investigation ("FBI") agents arrested Petitioner at his home in Peoria, Illinois, where he resided with his wife and five children. Three months earlier, al-Marri, a citizen of Qatar, had lawfully entered the United States with his family to pursue a master's degree at Bradley University, from which he had obtained his bachelor's degree in 1991. On January 4, 2002, the FBI transported him from the Peoria County Jail to the maximum-security Special Housing Unit of the Metropolitan Correctional Center in Manhattan, where he continued to be detained as a material witness to the September 11 attacks. Appellant App. 6-7.

Less than a month later, the United States filed the first of three successive criminal indictments against al-Marri. The first, filed in the United States District Court for the Southern District of New York on January 28, 2002, charged him with credit card fraud, Appellant App. 187-88; the second, filed on January 22, 2003, superceded the initial indictment, adding charges of false statements to the FBI and on a bank application, as well as identity theft, Appellant App. 198-99. After al-Marri successfully moved to dismiss the charges for improper venue, on May 12, 2003, an identical indictment was filed in the United States District Court for the Central District of Illinois, and al-Marri was returned to the Peoria County Jail to await trial. *al-Marri v. Bush*,

274 F. Supp. 2d 1003, 1004 (C.D. Ill. 2003); Appellant App. 7, 197, 201.

Petitioner's Designation and Detention as an "Enemy Combatant"

On June 23, 2003, just days before a scheduled suppression hearing and less than a month before trial, President George W. Bush declared Petitioner to be an "enemy combatant" and ordered the Attorney General to surrender him to the custody of the Secretary of Defense for military detention. Appellant App. 7. The President's declaration alleged that al-Marri was "closely associated" with al Qaeda and had "engaged in conduct that constituted hostile and warlike acts, including conduct in preparation for acts of international terrorism." App. 23. The President claimed that Petitioner, although in federal criminal custody, represented "a continuing, present, and grave danger to the national security of the United States," and that military detention was "necessary to prevent him from aiding al Qaeda." *Id.* The President also asserted that Petitioner "possesse[d] intelligence . . . that . . . would aid U.S. efforts to prevent attacks by al Qaeda." *Id.* That same morning, the district court dismissed the criminal indictment with prejudice. *al-Marri v. Bush*, 274 F. Supp. 2d at 1004.

Petitioner was transported to the Naval Brig in Charleston, South Carolina, where he remained in U.S. military custody for over five years and eight months. Appellant App. at 7. During that time, al-Marri faced

extraordinarily harsh conditions of confinement, including prolonged isolation and denial of access to counsel and family. When he was ultimately sentenced, the sentencing court, based upon the extensive record before it, described the conditions that al-Marri faced through the fall of 2004 as "extremely severe" warranting a nine-month reduction in the sentence that would otherwise have been imposed. Appellant App. 7-8, 173-74.

Petitioner's Prior Efforts to Challenge the Lawfulness of His Detention

During his 68 months of military detention, al-Marri repeatedly attempted to challenge the lawfulness of his military detention as an "enemy combatant." On July 8, 2003, his counsel sought a writ of habeas corpus on his behalf in the Central District of Illinois. That petition was dismissed on venue grounds. *al-Marri v. Bush*, 274 F. Supp. 2d 1003, *aff'd sub nom. al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir.), *cert. denied*, 543 U.S. 809 (2004).

On July 8, 2004, in compliance with this Court's decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), Petitioner's counsel filed a second habeas petition in the District of South Carolina. The government answered, appending the then-redacted Declaration of Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism, as the sole support for al-Marri's indefinite military detention. *See* Appellant App. 214-29. al-Marri moved for summary

judgment, arguing that the allegations in the Rapp Declaration were legally insufficient to sustain the government's burden and that, in any case, the Executive lacked the legal authority to detain him as an enemy combatant. The magistrate judge to whom the case had been assigned directed Petitioner to file "rebuttal evidence" and warned Petitioner that unless he came forward with "more persuasive evidence . . . the inquiry will end there." Order at 6-7, *al-Marri v. Hanft*, No. 2:04-cv-2257 (D.S.C. Dec. 19, 2005) (dkt. No. 41).

In response to the magistrate judge's order, al-Marri again argued that the allegations against him – many of which remained redacted – were legally insufficient; that the Executive had no legal authority to hold him in military custody; and that the process proposed by the magistrate judge, under which al-Marri bore the burden of disproving the Rapp Declaration's allegations, improperly shifted the burden of proof to Petitioner and forced him to bear an impossible evidentiary burden by refuting multiple hearsay allegations without access to the government's evidence, without discovery, and without knowledge of the identity of his accusers or the opportunity to confront them. The magistrate judge recommended dismissal of al-Marri's habeas petition, and the district court agreed. *al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006). Petitioner appealed.

On June 11, 2007, a divided panel of the United States Court of Appeals for the Fourth Circuit reversed the district court's judgment, holding that "our

Constitution does not permit the Government to subject *civilians* within the United States to military jurisdiction." *al-Marri v. Wright*, 487 F.3d 160, 182 (4th Cir. 2007). The court ruled that under applicable legal principles, al-Marri was a civilian, and the Government's allegations against him did not bring him within the legal category of "enemy combatants" who may constitutionally be detained during wartime. *Id.* at 174-89. In addition, the majority rejected the claim that the President was possessed of "inherent" constitutional authority "to order the military to seize and indefinitely detain civilians, even if the President calls them 'enemy combatants,'" warning that "[f]or a court to uphold a claim to such extraordinary power would do more than render lifeless the Suspension Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Sixth, and Eighth Amendments; it would effectively undermine all of the freedoms guaranteed by the Constitution." *Id.* at 195.

On the government's motion for rehearing, the Fourth Circuit vacated the panel opinion and heard the case *en banc*. On July 15, 2008, a divided *en banc* court issued a fragmented decision that again held al-Marri's military detention constitutionally deficient, although this time on procedural grounds. *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). Specifically, in a *per curiam* opinion, the court of appeals held by a 5-4 vote that Congress had empowered the President to detain persons lawfully resident in the United States indefinitely and without charge as enemy

combatants. But, by a different 5-4 majority, the court also ruled that al-Marri had been afforded insufficient process to challenge the government's allegations against him. *Id.* at 216-17.

Seven judges filed separate opinions. Five believed that al-Marri could be detained as an enemy combatant under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, if the facts alleged in the Rapp Declaration were true. *al-Marri v. Pucciarelli*, 534 F.3d at 216. However, those judges could not agree on a legal definition of "enemy combatant" or even on whether that definition had a statutory or constitutional basis. Instead, they issued three separate opinions providing three different definitions of an "enemy combatant" who may lawfully be subject to indefinite military detention. *Id.* at 253-54 (Traxler, J., concurring) (defining enemy combatant as a "belligerent[ ] who enter[s] our country for the purpose of committing hostile and war-like acts"); *id.* at 285 (Williams, C.J., concurring in part and dissenting in part) (individual is an enemy combatant if "(1) he attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force"); *id.* at 325 (Wilkinson, J., concurring in part and dissenting in part) (to be classified as an enemy combatant "the person must (1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in

conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization").

