10-1986

United States v. Salerno

Lewis F. Powell Jr.

C.F.R.

Should Dissent Thurgood 86-129 Rubido v. Zorilla v. U.S. (CA 3) - that arguably conflicts with this case. I'd also Grant 86-129 + set back-to-back, or at least Hold 8-129.

Response in. - no change

Grant (also expedite)

CA2 (2-1) invalidated the Bail Reform Act of 1984 as facially invalid.

This is an important case designed to keep dangerous criminals off the streets.

PRELIMINARY MEMORANDUM

September 29, 1986 Conference
Summer List 21, Sheet 1

No. 86-87-CFY

United States

v.

Salerno and Cafaro
(kept in pretrial
detention)

Cert to: CA2 (Kearse, Newman, Feinberg [dis.])

Federal/Criminal

Timely

1. SUMMARY: United States challenges CA2 decision that Section 3142(e) of the Bail Reform Act of 1984 is facially unconstitutional.

CFR w/ a view to grant. This is very important. I don't think there is any need to let the conflict go further.

Ronald

2. FACTS AND PROCEEDINGS BELOW: The Bail Reform Act of 1984, 18 U.S.C. (Supp. II) §3141 et. seq., revised the federal law governing pretrial release of criminal suspects. Under §3142(e) of the Act, if a judicial officer "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," the officer "shall order the detention of the person prior to trial." Upon the government's request, the judicial officer must hold a pretrial detention hearing in cases involving crimes of violence, offenses that may result in a sentence of life imprisonment or death, serious drug-related crimes, and felonies committed by persons previously convicted of serious crimes. §3142(f)(1). Section 3142(f) of the Act specifies a series of procedural safeguards. The person resisting detention may request the presence of legal counsel at the hearing, may testify and present witnesses, may cross-examine other witnesses, and may present evidence by proffer. The judicial officer must take into account specific factors, including the nature and seriousness of the charges against the suspect, the weight of the evidence, the history and characteristics of the person, and the nature and seriousness of the danger to any other person or the community that would be posed by the suspect's release. §3142(g). The judicial officer's findings that no conditions will reasonably assure the safety of other persons and the community must be "supported by clear and convincing evidence," §3142(f), and the detention order must include written

findings of fact and a statement of reasons for the detention, §3142(i).

Salerno, the reputed leader of the Genovese organized crime family, and Cafaro, a reputed "captain" in the organization, were charged with various racketeering offenses and violent crimes, including two murder conspiracies. The government sought pretrial detention of resps pursuant to §3142(e) and the DC (S.D.N.Y., Walker, J.) held an evidentiary hearing. The government submitted evidence that resps were engaged in a continuing course of illegal and violent activity and that no conditions of release would prevent resps from resuming those activities during the pendency of their trial. The DC agreed. It characterized the government's evidence against resps as "overwhelming," and stated that the activities of a criminal organization such as the Genovese family would not cease with the release of its principals "on even the most stringent of bail conditions." "The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of [the criminal enterprise's] leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose to the community is self-evident." Pet. App. 56a-57a. Resp's trial was assigned to Judge Lowe (S.D.N.Y.), who reviewed and upheld Judge Walker's detention order.

CA2 reversed. The court agreed that the evidence proferred by the government amply supported the DC's finding that the re-

lease of resps posed a danger to the community. Nevertheless, a majority of the court concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community." Pet. App. 14a.

Pretrial detention may be validly imposed when substantial evidence indicates that a defendant might flee or might threaten potential witnesses, jurors, or others involved in the judicial process. "Pretrial detention to avoid undue risks of flight or jeopardy to the trial process [is] not prohibited by a constitutional scheme that relies on a trial process to determine guilt and enforce the criminal law." Pet. App. 19a (quoting United States v. Melendez-Carrion, 790 F.2d at 1002 (Newman, J. concurring)). Pretrial detention on the sole basis that defendants would carry out violent "business as usual" is, however, completely different. There is certainly a compelling state interest in maintaining public safety. But the system of criminal justice contemplated by the Due Process Clause is that people will be accountable "for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes." Pet. App. 17a (quoting Melendez-Carrion) (emphasis in original omitted).

The Due Process Clause would clearly prohibit incarcerating a person not even accused of a crime in order to prevent his future crimes, and would bar preventive detention of a person who

has been convicted of past crimes and has served his sentence. It must equally bar detention of a person not convicted but only accused of a crime. Detention of persons arrested for criminal conduct is unconstitutional "not because preventing crime is less important than preventing a defendant's flight," Pet. App. 20a, but because that particular means of preventing crime violates substantive due process, regardless of any particular procedural due process protections in the Act. The proper governmental response in a case of suspected dangerousness is surveillance of the suspect and a prompt trial.

The decision in Schall v. Martin, 467 U.S. 253 (1984), upholding brief preventive detention of juveniles, does not dispose of this case. Though the governmental interest in protecting the public is of high order whether the danger is posed by juveniles or adults, the Court in Schall pointed out "that juveniles, 'who unlike adults, are always in some form of custody,' id. at 265, have an interest in liberty less substantial than that of adults." Pet. App. 22a. In addition, CA2 stated that it disagreed with the decisions of others CAs that have upheld the constitutionality of pretrial detention on the ground of dangerousness (referring, without elaboration, to the reasons stated by Judge Newman in Melendez-Carrion).

Chief Judge Feinberg dissented. He noted that Congress enacted the preventive detention provision of the Bail Reform Act out of a deep concern with "'the growing problem of crimes committed by persons on release.'" Pet. App. 24a (quoting Senate Report). In Schall, the Court concluded that the need to protect

the community was a "legitimate and compelling" government interest that could constitutionally justify the pretrial detention of juveniles. Although the liberty interest of juveniles is concededly inferior to that of adults, the compelling societal interest in protecting the community does not vary with the age of the person detained, and if anything, is stronger with regard to adults who may have superior access to committing serious offenses. "Accordingly, the government has advanced a legitimate and compelling reason for pretrial confinement of adults accused of crimes." Pet. App. 25a. Further, although due process dictates that the government not pursue its goals through "conduct that shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), there is "nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement." Pet. App. 26a. Although the statute may be unconstitutional as applied if pretrial detention is so lengthy as to constitute punishment, the statute is constitutional on its face.

3. CONTENTIONS: CA2's holding directly frustrates Congress' purpose in passing the Bail Reform Act. Congress enacted the pretrial detention provision in response to public concern over the "alarming problem of crimes committed by persons on release." S. Rep. 98-225, 98th Cong., 1st Sess. 5-6 (1983). The Senate Judiciary Committee recognized that pretrial detention could raise constitutional questions, but concluded after serious analysis that "pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to

the safety of others if released." Id. at 10. Congress included elaborate procedural safeguards for potential detainees, thereby attempting to strike a balance between the government's interest in protecting the public and the defendant's interest in retaining freedom. CA2's blanket holding completely sweeps aside this effort by Congress to accommodate competing interests.

CA2's holding is also in conflict with decisions by CA3 and CA7, that have rejected due process challenges to the Bail Reform Act's preventive detention provisions. See United States v. Perry, 788 F.2d 100 (CA3 1986); United States v. Portes, 786 F.2d 758 (CA7 1985); United States v. Accetturo, 783 F.2d 382 (CA3 1986). See also United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (upholding D.C.'s preventive detention statute), cert. denied, 455 U.S. 1022 (1982). This Court's review is necessary to resolve the conflict.

On the merits, CA2 is wrong. First, federal statutes enjoy a presumption of validity, particularly where Congress has specifically considered potential due process objections. Second, due process essentially commands that a balance must be struck between an individual's liberty and the demands of organized society. In the criminal context, this balance "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." Gerstein v. Pugh, 420 U.S. 103, 112 (1975). There is no doubt that the state has a "legitimate and compelling" interest in protecting the community from crime, and that future criminal conduct can be predicted. Schall v. Martin, 467 U.S. at 264, 278-79. Thus, the use of

pretrial detention in cases where no conditions will reasonably assure the safety of the community is neither an "arbitrary imposition" nor a "purposeless restraint" on an individual's liberty. Pet. 15 (citations omitted). CA2, by concluding that pretrial detention on the basis of dangerousness is a per se violation of substantive due process, has rejected any balancing of governmental and personal interests and its analysis thereby "conflicts with the approach consistently used by this Court in analyzing statutory restraints on liberty . . . " Pet. 16.

This Court has upheld various types of pretrial detention. See Schall (pretrial detention of juveniles); Greenwood v. United States, 350 U.S. 366 (1956) (pretrial detention of potentially dangerous mentally incompetent defendant); Shaughnessy v. Mezei, 345 U.S. 206 (1953) (indefinite detention of potentially dangerous returning resident alien). Thus, the use of pretrial detention to protect the public from particularly dangerous persons does not offend the "concept of ordered liberty" (Palko, 302 U.S. at 325). Indeed, CA2's contrary conclusion would lead to strikingly anomalous results. A court could detain a mentally incompetent person or a street criminal who threatened a witness, but would have to release an intentionally vicious defendant who threatened the public at large. Substantive due process does not compel these incongruous results.

4. DISCUSSION: The government presents two strong arguments for granting review in this case. First, whether CA2's constitutional analysis is correct or not, its decision strikes down a critical section of an act that is important in the admin-

istration of criminal justice. In addition, CA2's holding clearly frustrates the express goal of Congress in passing §3142(e) of the Bail Reform Act. The report of the Senate Judiciary Committee, S. Rep. 98-225, 98th Cong., 1st Sess. 6-7 (1983), characterized the pretrial detention provisions as responding to the "broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions" and the report stressed that "the Committee has given thorough consideration to the issues which have arisen during the lengthy debate over pretrial detention." The Committee concluded that the "important societal interest" in protecting the public from a "limited group of offenders" who are likely to commit additional crimes was sufficiently compelling to overcome the liberty interests of those individuals and to make those pretrial detentions appropriate and constitutionally valid. Id. at 7. CA2's decision directly rejects Congress' reasoning.