Four judges disagreed, arguing that al-Marri's indefinite detention was unauthorized by the AUMF and that the facts alleged in the Rapp Declaration did not render al-Marri an "enemy combatant." *Id.* at 231-37 (Motz, J., concurring). These judges also rejected the President's argument that he possessed inherent authority to detain al-Marri – a claim that no member of the *en banc* panel endorsed. *Id.* at 247-53.

As to the sufficiency of the process afforded al-Marri, the *en banc* court split 5-4 holding that the district court had erred in rigidly applying the burden-shifting framework set forth in *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35 (2004) (plurality op. of O'Connor, J.), to the different circumstances of al-Marri's domestic seizure and detention, and in accepting the hearsay Rapp Declaration without inquiring whether the government could provide non-hearsay evidence. *al-Marri v. Pucciarelli*, 534 F.3d at 267-70 (Traxler, J., concurring). Judge Traxler suggested, however, that the district court could consider hearsay evidence in violation of "the normal due process protections available to all within this country" if it concluded, as to any specific piece of evidence, that these protections were "impractical, outweighed by national security interests, or otherwise unduly burdensome." *Id.* at 273.

On September 19, 2008, al-Marri filed a petition for certiorari in this Court. Over the Government's objection, the Court granted the petition on December 5, 2008. *al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008). Upon his election, however, President Barack Obama immediately ordered a review of al-Marri's detention. Appellant App. 230. A little more than a month later, on February 26, 2009, a federal grand jury in the Central District of Illinois returned a two-count indictment charging Petitioner with conspiracy to provide material support to a foreign terrorist organization, and with providing such material support, in violation of 18 U.S.C. § 2339B(a)(1). App. 4. The next day, about a month before the deadline for the Government's opposition brief on the merits in this Court, the President ordered al-Marri transferred back to the criminal justice system, thereby rendering his legal challenge to military custody moot, and pretermitting a final adjudication by this Court of the lawfulness of his detention. Appellant App. 231. On March 6, 2009, this Court granted the Government's motion to transfer al-Marri, ordered the *en banc* judgment of the Fourth Circuit vacated, and remanded the case with instructions to dismiss as moot al-Marri's challenge to his nearly six-year-long military detention. *al-Marri v. Spagone*, 555 U.S. 1220 (2009).

Petitioner's Criminal Conviction and Sentencing

Pursuant to a plea agreement, al-Marri pleaded guilty on April 30, 2009, to one count of conspiracy to

provide material support to a foreign terrorist organization. App. 4. Prior to sentencing, the Federal Bureau of Prisons ("BOP") informed the sentencing court that under 18 U.S.C. § 3585(b), it would only grant al-Marri credit against his sentence for the time that he spent in pretrial criminal detention between January 28, 2002 and June 22, 2003, before he was designated an "enemy combatant," and for the period after he was transferred back to civilian custody, running from March 10, 2009 through the date of sentencing. App. 4. In other words, BOP would not give al-Marri credit for the 68 months he was detained as an enemy combatant (or for the three months he was detained as a material witness).

The statutory maximum sentence available was 180 months. At sentencing, on October 29, 2009, the court granted a nine-month reduction "to reflect the very severe conditions of part of his confinement at the Naval Brig." *Id.* (internal quotation omitted). More germane here, the sentencing court reduced the sentence "by 71 months to reflect the periods of time for which he will not be credited by the BOP." App. 5. It did so "to reflect just punishment for the offense" under 18 U.S.C. § 3553(a)(2)(A), particularly because al-Marri's "detention as a Material Witness and as an Enemy Combatant involved the same conduct with which he was charged in this indictment." Appellant App. 152. Indeed, the allegations in the Rapp Declaration that served as the sole factual basis for al-Marri's military detention described precisely the same facts that eventually formed the basis for the

plea agreement that produced his criminal conviction and sentence. *Compare* Appellant App. 217-25 (Rapp Decl.), *with id.* at 240-48 (plea agreement).

Government's Refusal to Award Good Conduct Time Credit for Military Detention, and Subsequent Proceedings Below

Following sentencing, BOP was charged with calculating an award of good conduct time ("GCT") credits for the time al-Marri had already served and that had been credited against the sentence. 18 U.S.C. § 3624(b)(1). Under the GCT statute, individuals may earn up to 54 days of credit per year of imprisonment against the time to be served by a federal inmate. In calculating al-Marri's GCT award, and notwithstanding the sentencing court's intention that it be viewed as credit against the time served in federal custody for precisely the same conduct, BOP refused to take into consideration al-Marri's 68-month period of detention as an enemy combatant (or his three-month detention as a material witness). App. 4. Instead, BOP calculated GCT credits only for those periods prior to the imposition of the sentence when al-Marri had been held in criminal pretrial detention under pending indictment. *Id.*

Petitioner al-Marri challenged BOP's calculation. After his administrative appeal was denied, al-Marri filed the present habeas petition seeking a calculation of GCT for the 71 months of detention as an enemy combatant and material witness. App. 5-6. The

petition asserted both a statutory and constitutional basis for his entitlement to a calculation of GCT credit for these periods. App. 6. The district court denied the petition, holding that the statutory claim failed and that the court was without authority to award a calculation of GCT credit as a remedy for a constitutional violation. On reconsideration, the district court assumed that al-Marri's detention was unconstitutional and that it was within the court's equitable powers to order the remedy sought, but nevertheless rejected Petitioner's request because "[t]he sentencing court has, in effect, addressed the issue of the Petitioner's confinement as a material witness and as an enemy combatant in harsh conditions by its substantial departure from the Sentencing Guidelines." App. 14-15. Accordingly, the district court left al-Marri without the GCT credits for which he would have been eligible had he been held in ordinary criminal custody rather than as an enemy combatant.

Petitioner al-Marri appealed both the statutory and constitutional holdings to the United States Court of Appeals for the Tenth Circuit. That court rejected al-Marri's statutory arguments, largely deferring to BOP's interpretation of the applicable provisions. App. 7-11. With respect to the question of constitutional remedy, the court held that the district court's decision to deny any remedy was not an abuse of discretion. App. 11-12.

Petitioner now seeks this Court's review only on the issue of whether al-Marri's detention was

unconstitutional and unauthorized by the laws of the United States; and, if so, whether a district court possesses the discretion to deny al-Marri relief by permitting his imprisonment for a longer period of time than would have been the case had he not been unlawfully diverted from our civilian system of justice, where he was a lawful pretrial detainee, to the military, where he was held, indefinitely and without charge, as an enemy combatant.

The courts below failed to confront the constitutional and statutory issue here raised, or to award the concrete, readily available remedy that is necessary to cure al-Marri's deprivation of liberty under this Court's test for the adequacy of habeas remedies. But the key question upon which such remedy rests is whether his military detention was unlawful in the first place, and it is on that question – one of immense constitutional significance – that this Court should grant certiorari.