Second, the SG argues that CA2's decision is in conflict with decisions by CA3 and CA7. CA2's ultimate result (striking down §3142(e)) is certainly in conflict with decisions from those two circuits, although neither of those courts has engaged in as complete a constitutional analysis on the substantive due process question as has CA2. In United States v. Accetturo, 782 F.2d 382, 387-88 (CA3 1986), the substantive due process issue was not even raised. The defendants there challenged §3142(e) solely on the grounds that it failed to direct judges to consider the probable length of pretrial detention that would be faced by defendants. CA3 rejected that challenge on the ground that Congress

legitimately chose to rely on the Speedy Trial Act to regulate the length of pretrial delays for both detained and undetained defendants. In United States v. Perry, 788 F.2d 100, 112-113 (CA3 1986), the defendants did present a facial challenge to the Act on, inter alia, substantive due process grounds. In a brief analysis, CA3 stated that in Jackson v. Indiana, 406 U.S. 715 (1972), the Supreme Court explained that its holding in Greenwood (1956)(allowing civil detention of individuals mentally incompetent to stand trial) was based on the fact that such detained persons had been found to be dangerous. CA3 concluded that because the Bail Reform Act only permitted detention of "persons found to be dangerous in a very real sense [--] distributors of dangerous drugs and users of firearms in the commission of crimes of violence," there was no substantive due process violation. In United States v. Portes, 786 F.2d 758, 767-78 (1985), CA7 also engaged in a rather brief analysis of a due process challenge. The court did not use the term "substantive due process," but simply stated that pretrial detention to protect the community was not "punishment" in violation of the fifth amendment's prohibition of punishment "'prior to an adjudication of guilt in accordance with due process of law.'" 786 F.2d at 767 (quoting Bell v. Wolfish, 441 U.S. at 535). It therefore upheld the Act as facially constitutional. Thus, CA2's holding is in conflict with the results reached by CA3 and CA7, although the debate on substantive due process is certainly not as well formulated as it could be for purposes of this Court's review.

On the merits, I think this is a difficult question. In Bell v. Wolfish, 441 U.S. 520, 534 n. 15 (1979), the Court expressly left open the question whether, apart from the government's substantial interest in ensuring that people accused of crimes are available for trial, "other governmental objectives may constitutionally justify pretrial detention." In Schall v. Martin, 467 U.S. 253 (1984), the Court had the opportunity to consider this question in the context of a New York statute that allowed for the pretrial detention of juveniles who posed a "serious risk" of committing a crime before trial. The Court stated that there is a "'legitimate and compelling state interest' in protecting the community from crime," 467 U.S. at 264 (quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960)). It then went on to state, however, that the "juvenile's countervailing interest in freedom . . . must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's 'parens patriae interest in preserving and promoting the welfare of the child.'" 467 U.S. at 265 (citation omitted). Thus, the Court did not choose to hold that the compelling governmental interest in preventing future crime was, by itself, sufficient to overcome an individual's liberty interest.

Given this case law, CA2's analysis is not unreasonable. It agreed that providing protection against the occurrence of future crimes is an interest of high social value. Nevertheless, even according that objective the "highest value," CA2 could not

agree that the objective could constitutionally be achieved by incarcerating a person likely to commit crimes in the future. CA2 is correct that substantive due process would ordinarily prohibit incarcerating a person without a trial simply on the government's proof that the person is likely to commit future crimes. CA2's conclusion that "[t]he lodging of charges for alleged past crimes does not alter this concept of due process," Pet. App. 18a, is certainly not unreasonable.

Regardless of the merits of CA2's analysis, however, I still think the granting of cert is appropriate. CA2's decision, as noted above, does overturn a critical section of an important criminal law and directly undermines a express objective of Congress. Moreover, although one may ordinarily wish to wait for more circuits to address directly (and more thoroughly) the same substantive due process concern raised by CA2, that does not seem particularly appropriate here. In this case, it is important that the Bail Reform Act be applied uniformly, and CA2's decision itself will probably affect a number of important criminal detention cases. In addition, although CA2's analysis may be reasonable, even in light of Schall, some of Schall's analysis could certainly support a reversal of the CA2 decision.

There is no response, and therefore I recommend calling for one.

5. RECOMMENDATION: I recommend CFR with an eye to grant.

September 2, 1986 Feldblum Opn in petn

OK

GRANT motion to expedite (if petn for cert granted)
Schickele

October 31, 1986 Conference
List 3, Sheet 1

No. 86-87

UNITED STATES

v.

ANTHONY SALERNO

Motion of petitioner to expedite consideration[1]

SUMMARY: The SG requests that the Court give expedited consideration to the Government's challenge to the CA 2's ruling that a provision of the Bail Reform Act of 1984 concerning pretrial detention is unconstitutional. } Grant

BACKGROUND: Resps are reputed leaders of organized crime. Resps were charged with various racketeering offenses and violent crimes. The Government sought pretrial detention of resps pursuant to Section 3142(e) of the Bail Reform Act of 1984,

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[1] This motion was added to the previously listed petn for cert after the Conference List was circulated. This memorandum discusses only the motion.

Grant (See my annotation of the pool memo in this case) Ronald

18 U.S.C. (Supp. II) 3141 et seq., which authorizes detention of a criminal defendant if no release conditions "will reasonably assure . . . the safety of any other person and the community." The DC ordered resps detained on the ground that there was "overwhelming" evidence that, if released, resps would continue to engage in violent criminal behavior.

Resps appealed to the CA 2. The CA 2 (Kearse and Newman, with Finberg dissenting) held that section 3142(e)'s authorization of pretrial detention based on a determination of future dangerousness was facially unconstitutional as a violation of substantive due process. The CA 2 stayed the issuance of its mandate to allow the Government to seek this Court's review.

The Government promptly filed a petn for cert. After the court requested a response, resp filed an answer. The petn is scheduled for consideration at the October 31, 1986, Conference. Resps are still incarcerated subject to the DC's order of pretrial detention. Trial is scheduled to begin on January 19, 1987, and is expected to last approximately four months.

CONTENTIONS: In support of the motion to expedite the SG alleges that: (1) the CA 2's declaration that the pretrial detention provisions of the Bail Reform Ace are unconstitutional "presents a question of great importance to the administration of the criminal law;" (2) the CA 2's decision "has largely paralyzed the application of the Bail Reform Act's pretrial detention provisions within the Second Circuit;" (3) expedited consideration may be necessary to protect the Court's jurisdiction because trial will commence in January and the case

may become moot with the completion of the trial; and (4) resps do not oppose expedition.

To facilitate the Court hearing the case in January 1987, the SG offers to file his brief within fifteen days of the Court's grant of cert. The SG suggests that resps brief be due 30 days after receipt of its brief and that the Government file its reply brief one week before oral argument. The SG also suggests that all briefs be served "through the use of an overnight delivery service." This means that if the Court grants cert on Monday, November 3, 1986, the SG's brief will be filed on or about Tuesday, November 18, 1986, and resps brief would be filed by Friday December 19, 1986. Under this schedule the case could be scheduled for argument in January 1987.

Resps have filed a response to the motion urging that the Court grant the SG's motion and expedite its consideration of this case.

DISCUSSION: If the Court grants the petn for cert, it should also grant the motion to expedite. Resps' pretrial detention may become a moot issue with the conclusion of resps' trial. Therefore, the Court should adjust its schedule to allow it to complete consideration of the case before the conclusion of the trial. Expediting the case will (1) make it less likely that the case will become moot before oral argument, and (2) reduce the stress on counsel of simultaneously defending resps at trial in the DC and briefing and arguing the case before this Court. In addition, the reasons for granting cert (i.e., the importance of the issue, the existence of conflicts between the circuits and

the possibility of further conflicts) also support expedition. Finally, expedition does not impose any hardship on the parties[2] or the Court. Resps support petr's motion to expedite and the schedule recommended by the parties will not inconvenience the Court.

CONCLUSIONS: If the Court grants cert, the Court should expedite the case in order to lessen the possibility that the issue of pretrial detention might escape review because resps' trial began and concluded before the Court heard oral argument. Even if expedition is not strictly necessary to avoid a question of the case becoming moot, (1) the importance of the issue, (2) the apparent confusion on the issue in the various circuits, (3) the parties willingness to expedite the case, and (4) the fact that expedition will not inconvenience the Court, all recommend that the motion to expedite be granted.

There is a response urging that the motion be granted.

October 27, 1986 Schickele

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[2] Since the CA 2 stayed its mandate, resps will continue to be detained pending trial until, and unless, this Court denies cert or affirms the CA 2. Thus, expedition will not harm, and may benefit, resps.

October 31, 1986

Court..... *Voted on*....., *19*.....

Argued....., *19*..... *Assigned*....., *19*..... No. 86-87

Submitted....., *19*..... *Announced*....., *19*.....

UNITED STATES

vs.

SALERNO

Flaggel for you.

Grant and Expedite

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											
Scalia, J.		✓											

Fall
Ct P

Notes 1/2/87

86-87 U.S. v. Salerno & Cafaro (CA2)

Mootness question?

Salerno has been sentenced to 99 yrs. Cafaro has been temporarily released from custody because of medical reasons.

Reverse (pre-trial detention here was lawful, and Act is not facially invalid.)

1. Bail Reform Act (1984). Where, after hearing, a judge finds that "no condition or combination of conditions will reasonably assure --- the safety of any other person and the community;" the judge shall order the detention of the person prior to trial"

2. Dist Court. Acting pursuant to the Act, the D.C. - after a two day hearing ~~date~~ in which extensive taped conversations were heard - found that the G.V. was "overwhelming" ~~=~~ that there alleged Mafia Δs. if released would endanger the safety of person & the community.

3. CA2 Reversed (J Kearse & Newman, Feinberg dissenting)

There is a companion case pending here: U.S. v. Melendez v. Carrion in which J. Newman (for CA2) held the Bail Act facially unconstitutional as a violation of substantive D/P.

CA2 in this case relied on & agreed with Newman's decision in Melendez.

CA2 agreed that detention would be lawful if flight were likely. A court may assure a Δ's presence for trial. But until convicted a person presumed to be ~~innocent~~ innocent may not be jailed.

~~5~~ 4. The Act is valid (not facially invalid)

It is carefully balanced. A court must find "clear & convincing" evidence that safety of others would be endangered.

Sct Ct's power upheld the Act. CA2 stands alone

January 7, 1987

SALERNO GINA-POW

86-87 United States v. Salerno and Cafaro (CA2)

MEMO TO FILE:

Section 3142(e) of the Bail Reform Act of 1984 authorizes the pretrial detention of an indicted defendant if, after a hearing, a court finds upon clear and convincing evidence that "no release conditions will reasonably assure ... the safety of any other person and the community".

In this case, CA2, in an opinion by Judge Kearse joined by Judge Newman, held that this section of the Act is facially unconstitutional as a violation of substantive due process. Judge Fineberg dissented persuasively.

Some half a dozen other courts of appeals have addressed the same question, and concluded that the Bail Reform Act is not facially invalid. See P. 11, n. 8 of the brief for the United States.

CA2 agreed that pretrial detention of a defendant is lawful where evidence indicated a likelihood that he would flee, and not be available for trial. CA2 reasoned, however, that it would be unconstitutional to hold a

citizen in jail simply because there was evidence that he probably would endanger the safety of others. Of course the case before us is different. Here respondents, members of the Mafia, have been indicted, and the TC - relying primarily on taped conversations - found clear and convincing evidence that the public safety would be endangered.

Judge Fineberg persuasively dissented, and I am inclined to agree with him and with the SG's brief.

I should add, however, that the briefs on behalf of respondent are well written, and present strong arguments at least on their face. In essence, they emphasize that the effect of pretrial detention is to "inflict punishment prior to a determinaition of guilt". This, of course, normally is a denial of due process. Respondents cite a good many of our cases that support this general truth: Bell v. Wolfish; Palko v. Connecticut, Kennedy v. Mendoza-Martinez, and others. I do not believe there is a case directly in point. Despite the force of respondents' arguments, I think the carefully designed Bail Reform Act is constitutional. It strikes a proper balance, at least this is my present tenative view, between the right of a person not to be incarcerated prior to a determination of

guilt and the need to protect persons and the community from the type of criminal conduct that has been so pervasive in organized crime.

* * *

Although I do not think this case is free from constitutional difficulty, I would be hesitant to invalidate the Bail Reform Act. The courts can adequately protect the rights of defendants by requiring clear and convincing evidence of danger to other persons.

Unless my clerk has a different view, a very brief memo will suffice.

LFP, JR.

ral 01/13/87

January 13, 1987

To: Justice Powell
From: Bob

No. 86-87, United States v. Salerno and Cafaro

Apparently this case is not moot. The SG's reply brf. states that Cafaro has not been convicted of anything, although he has been "temporarily released" for medical reasons. The SG also states that Salerno has not been sentenced yet for his unrelated conviction, and is still being held under the precentive detention order at issue here. Reply brf. , at 1 n. 1.

1/14. Today's newspaper reports that Salerno has been sentenced to 99 years. The case may now be moot as to him, but not as to Cafaro. — Bob.

ral01/13/87 Reviewed 1/14. Excellent memo

1. Mootness (p 4-6). Resps have been convicted. Briefs do not discuss. Ask at Argument. Issue is "capable of repetition yet evading review" - p 5

2. Bail Reform Act is valid. Narrowly drawn - requires clear & convincing ev. of dangerousness.

Schall v. Martin upheld "pre-trial [redacted] detention" of minors. Most relevant case

BENCH MEMORANDUM

State interest is "compelling" - 7

J. Newman's op. in best argument against validity

To: Justice Powell January 13, 1987

From: Bob

At argument: Ask about terrorist p 8

No. 86-87, United States v. Salerno and Cafaro

Close Q but Bob would Reverse

Cert. to CA2 (Newman, Kearse, Feinberg [dissenting])

Wednesday, January 21, 1987 (4th case)

Question Presented

1. Is §3142(e) of the Bail Reform Act of 1984, which authorizes the pretrial detention of an indicted defendant if no release conditions "will reasonably assure ... the safety of any other person and the community," unconstitutional on its face?

I. BACKGROUND

If a person is charged with a crime of violence, an offense that may result in a life sentence or death, a serious drug-related crime, or if the person has been convicted of such a crime and is charged with a felony, the prosecutor may move for preventive detention under 18 U.S.C. §3142(f)(1). The statute provides for an immediate evidentiary hearing. The defendant may seek a continuance of up to 5 days; the prosecutor may seek a continuance of up to 3 days; longer continuances are permitted for good cause shown. 18 U.S.C. §3142(f). At the hearing, the suspect may be represented by counsel; may present evidence on his own behalf; may cross-examine government witnesses; and may present evidence by proffer. Ibid. The statute specifies factors that the judicial officer must take into account in deciding whether to allow pretrial release. §3142(g). The judicial officer may order preventive detention only if he finds that no condition or combination of conditions of release will reasonably assure the safety of the community. The order must be supported by "clear and convincing" evidence, §3142(f), and accompanied by written findings of fact and a statement of reasons. §3142(i). The statute provides for expedited review. §3145(b)-(c).

Resps were arrested on March 21, 1986, and charged in a 29-count indictment with RICO violations, mail and wire fraud, extortion, and operation of illegal bookmaking and numbers operations. The RICO counts alleged 35 acts of racketeering activity, including two conspiracies to commit murder. The

government conceded that neither defendant posed a risk of flight, but moved for pretrial detention to assure the safety of the community. At a two-day evidentiary hearing before the DC, the government submitted a detailed proffer of evidence indicating the Salerno is the head of the Genovese family of the New York Mafia, and that Cafaro is a "captain" in that family. The proffer indicated that resps used violence to monopolize illegal gambling activities, to operate a loansharking business, and to control labor unions. According to the evidence, Salerno could order a murder by uttering the single word "hit." Petn 5a. Cafaro conducted the day-to-day operations of the family and ordered the use of violence.

At the hearing Salerno contended that the government's witnesses were unreliable because of their criminal activities and because they benefited from their cooperation with the government. Salerno also proffered the testimony of witnesses who would state that they did not consider him a danger to the community, and a physician's letter stating that he suffered from heart disease. Cafaro proffered no evidence, but argued that the government's tape recordings of his threats of violence did not prove that he had carried out any of his threats.

The DC concluded that the government had shown by clear and convincing evidence that no combination of conditions--such as house arrest and an order not to commit crimes--would reasonably ensure the safety of the community. The DC found that the family's "illegal businesses, in place for many years, require constant attention and protection, or they will fail." and

"business as usual" for resps "involves threats, beatings, and murder." Petn 6a. Resps asked the trial judge to review the pretrial detention order, but she concluded that de novo review was inappropriate, and found no new evidence warranting resps' release.

A divided CA2 panel reversed. (2-1) Judge Kearse's opinion, for herself and Judge Newman, relies upon the constitutional imperative that punishment shall not be imposed except upon conviction, and concludes that preventive detention is punishment. Chief Judge Feinberg's dissent reasons that the interest in protecting society from adult crime is, if anything, even greater than the interest in protecting it against juvenile crime. In his view, the procedures set out in the statute provide constitutionally adequate protection against erroneous deprivations of liberty.

II. DISCUSSION

Although this is a very important case, it does not appear to be an unusually difficult one for you. You agree that preventive detention serves a compelling government interest in preventing crime, and that a prediction of future dangerousness based on adequate procedures is not arbitrary.

A. Mootness. The newspapers reported some time ago that Salerno, and possibly Cafaro as well, has been convicted and sentenced on other charges. None of the briefs discusses the possibility that this has mooted the case. This should be a subject of questioning at oral argument.

The controversy is one "capable of repetition yet evading review" by this Court. Pretrial detainees are supposed to be brought to trial quickly to shorten the period of pretrial detention. In Schall v. Martin, 467 U.S. 253, 280 (1984), the Court considered the New York courts' "liberal view of the doctrine of 'capable of repetition, yet evading review'" as one of several features of the New York law that satisfied the requirements of procedural due process.

Resps, however, may not be able to satisfy the requirement of City of Los Angeles v. Lyons, 461 U.S. 95 (1983), that there be a real and immediate threat that they will again be subject to preventive detention. Apparently there is no likelihood that Salerno, at least, will finish serving his sentence in the near future. It may be that resps wish to pursue an action for damages, although it seems clear that the officials involved would be immune. Perhaps resps have a sufficient interest in erasing the stigma that attaches to a judicial finding that they are dangerous to the community. Of course this does not seem of great importance now that they have been convicted. In any event, a decision on the constitutional issue would not affect any of the DC's factual findings.

Resps may attempt to argue that a decision in this case will have some effect on their application for release pending appeal of their convictions. I doubt that such an argument has merit. Of course a person's protected interest in liberty is greatly diminished by conviction of a serious crime. Under the Bail Reform Act, moreover, the standards for release on appeal are

much stricter than those for release before trial. A convicted person must show, by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of the community. Section 3143(b)(1). Resps also must show that the appeal is not for the purpose of delay and raises "a substantial question of law or fact likely to result in reversal or an order for a new trial." Section 3143(b)(2). It is possible, however, that a Court decision invalidating the procedures at the pretrial detention hearing would be relevant to the procedures at a post-conviction hearing.

In sum, I think this case may be moot, although I await instruction from the parties at oral argument. It may be that this question, like other questions regarding bail, will be reviewable only if the Court hears and decides it with the greatest expedition. See Stack v. Boyle, 342 U.S. 1, 4 (1951) (granting cert. and deciding merits at the same time).