REASONS FOR GRANTING THE PETITION

This case raises the important question whether (and, if so, when) the Executive can, consistent with the AUMF and the Constitution, seize and subject to indefinite military detention, without criminal charge or trial, a person lawfully residing in the United States based on government assertions that he is an "enemy combatant." Petitioner al-Marri's military detention, which lasted some 68 months, is now over.

But the government continues to impose a concrete injury upon him as a direct and specific result of his unconstitutional treatment. Specifically, by denying him good conduct time credits for his almost six-year period of detention in a U.S. government facility for precisely the same conduct as that for which he now serves his criminal sentence, the government fails to make him whole for having unlawfully detained him. That is, every additional day that al-Marri will spend in prison as a result of being denied GCT credits while in U.S. custody as an enemy combatant is solely the result of the government's unauthorized and unconstitutional decision to divert him from the criminal justice system in which he was charged and to hold him in military custody, indefinitely and without charge, as an enemy combatant.

The courts below refused to order respondent to calculate an award of GCT credit for this 68-month period as a remedy for the unconstitutional and unauthorized deprivation of liberty suffered by al-Marri, citing their equitable discretion with regard to remedies in habeas corpus. But such refusal stands in opposition to this Court's precedents regarding remedies for constitutional violations, which require courts to award a remedy, where one is available, that is "tailored to the injury suffered" and that "must neutralize the taint of a constitutional violation, while at the same time not grant a windfall to the defendant." *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (internal quotations omitted); *see also, e.g.*, *United States v. Morrison*, 449 U.S. 361, 364 (1981); *Milliken v. Bradley*,

418 U.S. 717, 746 (1974) (constitutional remedies are "necessarily designed, as all remedies are, to restore the victims of [constitutional violations] to the position they would have occupied in the absence of such conduct"). That is, to award no remedy, as did the courts below, fails to neutralize the taint of the constitutional violation. Indeed, there could be no more carefully tailored remedy than the one Petitioner seeks: an order requiring Respondent merely to calculate an award of GCT. It was, however, not open to the courts below, as a matter of either law or of equitable discretion, to simply refuse to award a remedy if there was a violation. *See infra* Section II.

Thus, the key question presented here is the same as that presented the last time this matter was before this Court. Then, the Court granted review on the question whether "the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize[d] – and if so d[id] the Constitution allow – the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?" *al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008). That is, the Court has once before determined to address the question of the lawfulness of al-Marri's detention. If, as al-Marri contends, his detention was unlawful, then the courts below erred in denying him a remedy that provided redress of this violation. *See infra* Section I.

I. THIS CASE RAISES A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

This case raises a legal question of extraordinary significance: the scope of the Executive's authority to order domestic terrorism suspects – including American citizens, lawful permanent residents, and individuals apprehended within the United States – held indefinitely and without charge. The profound importance of this question is self-evident; that this Court previously granted certiorari on it makes clear that it is worthy of the Court's review, no less today than in 2008.

Even before accepting al-Marri's 2008 petition, members of this Court had on multiple occasions signaled the importance of determining the lawful scope of the military's authority to detain citizens or legal immigrants arrested on U.S. soil upon allegations of involvement in terrorism. *See Rumsfeld v. Padilla*, 542 U.S. at 450 (in a case of a citizen challenging his indefinite detention by the military without charge, refusing to resolve the merits on jurisdictional grounds even though "the merits of this case are indisputably of profound importance") (internal quotation omitted)); *id.* at 465 (Stevens, J., dissenting) ("At stake . . . is nothing less than the essence of free society."); *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Kennedy, J., concurring in the denial of certiorari) ("[Petitioner's] claims raise fundamental issues respecting the separation of powers."). The judges in the Fourth Circuit, though

divided on the merits, also emphasized the surpassing importance of the question presented. *See, e.g.*, *al-Marri v. Pucciarelli*, 534 F.3d at 219 (Motz, J., concurring) (stating that "[t]o allow the President, in the absence of congressional authorization, to exercise military force against civilians in this country is to abandon these principles" of "freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers" (internal quotation omitted)); *id.* at 293 (Wilkinson, J., concurring in part and dissenting in part) ("I recognize that the military detention of someone lawfully in this country is a momentous step, but a refusal to recognize Congress's ability to authorize such a detention in these circumstances would be more momentous still.").

Moreover, this case permits the Court to clarify the application of its holding in *Hamdi v. Rumsfeld*, which was carefully limited to the "narrow circumstances considered [t]here" of a citizen captured fighting for the Taliban on a battlefield in Afghanistan. 542 U.S. at 516. In particular, *Hamdi* left for another day the scope of the military's authority to detain citizens and legal immigrants on U.S. soil not because they actually took up arms on a battlefield, but solely on the basis of allegations of involvement in terrorism plots. *Hamdi* also left open the question of what process is due to such individuals to challenge their detention. Both questions can finally be resolved in the present case.

Such resolution is necessary given the current confusion in the law. The Fourth Circuit's *en banc* ruling in al-Marri's prior case, vacated as moot by this Court after certiorari had been granted, articulated three different and novel definitions of "enemy combatants," individuals who could lawfully be subject to indefinite military detention despite their liberty interests deriving from their lawful permanent residence (as in al-Marri's case), their American citizenship, or their presence on U.S. soil. *See supra* at 9-10. The four dissenting judges articulated a fourth definition. *See id.* at 10. And the Fourth Circuit's prior decision in *Padilla v. Rumsfeld* articulated yet another standard. *See* 432 F.3d 582, 583 (4th Cir. 2005). Each of these opinions makes a considerable effort to define the scope of the Government's authority but, as demonstrated by the diversity of opinions, the matter is yet unresolved, and the executive, legislative and judicial branches are accordingly left without the guidance of this Court with regard to this fundamental question.

Similarly, the Fourth Circuit *en banc* decision was divided as to the procedures owed to al-Marri to challenge his detention. Judge Traxler, joined by four judges, held that the district court erred by applying the relaxed evidentiary standards articulated in *Hamdi*, 542 U.S. at 533-34, for purposes of battlefield captures. *al-Marri v. Pucciarelli*, 534 F.3d at 268-74 (Traxler, J.) (internal quotation and citation omitted). By contrast, Chief Judge Williams and Judges Wilkinson, Niemayer, and Duncan, all agreed with the

district court's approach, including its sole reliance upon the hearsay Rapp Declaration. *Id.* at 288-93 (Williams, C.J.); *id.* at 294-95, 329-38 (Wilkinson, J.); *id.* at 346-51 (Niemayer, J.); *id.* at 351 (Duncan, J.).

Only this Court has the authority to resolve conclusively this confusion in the law. Moreover, the issue presented here is still extraordinarily salient, even though al-Marri is no longer militarily detained. First and foremost, of course, it is critical to al-Marri himself, for he stands to spend almost a year more in prison as a result of the violation of his constitutional right. But beyond his specific circumstances, the question of the Executive's authority under the AUMF and the Constitution to detain individuals seized on U.S. soil persists in its significance.

Thus, for example, Congress recently enacted a statute "affirming" the authority of the President under the AUMF to militarily detain individuals who were "part of" or who "substantially supported al Qaeda, the Taliban or associated forces . . . including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." National Defense Authorization Act for Fiscal Year 2012 ("NDAA"), Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (codified at note following 10 U.S.C. § 801). The provision makes no specific exception for domestic military detentions, instead affirming the "existing law" on point. *Id.* § 1021(e) ("Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident

aliens of the United States, or any other persons who are captured or arrested in the United States."). But, of course, the existing law is, as described above, unresolved.

Indeed, Congress has noted the importance of this Court deciding the legal limits on the Executive's military detention authority. In deliberating the NDAA, members of Congress acknowledged the law's current opacity and pointedly observed that the scope of the Executive's detention power is a question for this Court to decide. As Senator Durbin remarked:

> To this day, the Supreme Court has never ruled on the question of whether it is constitutional to indefinitely detain a U.S. citizen captured in the United States. . . . [T]he language we have agreed on makes it clear that section [1021] will not change the law in any way. The Supreme Court will decide who will be detained; the Senate will not.

157 Cong. Rec. S8,094, S8,124 (daily ed. Dec. 1, 2011); *see also id.* (statement of Sen. Graham) ("The ultimate authority on the law is not Lindsey Graham or Dick Durbin, it is the Supreme Court of the United States. That is the way it should be, and that is exactly what we say here."). Indeed, given Congress's determination that it is for this Court to decide whether the Executive may indefinitely detain domestic terrorism suspects, at least one Court of Appeals has very recently concluded that the existing detention law "simply says nothing at all" on the lawfulness of the military detention of "citizens,

lawful resident aliens, or individuals captured or arrested in the United States." *Hedges v. Obama*, Nos. 12-3176 (L), 12-3644 (Con), slip op. at 39 (2d Cir. July 17, 2013). Congress, therefore, has plainly spoken: this Court – and only this Court – may decide the critical question that this petition presents.

Moreover, the importance of clarifying the constitutional limits on domestic military detention authority is amplified by another provision of the NDAA, which *requires* military detention under certain circumstances. NDAA § 1022(a)(1)-(4), 125 Stat. at 1563. While the statute exempts U.S. citizens from this presumptive requirement of military custody, *id.* § 1022(b)(1), it requires mandatory detention of lawful permanent residents, such as al-Marri, "to the extent permitted by the Constitution of the United States," *id.* § 1022(b)(2).

Further, there continue to be regular calls from members of the legislative branch for the President to divert domestic terrorism suspects from the criminal justice system and into indefinite military detention. A recent such demand for military detention came from two prominent senators who called for the surviving suspect in the Boston marathon bombings to be taken into military custody, even though he is a U.S. citizen and even though there was no evidence that he acted at the direction or in coordination with any international terrorist groups:

> The accused perpetrators of [the Boston marathon bombings] were not common criminals

> attempting to profit from a criminal enterprise, but terrorists trying to injure, maim, and kill innocent Americans. . . .
>
> Under the Law of War we can hold this suspect as a potential enemy combatant not entitled to Miranda warnings or the appointment of counsel. Our goal at this critical juncture should be to gather intelligence and protect our nation from further attacks.
>
> We remain under threat from radical Islam and we hope the Obama Administration will seriously consider the enemy combatant option. We will stand behind the Administration if they decide to hold this suspect as an enemy combatant.

Statement of Sens. Lindsay Graham & John McCain (Apr. 19, 2012 10:17 PM), https://www.facebook.com/USSenatorLindseyGraham/posts/10151453916938229 (last visited July 21, 2013).

The propriety of this type of demand is implicated by the issues presented here. Nor has the President ended this debate, for while he has indicated that he does not intend to militarily detain citizens, he has not foreclosed the possibility of detaining non-citizens arrested in the United States, such as al-Marri. *See* Statement by the President on H.R. 1540 (Dec. 31, 2011), http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540 (last visited July 21, 2013) ("I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. . . .

My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.").

In short, developments in society and in the law demand that the statutory and constitutional limits of the military detention to which al-Marri was subjected be defined. This case presents the Court with the opportunity to do just that. Until it again avails itself of that opportunity, the continuing uncertainty will serve neither liberty nor security. Certiorari should, therefore, be granted.

II. THIS CASE PROPERLY PRESENTS THE QUESTION OF THE LAWFULNESS OF PETITIONER'S MILITARY DETENTION

This case presents the statutory and constitutional issue described above squarely, despite the fact that Petitioner has long since been released from the Naval Brig and returned to federal criminal custody. This is because al-Marri continues to suffer a concrete and specific harm as a direct result of the time spent in military detention. Specifically, Respondent has perpetuated the effects of Petitioner's unlawful military detention by refusing to calculate good conduct time credits for the period of time served by al-Marri in military detention. As a federal prisoner, Petitioner is entitled by statute to a calculation of GCT credit of up to 54 days for every year of time served on the sentence. *See* 18 U.S.C. § 3624(b); *Barber v. Thomas*,

130 S. Ct. 2499, 2502 (2010). By refusing to calculate such credits for the time spent at the Naval Brig, Respondent denies al-Marri potential credits against his sentence even though those credits would indisputably be available had the government held al-Marri at all times in lawful criminal custody as a pretrial detainee, rather than in military detention as an enemy combatant. Moreover, the loss of credits is not negligible: if he were awarded the maximum possible credit for the 68 months that he spent in detention as an enemy combatant, al-Marri's release date, currently set for January 18, 2015, would be advanced by more than ten months. In other words, absent a judicial remedy, the government will imprison al-Marri for nearly one additional year solely as a result of its decision to subject him to military detention that, he submits, violated his constitutional rights. In short, Petitioner is being made to suffer twice for his unlawful detention – first, by the detention itself, and now by the denial of credits for which he otherwise be considered.

The district court erred in failing to adjudicate the lawfulness of al-Marri's detention and refusing to award a remedy, regardless of the constitutionality of that detention. And if, as the Fourth Circuit previously determined, the claim was meritorious, then, however broad the district court's discretion to craft an equitable remedy, it was not within its discretion to award no remedy at all. The courts below sought to avoid adjudicating the merits of al-Marri's constitutional claims by assuming a violation and then

awarding no remedy. App. 12, 14. This was an abdication of responsibility: if the courts below determined that al-Marri's period of military detention was unlawful, then they were obligated to effect a remedy – which, here, could only be an order requiring the calculation of GCT credits for his 68 months of military detention.