B. The Merits.

1. Substantive Due Process. The point of departure is Schall v. Martin, 467 U.S. 253 (1984), in which you joined CHIEF JUSTICE REHNQUIST's opinion for the Court upholding a New York statute authorizing pretrial detention of juveniles. The Schall opinion accepts as "axiomatic" the proposition that the Due Process Clause forbids punishment except upon conviction. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). Schall concludes that pretrial detention of juveniles is not punishment because it serves a "legitimate and compelling" government interest in

protecting society from crime, and also serves to protect the juvenile from his own folly. The Court relied upon several features of the New York law: there is no indication in the statute that preventive detention is intended as punishment; the detention lasts no longer than 17 days; juveniles often, although not always, are detained in "halfway houses" rather than prisons. Moreover, every state and the District of Columbia authorizes some form of juvenile pretrial detention, thus negating the argument that the practice offends deeply-rooted traditions.

This case is more difficult than Schall. First, society does not recognize a government interest in protecting sane adults from the consequences of their own folly. Second, the period of pretrial detention, though limited by the Speedy Trial Act, will often exceed the basic 90-day period established by that Act because much pretrial time is "excludable" under that Act. Third, although pretrial detainees are segregated from prisoners, they are not placed in non-secure half-way houses. Fourth, preventive detention of adults is a relatively new practice, and is a departure from the traditional principle that a criminal defendant is considered innocent until proven guilty. Only five states in addition to the District of Columbia authorize preventive detention of adults. On the other hand, the "compelling interest" in protecting society from crime is present, and preventive detention is available only for the most serious crimes, and only on a showing that no lesser restriction is likely to be effective.

Perhaps the strongest argument against the constitutionality of preventive detention is made by Judge Newman. First, Judge Newman notes that detaining a person who is not accused of any crime based on a prediction of future dangerousness would violate due process, even though it also would serve the compelling government interest in protecting society. Judge Newman argues that this logically implies that detaining a person who is accused of a crime for the same reason is equally invalid. The probable cause determination required by Gerstein v. Pugh, 420 U.S. 103 (1975), however, sets criminal defendants apart from other citizens. For one thing, it provides some evidence of dangerousness (because so many crimes are committed by recidivists). Moreover, as Judge Newman admits, arrest and indictment justify "some regulatory curtailment of liberty." Petn 19a. Suspects may be detained long enough to hold a pretrial hearing; afterwards they may be detained in order to ensure their appearance at trial, Bell v. Wolfish, 441 U.S. 520, 534 (1979), or to prevent them from tampering with witnesses. To be sure, these restrictions may be distinguished on the ground that they are all related to the crime with which the defendant is charged; however, they are also non-punitive restrictions on liberty imposed prior to conviction.

It is difficult to maintain the position that preventive detention is constitutionally forbidden in all cases. For example, if it were known that members of a terrorist organization would carry out bombing attacks on American cities while awaiting trial, detention would seem to be justified even

if it the terrorists were likely to appear for trial. Of course this example merely raises the social "costs" of pretrial release to a very high level. It is still possible to argue, as does Judge Kearse, that surveillance and an accelerated trial schedule are the only remedies. It is clear, however, that such remedies will be inadequate in many cases.

On balance, I think a carefully circumscribed preventive detention statute, such as this one, is not so shocking to the conscience as to violate substantive due process.

2. Procedural Due Process. In Schall, the Court concluded that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct." 467 U.S., at 278, citing Jurek v. Texas, 428 U.S. 262, 274 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ).

Of course there is a determination of probable cause at a preliminary hearing. The Bail Reform Act also provides the extensive procedural safeguards outlined above, and provides that the hearing shall be held promptly. Congress clearly was attentive to the need to provide procedural safeguards against erroneous deprivations of liberty. It is difficult to think of additional procedures that would provide a significantly different margin of safety for defendants. Indeed, resps' argument on this issue mostly confines itself to an unconvincing, and basically irrelevant, discussion of the alleged vagueness of the standard.

III. CONCLUSION

Society has a strong interest in protecting itself against the relatively small number of criminals who commit a relatively large share of the serious crimes. Congress has enacted a novel, carefully circumscribed statute, based on extensive legislative findings, with considerable potential for preventing crimes by this small group. In this situation the Court should hesitate to interpose a constitutional barrier to the legislative goal.

I am concerned, however, that permitting preventive detention of competent adults is "playing with fire." A much more sweeping statute also would serve the public interest in protection against crime, and would no doubt receive great popular support. On this score, it is ominous that Korematsu v. United States, 323 U.S. 214 (1944), the Japanese internment case, is cited several times in the briefs. Of course this Court sits to ensure that the legislature does not exceed constitutional bounds. In this area, fine gradations may make a constitutional difference. For example, the statutory "presumptions" of dangerousness, not at issue in this case, are troublesome and may warrant separate consideration in a later case.

I recommend that you vote to reverse the judgment of CA2.

Bob.

86-87 United States v. Salerno Argued 1/21/87

Fried (SG)

Setting high bail protected the community prior to their statute. But ~~[illegible]~~. The statute provides a fairer means.

Relies on J. Fenberg's dissent.

The statute is ancillary to normal working of criminal system. The statute is an "interim" measure to deal with a period prior to trial.

Resps say no justification is sufficient to detain prior to conviction.

Principles of prior cases required reversal.

A statute doesn't provide for "bail". TM asked whether ~~[illegible]~~ could affirm on whether 8th Amend applied.

CA2 majority said any pretrial detention however brief would violate D/P. Actually the trial in this case did not occur for 11 mos.

Resps offered no ev. rebutting the findings of DC or to evidence.

DC found "ev. overwhelming" Pet. 47a

Cardenas (Resp.) (associated with F. Lee Bailey)

Relies on 8th Amend.

The statute imposes "punishment".

"Bail" or denial of it, is traditional remedy for problems addressed by this statute.

(Counsel for Resp. declined to put on ev. to contradict Govt's evidence -

Rev 6-2

No. 86-87 United States v. Salerno Conf. 1/23/87

The Chief Justice Rev.

Facial validity in only general circ, ~~Fourth~~ is ~~applied~~ but must decided this case.

We need not say statute ~~is~~ will be valid in every case.

~~The Court~~ Should not say a person may never be ~~detained~~ detained prior to conviction. There are numerous exceptions.

Procedural protections are adequate

Justice Brennan Affirm.

Fundamental that detention prior to conviction is unlawful - suggest to exceptions where danger of flight.

We have sanctioned detention of espionage suspects, sexual deviants,

Purpose of bail is to assure presence of Δ at trial. But bail can not be denied to protect against dangerousness

Justice White Rev.

There are situations where detention is justified.

Statute is facially valid

Agree with CJ

Justice Marshall

Absent

Justice Blackmun

Rev.

Not absolute right to freedom. Various examples
Govt interests are strong.

CJ Feinberg was right when he said
adults are more dangerous than juveniles

Justice Powell

Rev.

Tell my notes. Case is difficult.
OK on face, & as applied in
this case.
Prov

See Feinberg's example re to terrorist
- but it is true that Resp. probably could
give orders to kill from jail

JUSTICE STEVENS Aff'm

Very difficult case.

More one reflects on problems, they are more serious than John first thought. Salerno could give orders to kill from prison.

Govt. stipulated there was no risk of flight. This was phoney. Govt set-up a test case.

Only legitimate excuse of bail is to have him & present. ~~Bail~~ Of course, there is "Excessive Bail Clause".

JUSTICE O'CONNOR Rev & Remand. Wrote narrowly

CA 2 erred in holding that in no case may there be pre-trial detention.

The procedural protections could be strongest. ABA's are better.

Resp. is accused of serious crimes of violence. Resp could threaten witnesses & otherwise affect trial if he were at liberty

JUSTICE SCALIA Rev.

Wrote narrowly.

~~It's~~ The fact that there is probable cause to charge one with a capital offense, this in itself is some justification for a rule to protect the public.

Congress has acted after careful consideration

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor
Justice Scalia

L.F.P.

From: **The Chief Justice**

Circulated: 2/18/87

Recirculated: _____

1st DRAFT

Reviewed

a fine opinion I can join

SUPREME COURT OF THE UNITED STATES

No. 86–87

UNITED STATES, PETITIONER *v.* ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[February ——, 1987]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Bail Reform Act of 1984 allows a federal court to detain an arrestee pending trial if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court's words, this type of pretrial detention violates "substantive due process." We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act.[1] 479 U. S. —— (1986). We hold that the Act fully comports with constitutional requirements, and we therefore reverse.

I

Responding to "the alarming problem of crimes committed by persons on release," S. Rep. No. 98–225, p. 3 (1983), Con-

[1] Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge. *United States* v. *Walker*, 805 F. 2d 1042 (CA11 1986); *United States* v. *Rodriguez*, 803 F. 2d 1102 (CA11 1986); *United States* v. *Simpkins*, U. S. App. D. C. ——, 801 F. 2d 520 (1986); *United States* v. *Zannino*, 798 F. 2d 544 (CA1 1986); *United States* v. *Perry*, 788 F. 2d 100 (CA3), cert. denied, 479 U. S. —— (1986); *United States* v. *Portes*, 786 F. 2d 758 (CA7 1985).

gress formulated the Bail Reform Act of 1984, 18 U. S. C. § 3141 *et seq.* (1982 ed., Supp. III), as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. No. 98–225, p. 3.

To this end, § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with "clear and convincing evidence," § 3142(f).

The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order

detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to § 3142(e), on the ground that no condition of release would assure the safety of the community or any person. The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese Crime Family of La Costra Nostra and that Cafaro was a "captain" in the Genovese Family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses. He offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterized the wiretap conversations as merely "tough talk."

The District Court granted the Government's detention motion, concluding that the Government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person:

> "The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." 631 F. Supp. 1364, 1375 (SDNY 1986).

Respondents appealed, contending that to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face. Over a dissent, the United States Court of Appeals for the Second Circuit agreed. 794 F. 2d 64 (1986). Although the court agreed that pretrial detention could be imposed if the defendants were likely to intimidate witnesses or otherwise jeopardize the trial process, it found "§ 3142(e)'s authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id.*, at 71–72. The court concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community. *Id.*, at 72, quoting *United States* v. *Melendez-Carrion*, 790 F. 2d 984, 1000–1001 (CA2 1986) (opinion of Newman, J.). It reasoned that our criminal law system holds persons accountable for past actions, not anticipated future actions. Although a court could detain an arrestee who threatened to flee before trial, such detention would be permissible because it would serve the basic objective of a criminal system—bringing the accused to trial. The court distinguished our decision in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), in which

we upheld police detention pursuant to arrest. The court construed *Gerstein* as limiting such detention to the "'administrative steps incident to arrest.'" 794 F. 2d, at 74, quoting *Gerstein*, 420 U. S., at 114. The Court of Appeals also found our decision in *Schall* v. *Martin*, 467 U. S. 253 (1984), upholding postarrest pretrial detention of juveniles, inapposite because juveniles have a lesser interest in liberty than do adults. The dissenting judge concluded that on its face, the Bail Reform Act adequately balanced the Federal Government's compelling interests in public safety against the detainee's liberty interests.

II

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *Schall* v. *Martin*, *supra*, at 269, n. 18. We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional.[2]

Respondents present two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness. First, they rely upon the Court of Appeals' conclusion that the Act exceeds the limitations placed upon the Federal Government by the Due Process Clause of the Fifth Amendment. Second, they contend that the Act contravenes the Eighth Amendment's proscrip-

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[2] We intimate no view on the validity of any aspects of the Act that are not relevant to respondents' case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.

tion against excessive bail. We treat these contentions in turn.

A

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

Respondents first argue that the Act violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial. See *Bell* v. *Wolfish*, 441 U. S. 520, 535, and n. 16 (1979). The Government, however, has never argued that pretrial detention could be upheld if it were "punishment." The Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is.

As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. *Bell* v. *Wolfish*, *supra*, at 537. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. *Schall* v. *Martin*, 467 U. S., at 269. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "'whether an alternative purpose to which [the

restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Ibid.*, quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963).

We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98–225, p. 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.*, at 4–7. There is no doubt that preventing danger to the community is a legitimate regulatory goal. *Schall* v. *Martin*, *supra*.

Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See 18 U. S. C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing, *ibid.* and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act. See 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. III). Moreover, as in *Schall* v. *Martin*, the conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" government. 467 U. S., at 270. As in *Schall*, the statute at issue here requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U. S. C. § 3142(i)(2). We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

not punishment

The Court of Appeals nevertheless concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." 794 F. 2d, at 71. Respondents characterize the Due Process Clause as erecting an impenetrable "wall" in this area that "no governmental interest—rational, important, compelling or otherwise—may surmount." Brief for Respondents 16.

We do not think the Clause lays down any such categorical imperative. We have repeatedly held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the government may detain individuals whom the government believes to be dangerous. See *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) (approving unreviewable Executive power to detain enemy aliens in time of war); *Moyer* v. *Peabody*, 212 U. S. 78, 84–85 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson* v. *Landon*, 342 U. S. 524, 537–542 (1952); *Wong Wing* v. *United States*, 163 U. S. 228 (1896). We have also held that the government may detain mentally unstable individuals who present a danger to the public, *Addington* v. *Texas*, 441 U. S. 418 (1979), and dangerous defendants who become incompetent to stand trial, *Jackson* v. *Indiana*, 406 U. S. 715, 731–739 (1972); *Greenwood* v. *United States*, 350 U. S. 366 (1956). We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community. *Schall* v. *Martin*, *supra*. Even competent adults may face substantial liberty restrictions as a result of the operation of

our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell* v. *Wolfish*, 441 U. S., at 534, or a danger to witnesses.

Respondents characterize all of these cases as exceptions to the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a "general rule" may freely be conceded, but we think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel. Given the well-established authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above.

The government's interest in preventing crime by arrestees is both legitimate and compelling. *De Veau* v. *Braisted*, 363 U. S. 144, 155 (1960). In *Schall*, *supra*, we recognized the strength of the State's interest in preventing juvenile crime. This general concern with crime prevention is no less compelling when the suspects are adults. Indeed, "[t]he harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." *Schall* v. *Martin*, 467 U. S., at 264–265. The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in *Schall*. The statute we upheld in *Schall* permitted pretrial detention of any juvenile arrested on any charge after a showing that the individual might commit some undefined further crimes. The Bail Reform Act, in

contrast, narrowly focuses on a particularly acute problem in which the government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U. S. C. § 3142(f). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. See S. Rep. No. 98–225, pp. 6–7. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U. S. C. § 3142(f). While the government's general interest in preventing crime is compelling, even this interest is heightened when the government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we

cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

"Given the legitimacy of the [government's] interest in preventive detention, and the nonpunitive nature of that detention, the remaining question is whether the procedures afforded . . . provide sufficient protection against erroneous and unnecessary deprivations of liberty. See *Mathews* v. *Eldridge*, 424 U. S., at 335." *Schall*, *supra*, at 274. We think that the procedures enumerated in the Bail Reform Act satisfy the requirements of procedural due process. As we stated in *Schall*, "there is nothing inherently unattainable about a prediction of future criminal conduct." *Id.*, at 278; see *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 279 (WHITE, J., concurring in judgment). Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U. S. C. § 3142(f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid.* These procedures ensure the accuracy of the information flowing to the decisionmaker.

The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. § 3142(g). By explicitly stating the relevant considerations, Congress has reduced the possibility that a judicial officer will order detention on facts not relevant to the government's compelling interest in preventing danger to the community. The chances of an erroneous decision are further reduced by the Act's require-

ment that the government prove its case by clear and convincing evidence, *id.*, § 3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. § 3142(i). This requirement, combined with the Act's prompt review provisions, § 3145(c), provides for effective and immediate appellate review of the detention decision, further reducing the possibility of an erroneous deprivation of liberty.

We think these extensive safeguards provide ample protections to arrestees subject to detention under the Act. The protections are more exacting than those we found sufficient in the juvenile context, see *Schall*, 467 U. S., at 275–281, and they far exceed what we found necessary to effect limited postarrest detention in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). We think respondents "have failed to note any additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes." *Schall*, *supra*, at 277. Given legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not invalid under the Due Process Clause of the Fifth Amendment.

B

Respondents also contend that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment. The Court of Appeals did not address this issue because it found that the Act violates the Due Process Clause. We think that the Act survives a challenge founded upon the Eighth Amendment.

8th Amend

The Eighth Amendment addresses pretrial release by providing merely that "Excessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951), in which the Court stated that "Bail set at a

figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21–22. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail—to ensure integrity of the judicial process.

While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above-quoted *dicta* in *Stack* v. *Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial.

The holding of *Stack* is illuminated by the Court's holding just four months later in *Carlson* v. *Landon*, 342 U. S. 524 (1952). In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release

would be prejudicial to the public interest and *would endanger the welfare and safety of the United States.*" *Id.*, at 529 (emphasis added). The detainees brought the same challenge that respondents bring to us today: the Eighth Amendment required them to be admitted to bail. The Court squarely rejected this proposition:

> "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *Id.*, at 545–546 (footnotes omitted).

Carlson v. *Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the government's response is excessive, we must compare that response against the interest the government seeks to protect by means of that response. Thus, when the government has admitted that its only interest is in

preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack* v. *Boyle*, *supra*. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

III

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

The judgment of the Court of Appeals is therefore

Reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

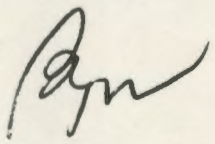
February 18, 1987

86-87 - United States v. Salerno

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 18, 1987

Re: No. 86-87-United States v. Salerno and Cafaro

Dear Chief:

In due course I hope to file a dissent in this one.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

ral 02/19/87

February 19, 1987

To: Justice Powell
From: Bob

No. 86-87, United States v. Salerno

I think this is a careful opinion that you can join without reservation. THE CHIEF JUSTICE has been careful to leave undecided the constitutionality of the statutory presumptions of dangerousness, as well as the possibility that the statute may be unconstitutional as applied, p. 5 n. 2.

1. The "substantive due process" section (pp. 6-11) is well crafted. The opinion first concludes that preventive detention is not punishment. Pp. 6-8. In answering this question, the opinion looks primarily to legislative intent, but also considers the "incidents" of pretrial detention in relation to the goals of Congress. This seems to me precisely the right analysis. The opinion notes the similarities between this case and Schall v. Martin, the juvenile preventive detention case, but does not push them too far. The most important part of the opinion, pp. 8-12, simply concludes that there is no impenetrable constitutional barrier to detaining sane adult defendants on the basis of danger to the community. The opinion notes that detention is permitted in a wide variety of circumstances. There is no question that the government's interest in protecting the community is legitimate and compelling. The opinion reasons that the government's interest is "overwhelming" when the class of detainees is nar-

rowed to those who are: (1) charged with committing a serious crime and (2) found to present a danger to the community, on the basis of clear and convincing evidence. Although it may seem somewhat odd to say that these procedural restrictions result in a "super-compelling" government interest, I think this is the proper analysis. It does not require the Court to minimize the individual's liberty interest. More importantly, it suggests that preventive detention would be unconstitutional if the detainee were not charged with a serious crime, or if his detention were not based on judicial findings of dangerousness after an evidentiary hearing. Of course the difficulty in this area is to place principled constitutional limits on preventive detention. The opinion's approach suggests such limits.

2. The "procedural due process" question is not difficult. As the opinion observes, it is difficult to think of additional procedural protections that would increase significantly the accuracy of predictions of future dangerousness.

3. CA2 did not discuss the applicability of the Eighth Amendment. Although the Court need not address the question, it probably is wise to do so, to settle doubts about the facial constitutionality of the statute. The opinion does cut back significantly on the statement in Stack v. Boyle, 342 U.S. 1, 5 (1951), that bail set higher than reasonably necessary to ensure the defendant's presence at trial violates the Eighth Amendment. However, the opinion's discussion of Stack v. Boyle is quite fair. The Court was not required to decide in that case whether bail could be denied for reasons other than ensuring the defendant's

presence at trial. The opinion does suggest, on pp. 13-14, that the Bail Clause never requires that bail be available, but only that bail not be excessive if it is available. You might conclude that this is too narrow a reading of the Bail Clause. The opinion expressly leaves this question open, however. I see no reason to ask for a language change, because you can easily dissociate yourself from "mere dicta" in a later case if you wish.