Longstanding and elemental principles of constitutional adjudication inform this analysis, and are at stake in this appeal. Thus, this Court has long insisted that where a constitutional right is violated, a remedy should issue. *See generally Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (federal jurisdiction includes "not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, but also the

authority to choose among available judicial remedies in order to vindicate constitutional rights") (internal citation omitted).

In accordance with these principles, modern precedents governing the award of habeas remedies for constitutional violations reiterate that "remedies should be tailored to the injury suffered" and "must neutralize the taint of a constitutional violation, while at the same time not grant a windfall." *Lafler*, 132 S. Ct. at 1388 (internal quotation omitted); *accord Rushen v. Spain*, 464 U.S. 114, 119-20 (1983) (holding, in the context of a habeas petition, that "[t]he adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred"); *Morrison*, 449 U.S. at 364 (stating that "the general rule" is that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests"); *Milliken*, 418 U.S. at 746 (constitutional remedies are "necessarily designed, as all remedies are, to restore the victims of [constitutional violations] to the position they would have occupied in the absence of such conduct").

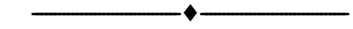
In this case, the "taint" of al-Marri's unlawful detention may be "neutralized" only by a calculation of GCT credits for the 68 months he was held as an enemy combatant; in the absence of the unauthorized and unconstitutional decision to hold him without charge, he would have remained in criminal custody, accruing such credits. In other words, every additional day that al-Marri spends in prison because of

BOP's refusal to calculate an award of GCT credits is a day tainted by the government's unlawful conduct. The appropriate remedy, then, is obvious and readily available: to order BOP to calculate an award of good conduct time. *See, e.g.*, *Bell*, 327 U.S. at 684 ("[F]ederal courts may use any available remedy to make good the wrong done."); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."). Nor can it be said that this remedy must be withheld because it would constitute a "windfall" or is otherwise unfair to the government, and neither court below rested its refusal to order the remedy sought on this basis.

The courts below offered two reasons for refusing to order a remedy, neither of which constitutes a basis for denying al-Marri the relief to which he is entitled as a result of the violation of his constitutional rights engendered by his detention as an enemy combatant. First, of course, it is simply not the case, as the lower courts stated, that the sentencing court provided the full measure of relief to which al-Marri was entitled by crediting against his sentence the time spent at the Naval Brig; rather, al-Marri was provided a month-for-month credit that did not include a calculation of GCT. And second, the lower courts expressed their concern that they lacked the power to order a calculation of GCT credit as an equitable remedy, where such a calculation was not necessarily owed pursuant to the GCT statute. App. 11-12, 14. But

"[t]he federal courts' power to grant relief not expressly authorized by Congress is firmly established," *Bush*, 462 U.S. at 374, and the courts have often awarded constitutional remedies not provided by statute, *see, e.g.*, *id.* at 374 n.12 (collecting examples); *Lafler*, 132 S. Ct. at 1389 (holding that in order to remedy ineffective assistance of counsel in plea bargaining, a court "may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between" even though no statute remotely contemplates such remedies). Moreover, this Court has specifically held that a court's authority to order constitutional remedies is not generally limited, "unless Congress has expressly indicated otherwise," *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66-71 (1992), and neither the courts below nor the government have pointed to any statute limiting the courts' remedial power to order BOP to calculate an award of GCT credits.

In sum, the district court's refusal to award a remedy – and the court of appeals' affirmance thereof – were unjustified as a matter of law. If al-Marri's detention was unconstitutional, as the Fourth Circuit held it was, then it was error not to grant a remedy that removes the taint of the constitutional violation, particularly the readily available one of requiring a calculation of GCT credits for the period of unconstitutional detention.



CONCLUSION

The essential question presented to this Court is whether, under the Constitution and laws of the United States, it was permissible to seize Petitioner, who was legally present in the United States, and to remove him from the civilian system of criminal justice and detain him indefinitely and without charge as an enemy combatant. This Court should again grant Petitioner's application for a writ of certiorari in order to determine when the President of the United States can be permitted to substitute indefinite military detention for criminal prosecution. And, if such substitution was unlawful, this Court should further hold that this violation must be remedied by awarding appropriate equitable relief – here, in the form of good conduct time credits reflecting Petitioner's 68 months' unlawful military detention.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALI SALEH KAHLAH AL-MARRI, Petitioner-Appellant, v. BLAKE DAVIS, Warden, ADX-Florence, Respondent-Appellee.	No. 12-1230

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 1:11-CV-02255-RPM)

(Filed Apr. 24, 2013)

Lawrence Lustberg, (Darold W. Killmer of Killmer, Lane & Newman, L.L.P., Denver, Colorado; Jonathan Manes of Gibbons, P.C., on the briefs), Newark, New Jersey, for Petitioner-Appellant.

Michael C. Johnson, Assistant United States Attorney, (and John F. Walsh, United States Attorney, on the brief), Denver, Colorado, for Respondent-Appellee.

Before **KELLY**, **MCKAY**, and **O'BRIEN**, Circuit Judges.

KELLY, Circuit Judge.

Petitioner-Appellant Ali Saleh Kahlah al-Marri, a federal inmate, appeals from the district court's judgment denying his petition for a writ of habeas corpus. 28 U.S.C. § 2241. Mr. al-Marri is serving a 100-month federal sentence for conspiracy to provide material support or resources to a foreign terrorist organization (al-Qaeda). 18 U.S.C. § 2339B(a)(1). He contends that he is entitled to Good Conduct Time (GCT) for the 71 months he was held as a material witness and an enemy combatant. The Bureau of Prisons (BOP) and the district court did not agree. On appeal, he claims that he is entitled to a GCT calculation under 18 U.S.C. § 3624(b), or as an equitable remedy for his allegedly unconstitutional detention. Exercising our jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm the district court's denial of relief.

Background

On December 12, 2001, the Federal Bureau of Investigation (FBI) arrested Mr. al-Marri as a material witness to the September 11, 2001 terrorist attacks against the United States. Aplt. App. 6, 240. Following the arrest, Mr. al-Marri was held in Peoria County Jail, Illinois, until January 4, 2002. *Id.* at 6-7.

He was then transferred to the Metropolitan Correctional Center (MCC) in Manhattan. *Id.* at 7.

Mr. al-Marri was subsequently indicted in federal district court (Southern District of New York) on charges of credit card fraud, bank fraud, identity theft, and making false statements to the FBI. *Id.* The charges were eventually dismissed on the ground of improper venue. *Id.* The government immediately refiled an indictment in another federal district (Central District of Illinois). *Id.* Accordingly, Mr. al-Marri was transferred back to Peoria County Jail. *Id.*

On June 23, 2003, President George W. Bush declared Mr. al-Marri to be an "enemy combatant" and ordered Mr. al-Marri's transfer to the Department of Defense. *Id.* at 7, 215, 231. In response, the Illinois federal district court dismissed the indictment with prejudice. *Id.* at 7.