February 19, 1987

86-87 United States v. Salerno

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 19, 1987

Re: 86-87 U.S. v. Salerno and Cafaro

Dear Chief,

I had thought the only thing actually decided by CA2 and which we needed to address was whether "the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause." 794 F.2d 64, 72. I assumed we did not need to decide any procedural Due Process issue. Your opinion indicates "we think that the procedures enumerated in the Bail Reform Act satisfy the requirements of procedural due process." p.11. Because I have concerns about the procedural provisions of the Act, I plan to concur in the judgment and perhaps Parts I and IIB.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 20, 1987

Re: 86-87 - United States v. Salerno

Dear Chief:

I shall wait for Thurgood's dissent.

Respectfully,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 23, 1987

Re: 86-87 United States v. Salerno and Cafaro

Dear Sandra,

I agree with you the only thing decided by CA2 in this case was whether any system resulting in confinement prior to trial was valid under the Due Process Clause, but I think the reason that that was the only question that they reached was because they concluded that no such scheme could be valid. Having come to the opposite conclusion, it seems to me perfectly logical that we should go on and evaluate the procedural guarantees contained in the statute, rather than sending the question back to the same panel of CA2 which declared the whole thing unconstitutional.

I think it is important to have as strong an opinion as possible in a case like this, and I would hope that it would not be weakened by separate writing on the part of those who are in basic agreement any more than is absolutely necessary. If you have misgivings about any of the language in parts I and IIB, I would be happy to consider any suggestions that you have.

Since Byron and Lewis have already joined my draft, I am sending them copies of this letter.

Sincerely,

Bill

cc: Justice White
Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 24, 1987

Re: 86-87 U.S. v. Salerno and Cafaro

Dear Chief,

The Solicitor General stated several times during the oral argument that procedural due process issues were not to be resolved in this case. In my view there may be some procedural weaknesses and I am not prepared under the circumstances to express blanket approval for them.

Your discussion of procedural due process begins with the first full paragraph on page 11 and continues until Part IIB on page 12. One suggestion, if you want to retain all of that discussion, would be to break it out as a separate subsection and I could join the rest of the opinion.

An alternative suggestion would be to omit the first two full sentences on page 11, with the accompanying references, and the first full paragraph on page 12, and to insert on page 11 as a lead-in to the discussion of procedures something along the following lines:

> "This case does not raise the question whether the procedures of the Bail Reform Act provide sufficient protection against erroneous and unnecessary deprivations of liberty." See Matthews v. Eldridge, 424 U.S., at 335. Numerous procedural protections are built into the Act."
>
> ...[insert the balance of page 11 to the end of the runover paragraph on page 12] Whether these procedures are sufficient given the serious liberty interest at stake, however, must be addressed in future cases."

With changes along these lines I would be willing to join all of your opinion. In either event, I suggest the

second to last sentence in the opinion be changed to refer only to substantive due process.

I expect Nino and Harry may also suggest some changes. You may decide to wait until you have all the suggestions before considering any changes.

Sincerely,

Sandra

The Chief Justice

Copies to: Justice White
Justice Powell

Dear L, I agree that we probably may reach the procedural due process issue. If in my view, it is important to do so.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 2, 1987

Memorandum to the Conference

Re: United States v. Salerno, No. 86-87.

There has been some discussion of the propriety of reaching the procedural due process issues presented by this case. The current circulating draft addresses the question, although the Court of Appeals did not pass judgment on this aspect of the case. I believe that it is entirely proper and indeed desirable to pass upon the facial validity of the main thrust of the Act, which in my view includes the procedural question.

Initially, I believe that the Court of Appeals' majority opinion certainly hints at how that court would resolve the procedural issue. Admittedly, the majority opinion states rather unequivocally that "the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause." 794 F. 2d 64, 72. The opinion also states that a program of incarcerating persons not accused of any crime "would be constitutionally infirm, not for lack of procedural due process," id., but because of substantive limitations. But the majority opinion is not entirely without reference to the procedural aspects of the case. For example, in countering the government's argument below that the mere fact of arrest would justify detention, the majority opinion states:

> "Moreover, if the arrest is thought to reflect that the person is more deserving of confinement than members of the public not accused of crime, the confinement would offend the procedural component of due process by dispensing with the procedural guarantees of the Fifth and Sixth Amendments that must be observed before past conduct may justify incarceration on grounds of dangerousness." Id.

Chief Judge Feinberg was persuaded by the procedural aspects of the case, devoting a substantial discussion to the topic.

The issue was fully briefed by the parties in our Court. The government devotes a full fifteen pages to whether the Bail Reform Act strikes the proper balance between the defendant's liberty interest and the the government's interest in prevention of future crime. Respondents understandably devote eighteen pages to argument that the Act is invalid on procedural due process grounds.

I think that the procedural issue, which I see as part and parcel of the general claim of unconstitutionality, was fully presented below and here. I do not find it surprising that the parties have devoted such energy to the procedural issue, as this case is in the same posture as was Schall v. Martin, 467 U.S. 253 (1984), when it came before us. There, the CA2 held that §320.5(3)(b) of the New York Family Court Act was unconstitutional as to all juveniles because the statute authorized punitive pretrial detention. See 467 U.S., at 262. We rejected that substantive holding, and we also found that the law satisfied procedural due process, even though the CA2 had not explicitly reached that question.

I believe that this case presents compelling reasons to pass upon the facial validity of the Act, broadly defined. There is certainly no jurisdictional bar to our consideration of the procedural issue, because we would have power to consider it even if it had not been raised below. Berkemer v. McCarty, 468 U.S. 420, 443 (1984). Under these particular circumstances, considerations of judicial economy justify reaching this purely legal issue. Nixon v. Fitzgerald, 457 U.S. 731, 743, n. 23 (1982). There is nothing that further development in the CA2 would do to aid our resolution of the procedural issue. Moreover, I believe that this is precisely the kind of case in which the Court should endeavor to resolve, if at all possible, the general validity of the Act. This is a question of obvious importance to federal law enforcement--a question that we saw as sufficiently weighty to justify expedited oral argument. Given the importance of the issue and the purely legal question before us, I think it proper and desirable to rule on all of the constitutional questions presented.

If an opinion of this Court is to have any practical applicability at all, it must treat the intertwined substantive and procedural issues. A ruling that the Bail Reform Act satisfies substantive due process would be nothing more than a statement that under some undefined hypothetical circumstances, the government may detain an

individual before trial on the ground of future dangerousness. Such a holding would provide absolutely no guidance to the lower courts regarding even the general contours of the circumstances under which detention would be valid. I believe the importance of this case lies not in a ruling that broadly states that the government is not completely disabled from effecting pretrial detention. Rather, it is crucial to state that the limited circumstances under which pretrial detention is available and the extensive procedures surrounding the detention decision are the factors that motivate our decision to hold the Act valid.

Sincerely,

March 2, 1987

86-87 United States v. Salerno

Dear Chief:

I agree that we properly may reach the procedural due process issue.

In my view, it is important to do so.

Sincerely,

The Chief Justice

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 3, 1987

Re: No. 86-87, United States v. Salerno

Dear Chief:

I join your opinion. I am content to reach the procedural due process issues, although others may wish you to expand on this.

I have two minor concerns for your consideration. The first is the last sentence of the very first paragraph. It seems to me that when we say that the Act "fully comports with constitutional requirements," we imply that the door is closed against all possible challenges. In a sense that is somewhat inconsistent with footnote 2 on page 5. Could the sentence be softened somewhat so as to read, as a possible example, "We hold that, as against the facial attack mounted by these respondents, the Act ...."? At least something along that line would be welcome to me.

My second concern is a preference that the discussion of punishment v. regulation contain at least an intimation that if detention continues too long, it can become excessive in relation to the congressional goal and take on the attributes of punishment. Do you think that the insertion of a comment to this general effect would be useful?

Sincerely,

Harry

The Chief Justice

cc: The Conference

Change: pp. 11-12

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor
Justice Scalia

From: **The Chief Justice**

Circulated: _____

Recirculated: _____

Received with WHR's letter 3/9

3rd DRAFT

I agree. See my letter to WHR

SUPREME COURT OF THE UNITED STATES

No. 86–87

UNITED STATES, PETITIONER *v.* ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[February ——, 1987]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Bail Reform Act of 1984 allows a federal court to detain an arrestee pending trial if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court's words, this type of pretrial detention violates "substantive due process." We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act.[1] 479 U. S. —— (1986). We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements. We therefore reverse.

---

[1] Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge. *United States* v. *Walker*, 805 F. 2d 1042 (CA11 1986); *United States* v. *Rodriguez*, 803 F. 2d 1102 (CA11 1986); *United States* v. *Simpkins*, U. S. App. D. C. ——, 801 F. 2d 520 (1986); *United States* v. *Zannino*, 798 F. 2d 544 (CA1 1986); *United States* v. *Perry*, 788 F. 2d 100 (CA3), cert. denied, 479 U. S. —— (1986); *United States* v. *Portes*, 786 F. 2d 758 (CA7 1985).

I

Responding to "the alarming problem of crimes committed by persons on release," S. Rep. No. 98–225, p. 3 (1983), Congress formulated the Bail Reform Act of 1984, 18 U. S. C. § 3141 *et seq.* (1982 ed., Supp. III), as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. No. 98–225, p. 3.

To this end, § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with "clear and convincing evidence," § 3142(f).

The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the government's evidence against the

arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to § 3142(e), on the ground that no condition of release would assure the safety of the community or any person. The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese Crime Family of La Cosa Nostra and that Cafaro was a "captain" in the Genovese Family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses. He offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterized the wiretap conversations as merely "tough talk."

The District Court granted the Government's detention motion, concluding that the Government had established by

clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person:

> "The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." 631 F. Supp. 1364, 1375 (SDNY 1986).

Respondents appealed, contending that to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face. Over a dissent, the United States Court of Appeals for the Second Circuit agreed. 794 F. 2d 64 (1986). Although the court agreed that pretrial detention could be imposed if the defendants were likely to intimidate witnesses or otherwise jeopardize the trial process, it found "§ 3142(e)'s authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id.*, at 71–72. The court concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community. *Id.*, at 72, quoting *United States* v. *Melendez-Carrion*, 790 F. 2d 984, 1000–1001 (CA2 1986) (opinion of Newman, J.). It reasoned that our criminal law system holds persons accountable for past actions, not anticipated future actions. Although a court could detain an arrestee who threatened to flee before trial, such detention would be permissible because

it would serve the basic objective of a criminal system—bringing the accused to trial. The court distinguished our decision in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), in which we upheld police detention pursuant to arrest. The court construed *Gerstein* as limiting such detention to the "'administrative steps incident to arrest.'" 794 F. 2d, at 74, quoting *Gerstein*, 420 U. S., at 114. The Court of Appeals also found our decision in *Schall* v. *Martin*, 467 U. S. 253 (1984), upholding postarrest pretrial detention of juveniles, inapposite because juveniles have a lesser interest in liberty than do adults. The dissenting judge concluded that on its face, the Bail Reform Act adequately balanced the Federal Government's compelling interests in public safety against the detainee's liberty interests.

II

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *Schall* v. *Martin*, *supra*, at 269, n. 18. We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional.[2]

Respondents present two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness. First, they rely upon the Court of Appeals' conclusion that the Act exceeds the limitations placed upon the Federal Government by the Due Process Clause of the Fifth Amendment. Second, they contend

[2] We intimate no view on the validity of any aspects of the Act that are not relevant to respondents' case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.

that the Act contravenes the Eighth Amendment's proscription against excessive bail. We treat these contentions in turn.

A

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

Respondents first argue that the Act violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial. See *Bell* v. *Wolfish*, 441 U. S. 520, 535, and n. 16 (1979). The Government, however, has never argued that pretrial detention could be upheld if it were "punishment." The Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is.

As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. *Bell* v. *Wolfish*, *supra*, at 537. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. *Schall* v. *Martin*, 467 U. S., at 269. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "'whether an alternative purpose to which [the

restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Ibid.*, quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963).

We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98–225, p. 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.*, at 4–7. There is no doubt that preventing danger to the community is a legitimate regulatory goal. *Schall* v. *Martin*, *supra*.

Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See 18 U. S. C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing, *ibid.* and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.[3] See 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. III). Moreover, as in *Schall* v. *Martin*, the conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" government. 467 U. S., at 270. As in *Schall*, the statute at issue here requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U. S. C. § 3142(i)(2). We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regu-

[3] We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.

latory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

The Court of Appeals nevertheless concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." 794 F. 2d, at 71. Respondents characterize the Due Process Clause as erecting an impenetrable "wall" in this area that "no governmental interest—rational, important, compelling or otherwise—may surmount." Brief for Respondents 16.

We do not think the Clause lays down any such categorical imperative. We have repeatedly held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the government may detain individuals whom the government believes to be dangerous. See *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) (approving unreviewable Executive power to detain enemy aliens in time of war); *Moyer* v. *Peabody*, 212 U. S. 78, 84–85 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson* v. *Landon*, 342 U. S. 524, 537–542 (1952); *Wong Wing* v. *United States*, 163 U. S. 228 (1896). We have also held that the government may detain mentally unstable individuals who present a danger to the public, *Addington* v. *Texas*, 441 U. S. 418 (1979), and dangerous defendants who become incompetent to stand trial, *Jackson* v. *Indiana*, 406 U. S. 715, 731–739 (1972); *Greenwood* v. *United States*, 350 U. S. 366 (1956). We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community.

Schall v. *Martin*, *supra*. Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell* v. *Wolfish*, 441 U. S., at 534, or a danger to witnesses.

Respondents characterize all of these cases as exceptions to the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a "general rule" may freely be conceded, but we think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel. Given the well-established authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above.

The government's interest in preventing crime by arrestees is both legitimate and compelling. *De Veau* v. *Braisted*, 363 U. S. 144, 155 (1960). In *Schall*, *supra*, we recognized the strength of the State's interest in preventing juvenile crime. This general concern with crime prevention is no less compelling when the suspects are adults. Indeed, "[t]he harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." *Schall* v. *Martin*, 467 U. S., at 264–265. The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in *Schall*. The statute we upheld in *Schall* permitted pretrial detention of any juvenile arrested on any

charge after a showing that the individual might commit some undefined further crimes. The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U. S. C. § 3142(f). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. See S. Rep. No. 98–225, pp. 6–7. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U. S. C. § 3142(f). While the government's general interest in preventing crime is compelling, even this interest is heightened when the government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with

the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

Finally, we may dispose briefly of respondents' facial challenge to the procedures of the Bail Reform Act. To sustain them against such a challenge, we need only find them "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," *Schall*, *supra*, at 264, whether or not they might be insufficient in some particular circumstances. We think they pass that test. As we stated in *Schall*, "there is nothing inherently unattainable about a prediction of future criminal conduct." *Id.*, at 278; see *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 279 (WHITE, J., concurring in judgment).

Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U. S. C. § 3142(f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid.* The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. § 3142(g). The government must prove its case by clear and convincing evidence. § 3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. § 3142(i). The Act's review provisions,

§ 3145(c), provide for immediate appellate review of the detention decision.

We think these extensive safeguards suffice to repel a facial challenge. The protections are more exacting than those we found sufficient in the juvenile context, see *Schall*, 467 U. S., at 275–281, and they far exceed what we found necessary to effect limited postarrest detention in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.

B

Respondents also contend that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment. The Court of Appeals did not address this issue because it found that the Act violates the Due Process Clause. We think that the Act survives a challenge founded upon the Eighth Amendment.

The Eighth Amendment addresses pretrial release by providing merely that "Excessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951), in which the Court stated that "Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when

the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21–22. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail—to ensure integrity of the judicial process.

While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above-quoted *dicta* in *Stack* v. *Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial.

The holding of *Stack* is illuminated by the Court's holding just four months later in *Carlson* v. *Landon*, 342 U. S. 524 (1952). In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release would be prejudicial to the public interest and *would endanger the welfare and safety of the United States.*" *Id.*, at 529 (emphasis added). The detainees brought the same challenge that respondents bring to us today: the Eighth Amendment required them to be admitted to bail. The Court squarely rejected this proposition:

> "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be exces-

> sive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *Id.*, at 545–546 (footnotes omitted).

Carlson v. *Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the government's response is excessive, we must compare that response against the interest the government seeks to protect by means of that response. Thus, when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack* v. *Boyle*, *supra*. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

III

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We

hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

The judgment of the Court of Appeals is therefore

Reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 9, 1987

86-87 - United States v. Salerno and Cafaro

Dear Chief,

Your suggested changes are acceptable to me.

Sincerely yours,

The Chief Justice

Copies to: Justice Blackmun
Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1987

Re: No. 86-87, United States v. Salerno

Dear Chief:

This is in response to your letter of this morning. If Sandra and Nino will join your proposed opinion, if the changes on pages 11 and 12 of the forthcoming third draft are adopted, I shall go along. I do so despite my hesitancy about prediction of future dangerousness (which you now mention on the revised page 11). See my dissent in Barefoot v. Estelle, 463 U.S., at 920.

Sincerely,

HAB.

The Chief Justice

cc: Justice White
Justice Powell
Justice O'Connor
Justice Scalia

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 9, 1987

Re: No. 86-87 United States v. Salerno

Dear Byron, Harry and Lewis,

Nino and Sandra have said they would join my proposed opinion for the Court in this case if I make the changes indicated in the last three paragraphs of part IIA. The enclosed revision makes those changes, and the result is to narrow somewhat the holding of that part of the opinion. While I think I preferred the original draft, I am happy to make these changes in order to get Sandra and Nino to join the opinion. I wanted to circulate them to you to see if they are acceptable to you before circulating to the Conference as a whole.

Sincerely,

Justice White
Justice Blackmun
Justice Powell

cc: Justice O'Connor
Justice Scalia

March 10, 1987

86-87 United States v. Salerno

Dear Chief:

This refers to your letter of March 9, and the changes in the last three paragraphs of Part II-A of your opinion.

Although I was happy with your opinion as originally circulated, the proposed changes are entirely acceptable to me.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice White
Justice Blackmun
Justice O'Connor
Justice Scalia

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

March 10, 1987

Re: No. 86-87 - United States v. Salerno

Dear Chief:

I would be pleased to join your opinion.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 26, 1987

MEMORANDUM TO THE CONFERENCE

United States v. Salerno, No. 86-87.

In connection with my research for the dissent in this case, I have been informed that in affidavits filed in the United States District Court for the Southern District of New York, dated March 18, 1987, the Government discloses that appellee Vincent Cafaro became a cooperating witness in September 1986. Furthermore, according to the affidavit of Warren Neil Eggleston, then the Deputy Chief Appellate Attorney in the Southern District, on October 8, 1986, "the Government consented to Mr. Cafaro's temporary release on bail." See Affidavit of Eggleston, ¶10 (attached, emphasis added). This statement is difficult to reconcile with the statement in the Government's Reply Brief in this Court, filed January 12, 1987, that "Cafaro was temporarily released for medical treatment" but was "still subject to the pretrial detention order." Reply Brief, at 1-2, n.1.

These recent disclosures by the Government in the Southern District suggest to me that there may not have been a live controversy in this case at the time of argument. If other Members of the Conference agree, I would be in favor of requesting the Clerk in the Southern District of New York to supplement the record here with the subsequent filings in the District Court. I also believe that a request for supplemental briefing on the jurisdictional issues would now be appropriate.

Sincerely,

T.M.