As an enemy combatant, Mr. al-Marri was held at the Consolidated Naval Brig in Charleston, South Carolina for over five years and eight months. *Id.* He repeatedly challenged the constitutionality of his detention. *Id.* Fourth Circuit held that Mr. al-Marri's military detention was an unconstitutional violation of his Due Process rights. *al-Marri v. Pucciarelli,* 534 F.3d 213, 216 (4th Cir. 2008) (*en banc*) (affirming *al-Marri v. Wright,* 487 F.3d 160 (4th Cir. 2007)). On appeal, however, the Supreme Court vacated the Fourth Circuit's decision as moot because Mr. al-Marri had been transferred back to civilian custody pursuant to

a Presidential order. *al-Marri v. Spagone,* 555 U.S. 1220 (2009).

On February 26, 2009, a federal grand jury in Illinois indicted Mr. al-Marri on two counts of providing material support or resources to a designated foreign terrorist organization. 18 U.S.C. § 2339B(a)(1); Aplt. App. 8. On March 10, 2009, the Secretary of Defense turned Mr. al-Marri over to the U.S. Marshals Service. Aplt. App. 8. After a detention hearing, Mr. al-Marri was denied bail and transferred to Illinois, where he was held at a federal correctional institution. *Id.*

On April 30, 2009, Mr. al-Marri entered a plea agreement in which he pled guilty to one count of violating 18 U.S.C. § 2339B(a)(1). *Id.* at 232-51. The Guideline range was 292-360 months, but the statutory maximum was 180 months. *Id.* at 151.

Prior to sentencing, the BOP had indicated that under 18 U.S.C. § 3585(b), it would only grant prior custody credit for the time Mr. al-Marri spent in pretrial criminal detention between January 28, 2002 and June 23, 2003, and the period after he was transferred back to civilian custody, from March 10, 2009 through the date of sentencing. *Id.* at 9-10, 166, 172-74. In other words, the BOP was unwilling to credit Mr. al-Marri for the 71 months he was held as a material witness and an enemy combatant. *Id.*

Taking into account the BOP' s indication that it would deny Mr. al-Marri credit for the 71 months, the sentencing court explained that it would reduce the

maximum period of confinement (180 months) "by 71 months to reflect the periods of time for which he will not be credited by the [BOP]." *Id.* at 152. The court further reduced the sentence by nine months "to reflect the very severe conditions of part of his confinement at the Naval Brig." *Id.* Thus, the court sentenced Mr. al-Marri to 100 months' imprisonment. *Id.* at 145-56.

After sentencing, the BOP credited Mr. al-Marri under § 3585(b) for both periods spent in pretrial criminal detention (totaling 745 days), but refused to grant prior custody credit for the 71 months during which Mr. al-Marri was held as a material witness and an enemy combatant. *Id.* at 9-10, 154. Pursuant to 18 U.S.C. § 3624(b)(1), which entitles a prisoner to 54 days of OCT for each year served, the BOP granted Mr. al-Marri 108 days of GCT for his 745 days of prior custody credit. *Id.* at 9-10, 154-56. Consistent with its denial of prior custody credit for the 71 months, the BOP declined to grant Mr. al-Marri GCT for the period he was held as a material witness and an enemy combatant. *Id.* at 9-10.

Through counsel, Mr. al-Marri wrote two letters to the BOP challenging the calculation of GCT. *Id.* at 180-83. The BOP reiterated the basis of its calculation, and advised that Mr. al-Marri could challenge the calculation through an administrative appeal. *Id.* at 184. Mr. al-Marri then brought an administrative appeal, which the BOP denied on August 27, 2010, explaining that Mr. al-Marri's time as a material witness and an enemy combatant did not constitute

"official detention," under 18 U.S.C. § 3585(b). *Id.* at 185-86. Therefore, the BOP concluded he was not entitled to GCT under 18 U.S.C. § 3624(b). *Id.*

Mr. al-Marri then filed the instant § 2241 petition seeking a statutory calculation of GCT for the 71 months he was detained or, in the alternative, a calculation as an equitable remedy for his allegedly unconstitutional detention. *Id.* at 5-18. After oral argument, the district court denied the petition. *Id.* at 55-57. The court held that: 1) the GCT "statute does not become applicable until a prisoner begins service of the sentence imposed by the court," and 2) "there is no authority for this court to grant the requested [equitable] relief." *Id.* at 56-57. Mr. al-Marri sought reconsideration. *Id.* at 59-77. In denying reconsideration, the district court again stated that the BOP had correctly calculated Mr. al-Marri's statutory entitlement to GCT. *Id.* at 104. Further, assuming it had the equitable authority to order the BOP to make a calculation "contrary to its statutory duty," the district court expressly declined to exercise that power. *Id.*

Discussion

When reviewing the denial of a habeas petition under § 2241, we review the district court's legal conclusions de novo and accept its factual findings unless clearly erroneous. *Standifer v. Ledezma,* 653 F.3d 1276, 1278 (10th Cir. 2011).

A. Statutory Entitlement to Good Time Credit

Mr. al-Marri argues that the sentencing court's 71-month reduction qualifies as "prior custody credit" under § 3585(b), thereby entitling him to a calculation of GCT under § 3624(b). But this argument is foreclosed by the Supreme Court's decision in *United States v. Wilson,* 503 U.S. 329 (1992). *Wilson* held that a sentencing court does *not* have authority to grant prior custody credit under § 3585. *Id.* at 333 (emphasis added); *see United States v. Jenkins,* 38 F.3d 1143, 1144 (10th Cir. 1994). Instead, that authority is vested with the Attorney General, acting through the BOP. *See Wilson,* 503 U.S. at 335; *Jenkins,* 38 F.3d at 1144; *see also United States v. Peters,* 470 F.3d 907, 909 (9th Cir. 2006).

The sentencing court accounted for the 71-month period Mr. al-Marri was held as a material witness and an enemy combatant by reducing the maximum period of confinement. Were we to accept Mr. al-Marri's argument and deem the sentencing court's decision to be a § 3585(b) credit, the proper recourse would be to vacate the sentence and remand, thereby exposing Mr. al-Marri to the possibility of an additional 71 months. *See Jenkins,* 38 F.3d at 1144 (vacating district court's award of sentence credit). Instead, we construe the sentencing court's decision as an exercise of its discretion under 18 U.S.C. § 3553(a)(2)(A).

Additionally, credit is only available for "a term of imprisonment for any time . . . spent in official

detention prior to the date the sentence commences . . . *as a result of the offense for which the sentence was imposed*." 18 U.S.C. § 3585(b) (emphasis added).[1] Here, Mr. al-Marri was held for 71 months as a material witness and an enemy combatant. The detention of enemy combatants is an exercise of Executive power – it is not dependent on a showing that the detainee has violated civilian law. Moreover, the Court has explained that the purpose of detention is preventative rather than punitive. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 518-19 (2004). Mr. al-Marri was detained because the President declared him to be an enemy combatant; he was not detained for an alleged violation of the federal criminal code. *See United States v. Aslan,* 644 F.3d 526, 532 (7th Cir. 2011) (denying credit where "time in state custody was not as a result of the offense for which the federal sentence was imposed," and noting that "no federal charges were even filed until after [petitioner] was released from state custody"); *cf. Bloomgren v. Belaski,* 948 F.2d 688, 690 (10th Cir. 1991). Similarly, Mr. al-Marri was held under 18 U.S.C. § 3144 as a material witness – *not* as punishment for providing material support to a terrorist organization. In short,

[1] Section 3585 repealed an earlier statute that provided credit "for any days spent in custody in connection with the offense *or acts* for which the sentence was imposed." *Bloomgren v. Belaski,* 948 F.2d 688, 689-90 (10th Cir. 1991) (quoting 18 U.S.C. § 3568 (1976), *repealed by* the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 212(a)(2), 98 Stat. 1987) (emphasis added).

neither period of Mr. al-Marri's 71-month detention met § 3585(b)'s express requirement, and he was therefore ineligible for GCT.

Next, Mr. al-Marri argues that if the 71-month sentencing reduction does not constitute "prior custody" under § 3585(b), the "period should still be awarded because . . . it is undoubtedly 'time served' and therefore part of the 'term of imprisonment' within the meaning of the GCT, § 3624(b)." Aplt. Br. 23 n.4. For the purpose of this appeal, we will assume that § 3624(b)'s phrase "term of imprisonment" is ambiguous – i.e., it could be interpreted as encompassing presentence custody credited under § 3585(b) *or* presentence custody as reflected in a sentence crafted under § 3553. However, even assuming the statute is ambiguous, we believe the BOP reached the most logical conclusion.

In its response to Mr. al-Marri's appeal, the BOP explained that it had awarded GCT based on Mr. al-Marri's official detention period under § 3585(b). *See* Aplt. App. 186. As the Second Circuit recently held, "the most natural reading of the statute is that a defendant is eligible for GCT only as to the 'term of imprisonment' which constitutes the defendant's federal sentence as defined by § 3585." *Lopez v. Terrell,* 654 F.3d 176, 184 (2d Cir. 2011) (holding that GCT *cannot* be awarded where the sentencing court has granted an adjustment under U.S.S.G. § 5G1.3(b) for presentence custody because that time does not constitute part of the defendant's federal sentence); *see also Schleining v. Thomas,* 642 F.3d 1242, 1247-49

(9th Cir. 2011) (same). We likewise find the BOP's reading of the statute to be the most natural, and therefore defer to its persuasive interpretation.[2] *See id.* at 190 (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)); *see also Izzo v. Wiley,* 620 F.3d 1257, 1261 (10th Cir. 2010).

Finally, we are not persuaded by Mr. al-Marri's argument that *Barber v. Thomas,* 130 S. Ct. 2499 (2010) compels a different outcome. *Barber* held that "the phrase 'term of imprisonment' . . . refers to prison time actually served rather than the sentence imposed by the judge." *Id.* at 2506-07. Significantly, *Barber* did not involve a claim for GCT based on a time period *outside* the sentence imposed – its holding concerned only time served *within* the petitioner's sentence. Perhaps more important, the *Barber* Court deferred to the BOP's calculation system which, according to the Court, "reflects the most natural reading of the statute." *Id.* at 2502. Similarly, we find that the BOP's calculation of GCT for Mr. al-Marri comports with the most natural reading of the statute – that GCT applies only to time served under the actual

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[2] Consistent with the *Lopez* decision – and construing the facts in Mr. al-Marri's favor – we will also assume that the BOP's implementing regulation, 28 C.F.R. § 523.20, does not resolve the statutory ambiguity. *See Lopez,* 654 F.3d at 181-82. Thus, we do not apply the more deferential *Chevron* standard to the BOP's interpretation. *See id.* at 183; *see also Christensen v. Harris Cnty.,* 529 U.S. 576, 587 (2000). Instead, we consider whether the agency's informal interpretation has the "power to persuade." *Christensen,* 529 U.S. at 587.

sentence. We therefore defer to the BOP's interpretation.

B. Good Time Credit As an Equitable Remedy

As an alternative to his statutory claim, Mr. al-Marri argues that the BOP's refusal to calculate GCT for his unlawful detention entitles him to equitable relief. In denying reconsideration, the district court explained that its "ruling was and is that the [BOP] correctly determined that in awarding good time credits the term of imprisonment began when the sentence was imposed." Aplt. App. 104. Further, the district court stated that even assuming it had "equitable power to direct the [BOP] to act contrary to its statutory duty, the request is rejected." *Id.* As the district court explained, "[t]he sentencing court has, in effect, addressed the issue of the Petitioner's confinement as a material witness and as an enemy combatant in harsh conditions by its substantial departure from the Sentencing Guidelines." *Id.*

We review the district court's decision whether to exercise its equitable powers for abuse of discretion. *Clark v. State Farm Mut. Auto. Ins. Co.,* 433 F.3d 703, 709 (10th Cir. 2005). "A district court abuses its discretion when it renders a judgment that is arbitrary, capricious . . . or manifestly unreasonable." *United States v. Damato,* 672 F.3d 832, 838 (10th Cir. 2012) (quotation omitted).

Whether a district court is authorized to order a GCT calculation contrary to the BOP's statutory duty

is hardly clear. *See* Aplee. Br. 38-40. But even assuming such power, the district court did not abuse its discretion in declining to exercise it. As the district court explained, the BOP followed its statutory duty. Moreover, the sentencing court thoroughly considered, and clearly accounted for, Mr. al-Marri's 71-month detention in arriving at a sentence. Therefore, the district court's decision not to exercise its purported equitable power was not arbitrary, capricious, or unreasonable.

AFFIRMED. We GRANT the government's motion to strike pages 202-13 from appellant's appendix because the material was not before the district court. *Lantec, Inc. v. Novell, Inc.,* 306 F.3d 1003, 1022 (10th Cir. 2002).

McKAY, Circuit Judge, concurring:

I join in the court's opinion with the exception of its unnecessary resolution of whether Mr. al-Marri was eligible for prior custody credit under 18 U.S.C. § 3585(b) for the period of time he was detained as an enemy combatant. As the majority notes, the sentencing court did not have authority to grant prior custody credit under § 3585(b). (Majority Op. at 6.) The authority to do so is vested with the Attorney General, acting through the BOP. (*Id.*) To the extent Mr. al-Marri maintains he was improperly denied prior custody credit for his detention as an enemy combatant, the appropriate means by which to raise that argument is through a § 2241 petition challenging the

BOP's refusal to award such credit. *See Heddings v. Garcia,* 491 F. App'x 896, 898 (10th Cir. 2012) (arguing in a § 2241 petition "that the BOP failed to properly credit prior custody/time served" (internal quotation marks omitted)). Mr. al-Marri has not brought such a challenge – he argues only that a calculation of good credit time was required because his detention "meet[s] the requirements for prior custody credit under 18 U.S.C. § 3585(b)." (Appellant's Opening Br. at 23.) Accordingly, the question of whether the BOP erred in refusing to award prior custody credit for Mr. al-Marri's detention as an enemy combatant is not properly before us. Nor do we have reason to consider whether the sentencing court should have awarded such credit – something it unquestionably lacked authority to do. I therefore consider the majority's discussion of this issue dicta. I would leave to another day, when resolution of this issue is fully and squarely required in a case before us, any consideration of the matter.

Without reaching the merits of Mr. al-Marri's argument, I do note, however, that I see nothing in the language of 18 U.S.C. § 3585(b) that would foreclose the possibility that detention as an enemy combatant could, under the proper circumstances, qualify for prior custody credit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 11-cv-02255-RPM

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

BLAKE DAVIS, Warden, ADX-Florence,

Defendant.

ORDER DENYING MOTION
FOR RECONSIDERATION

On March 16, 2012, the Petitioner filed a Motion for Reconsideration and Brief in Support of Motion for Reconsideration [21], arguing that this Court misapprehended his argument that the 71 months should be regarded as "credit already provided for time served against the actual term of imprisonment of 71 months." This Court's ruling was and is that the Bureau of Prisons correctly determined that in awarding good time credits the term of imprisonment began when the sentence was imposed, October 29, 2009. The Petitioner's motion, brief and reply brief refer to recent Supreme Court rulings concerning the type of relief available by a unit of habeas corpus. Assuming that this Court has equitable power to direct the Bureau of Prisons to act contrary to its statutory duty, the request is rejected. The sentencing court

has, in effect, addressed the issue of the Petitioner's confinement as a material witness and as an enemy combatant in harsh conditions by its substantial departure from the Sentencing Guidelines. It is

ORDERED that the motion for reconsideration is denied.

DATED: May 4th, 2012

BY THE COURT:

s/Richard P. Matsch
Richard P. Matsch,
Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 11-cv-02255-RPM

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

BLAKE DAVIS, Warden, ADX-Florence,

Defendant.

ORDER DENYING RELIEF

In this habeas corpus proceeding under 28 U.S.C. § 2241, Ali Saleh Kahlah Al-Marri seeks to mitigate the perceived injustice of his confinement in civilian custody as a material witness and in military custody as an enemy combatant by asking this court to direct the Bureau of Prisons to consider that time as time served on his 100 month prison sentence for the purpose of awarding good time credits under 18 U.S.C. § 3624(b).

Al-Marri was sentenced to a term of 100 months by Judge Michael M. Mihm in the United States District Court for the Central District of Illinois on October 29, 2009. The sentence was based on a guilty plea to the charge of Conspiracy to Provide Material Support and Resources to a Foreign Terrorist Organization (al-Qaeda) in violation of 18 U.S.C. § 2339B(a)(1) for which the statutory maximum

sentence is 180 months. The sentencing judge reduced the sentence by 71 months to reflect the time of Al-Marri's detention as a material witness from December 12, 2001, to January 27, 2002, and from June 23, 2003, to March 9, 2009, as an Enemy Combatant, on the understanding that the Bureau of Prisons would not credit those times as prior custody under 18 U.S.C. § 3585(b). The judge reduced the sentence by an additional nine months under Sentencing Guidelines § 5K2.1 to reflect the very severe conditions of confinement at the Naval Brig in Charleston, South Carolina, from June 23, 2003, to the late Fall of 2004. Sentencing Memorandum, November 2, 2009. (Doc. 6-2).

In *Barber v. Thomas,* 130 S.Ct. 2499 (2010) the Supreme Court held that the BOP correctly applied 18 U.S.C. § 3624(b) by determining eligibility for an award of credit against prison time as a record for good behavior ("good time credit") of up to 54 days per year at the end of each year, beginning at the end of the first year of the term by measuring the time the prisoner actually serves, not the term of the sentence imposed. Thus, the credit may be earned after the first year of confinement on the sentence and after each succeeding year of time served. Here the petitioner contends that the 71 months should be considered as time served on the 100 month sentence by including that period of time in determining the award for good time credits.

The respondent argues that the BOP cannot begin calculation of good time credits until the sentence

has been imposed which began on October 29, 2009, and distinguishes prior custody credit under 18 U.S.C. § 3585(b). The BOP is unable to evaluate the prisoner's behavior before it receives him under the sentence.

The respondent's position is correct. The statute does not become applicable until a prisoner begins service of the sentence imposed by the court.

The petitioner makes the additional argument that these periods of confinement with no opportunity to challenge the basis for the denial of liberty is a violation of both procedural and substantive due process contrary to the Fifth Amendment to the United States Constitution. He challenged his military confinement by filing a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. That court's denial of relief was reversed by the Fourth Circuit Court of Appeals in an *en banc, per curiam* opinion reported at *Al-Marri v. Pucciarelli,* 534 F.3d. 213 (4th Cir. 2008). The majority of the judges remanded to give the petitioner an opportunity to challenge his designation as an enemy combatant. In a lengthy and persuasive concurring opinion, Judge Motz challenged the constitutional authority of the President to seize and indefinitely detain civilians by designating them as "enemy combatants."

The petition was made moot by Al-Marri's release to civilian custody to face the charges made in Illinois. While there is some appeal to accept the

invitation to address the constitutionality of that military detention in this proceeding, there is no authority for this court to grant the requested relief as what might be considered as equitable relief for an injustice.

Because the BOP's calculation of the time served on the 100 month sentence is not contrary to law, it is

ORDERED that the petition is denied and this action is dismissed.

DATED: February 17th, 2012

BY THE COURT:

s/Richard P. Matsch
Richard P. Matsch,
Senior Judge

18 U.S.C. § 3624. Release of a prisoner

* * *

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR. – (1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

Authorization for Use of Military Force

115 STAT. 224
Public Law 107-40
107th Congress

Joint Resolution

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL. – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

* * *

THE WHITE HOUSE

WASHINGTON

TO THE SECRETARY OF DEFENSE AND THE ATTORNEY GENERAL:

Based on the information available to me from all sources, **REDACTED**[.]

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Ali Saleh Kahlah al-Marri, who is under the control of the Department of Justice, is, and at the time he entered the United States in September 2001 was an enemy combatant;

(2) Mr. al-Marri is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. al-Marri engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. al-Marri possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would

aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. al-Marri represents a continuing, present, and grave danger to the national security of the United States, and detention of Mr. al-Marri is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. al-Marri as an enemy combatant; and

(7) it is, **REDACTED** consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. al-Marri as an enemy combatant.

Accordingly, the Attorney General is directed to surrender Mr. al-Marri to the Secretary of Defense, and the Secretary of Defense is directed to receive Mr. al-Marri from the Department of Justice and to detain him as an enemy combatant.

DATE: /s/ George W. Bush
White House Office-controlled Document
6/23/03