I agree Bob.
I think we
should take care of this
Justice -- This is a shocking development, if true.
Because the Court has an obligation to notice
defects in its subject matter jurisdiction, I
think it should do as J. MARSHALL suggests.
Still, I am confident the SG has a good
explanation. (Even if he does not, there

is still the possibility of "capable of repetition yet evading review" if other charges are brought against Cafaro.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

- v. - : AFFIDAVIT

ANTHONY SALERNO, et al., : SS 86 Cr. 245 (MJL)

Defendants. :

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

WARREN NEIL EGGLESTON, being duly sworn, deposes and says:

1. I am now the Deputy Chief Counsel of the House of Representatives Select Committee To Investigate Covert Arms Transactions With Iran. Until mid-January, 1987, I was an Assistant United States Attorney in the Office of Rudolph W. Giuliani, United States Attorney for the Southern District of New York. From February 1986, until November 30, 1986, I was Chief Appellate Attorney, and from March, 1985 until February, 1986, I was Deputy Chief Appellate Attorney in Mr. Giuliani's Office.

2. In mid-September, 1986, this office received confidential information that Vincent Cafaro, who then was incarcerated in the Metropolitan Correctional Center, wanted to talk to a representative of the Government. Because Mr. Cafaro was under indictment in the above-captioned case, I arranged for

him to meet with an investigator from this Office who was not involved with the prosecution of this case to determine what Mr. Cafaro wanted to discuss.

3. At that meeting, in mid-September, 1986, Mr. Cafaro told our investigator that he indeed had sent word that he wanted to meet with a representative of the United States Attorney's Office and that the subject he wanted to discuss was his potential cooperation with the Government. A day later, I met with Mr. Cafaro. He reiterated that he wanted to meet with a representative of this Office, but that he did not want his then-counsel to know about the meeting. We proceeded to discuss his possible cooperation and agreed to meet again.

4. Because of Mr. Cafaro's status as an indicted defendant, I regarded it as advisable to erect a "Chinese Wall" within this Office, within the Federal Bureau of Investigation, and, in large part, between this Office and the FBI in order to protect the right to counsel of Mr. Cafaro as well as of his co-defendants. I coordinated the execution of the steps necessary to protect those rights.

5. Assistant United States Attorneys Alan M. Cohen and Mark R. Hellerer, who were prosecuting Mr. Cafaro, were informed that Mr. Cafaro had contacted us about the possibility of cooperation, but they were not told anything about the substance of our discussions with him.

6. During the early stages of our discussions with Mr. Cafaro, I informed Special Agent James M. Kossler of the FBI of the possibility that Mr. Cafaro would become a cooperating witness. As Coordinating Supervisory Special Agent of the Organized Crime Branch of the FBI's New York Office, Agent Kossler was, in my view, best suited to be the FBI's representative to advise this Office as our discussions with Mr. Cafaro proceeded.

7. I advised Agent Kossler about the importance of preventing the transmission to the Assistant United States Attorneys or agents working on the prosecution of the above-captioned case of any information that we might obtain from Mr. Cafaro, especially information obtained from defendants under indictment in the case. Accordingly, I instructed Agent Kossler to construct a Chinese Wall between the agents who were working on the Salerno prosecution and any agents whom he assigned to work with Mr. Cafaro. I advised Agent Kossler to tell all of the agents who would be working with Mr. Cafaro about the purpose and importance of the Chinese Wall and that as an additional precaution they were to say nothing to the agents working on the Salerno prosecution about even the fact of Mr. Cafaro's cooperation.

8. Agent Kossler advised me that Supervisory Special Agent Damon Taylor would be assigned to coordinate the debriefing and covert phase of Mr. Cafaro's cooperation. Agent Taylor assigned Special Agent Richard Dill to assist him in the operation. I gave Agent Dill the same precautionary instructions I had given

Agent Kossler and directed Agent Dill to relay those instructions carefully to Agent Taylor. I further directed Agent Dill to instruct Mr. Cafaro not to relay to the FBI or this Office any information whatever concerning the defense strategy in the Salerno case. Thereafter, on several occasions, I personally met with Agent Taylor and gave him the same instructions.

9. In late September, 1986, Mr. Cafaro was taken to a hospital for a medical examination with the Government's consent. Shortly thereafter, Mr. Cafaro secretly retained new counsel for the purpose of continuing his discussions with the Government and, after consultation with that new counsel, agreed to cooperate with the Government's investigation of Organized Crime in New York. As part of his understanding with the Government, Mr. Cafaro agreed to assist our investigation by working in a covert capacity and to testify as required.

10. On October 7, 1986, the Government and Mr. Cafaro's new counsel together informed Judge Lowe of the possibility that Mr. Cafaro would become a cooperating witness and that he had retained new counsel in connection therewith. The following day, the Government consented to Mr. Cafaro's temporary release on bail.

11. In approximately mid-October, Mr. Cafaro began to assist the FBI in its ongoing investigation of Organized Crime in New York. That assistance included meetings which Mr. Cafaro attended and recorded concerning possible criminal conduct other than that charged in the Salerno Indictment.

12. On numerous occasions thereafter, I met with or talked to agents of the FBI who were involved in the investigation and warned them about the continuing need to respect the Chinese Wall.

13. Assistant United States Attorneys Alan M. Cohen, and Mark R. Hellerer were informed that Mr. Cafaro had agreed to cooperate and to participate in convert phases of the Government's continuing investigation. At no time, however, did I reveal to Messrs. Cohen or Hellerer the substance of the information that Mr. Cafaro was providing or the nature of the covert work in which he was engaged.

14. At the request of Assistant United States Attorneys Cohen and Hellerer, Mr. Cafaro was asked a series of specific questions about the charges contained and defendants named in the Indictment in this case. The purpose of asking those questions was to determine whether any of the defendants charged had not committed any the crimes charged or whether any of the crimes charged had not occurred. Mr. Cafaro's answers fully satisfied me that the Indictment was an accurate and fair charging instrument. Agent Taylor so informed Messrs. Cohen and Hellerer.

15. On October 20, 1986, the FBI informed me that Mr. Cafaro had been summoned by his Organized Crime superiors to a meeting concerning a criminal matter other than any of the crimes charged in the Indictment. One or more of Mr. Cafaro's indicted co-defendants were expected to attend the meeting. In addition, the meeting was scheduled to be held in the office of the lawyer

for one of the Salerno defendants, because the defendants had concluded that there was no other place where they could meet without violating their bail restrictions and thus risking revocation of bail and remand. After reviewing the pertinent caselaw, I advised the FBI that Mr. Cafaro could lawfully attend the meeting and record the conversation that occurred for the following reasons: a) the stated purpose of the meeting was for something other than to discuss defense strategy; b) non-defendants were expected to be present as well as defendants; c) criminal activities other than those charged in the Salerno Indictment were expected to be discussed; d) Mr. Cafaro was ordered to attend the meeting; and e) perhaps most significant, the Government would not seek to offer at the trial of the Salerno Indictment any evidence derived from the meeting if prohibited by Massiah v. United States, 377 U.S. 201 (1964); Maine v. Moulton, 106 S.Ct. 477 (1985); or United States v. Ginsberg, 758 F.2d 823 (2d Cir. 1985).

16. The meeting took place on October 28, 1986, at the law office of Robert Ellis, Esq., and the resulting conversation was recorded. The only indicted defendants present were Vincent DiNapoli and Louis DiNapoli. After the meeting, I reviewed the recording that had been made. For all but the last few minutes of the conversation, the participants discussed historical and ongoing crimes. No defense lawyers were present, and the conversation did not relate to defense strategy for the Salerno trial. At the very end of the meeting, the participants discussed vaguely whether any defendants might plead guilty in Salerno.

Mr. Ellis, counsel for Louis DiNapoli, then joined the meeting. In the presence of others, including unindicted individuals, Mr. DiNapoli posed some very general questions to Mr. Ellis about how the Government might be expected to proceed at trial if one indicte defendant (not one of the defendants at the meeting) chose to plead guilty. Mr. Ellis speculated very generally in response that such plea would not materially alter the Government's proof at the trial of the remaining defendants. After listening to the conversation, I instructed the FBI agents to duplicate the tape up to the point at which Mr. Ellis joined the conversation and transcribe the conversation up to the same point. I further directed the agents to store the complete tape securely and not to disclose it to anyone outside the immediate operational group. None of the prosecutors or agents who are preparing the Salerno case for trial has ever heard or been told about the contents of that recorded conversation, and the Government will not offer it in evidence at the trial of this Indictment. A draft transcript of the conversation is submitted herewith for the Court's in camera review.

17. In mid-November, 1986, Assistant United States Attorney Anne T. Vitale of this Office was informed that Mr. Cafaro was cooperating with the Government and was engaged in a covert aspect of the investigation. Assistant United States Attorney Vitale was assigned to assist with that aspect of the investigation. Thereafter, in December, 1986, Assistant United States Attorney Howard E. Heiss of this Office also was assigned to assist in the covert phase of the investigation. Both were carefully instructed about the purpose and nature of the Chinese

Walls that had been erected and told not to reveal to Assistant United States Attorneys Cohen or Hellerer or to any of the agents working with Messrs. Cohen and Hellerer any information that came into their possession during their participation in the investigation in which Mr. Cafaro was cooperating.

18. As the operation proceeded, the participating agents kept me informed about meetings which had been held and about the substance of what had occurred. They also gave me a copy of the recordings made at the meetings, which I reviewed. I at no time revealed such information to Assistant United States Attorneys Cohen or Hellerer or to the agents helping to prepare the Salerno case for trial. I instructed the agents working on the ongoing investigation to do the same. At no time during my participation in this matter did I learn any information whatever about the strategy that the defendants may use in defending against the charges in this Indictment.

WARREN NEIL EGGLESTON

Sworn to before me this
18th day of March, 1987.

NOTARY PUBLIC

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 10, 1987

No. 86-87 United States v. Salerno

Dear Chief,

Please join me in your opinion.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 27, 1987

Re: 86-87 - United States v. Salerno

Dear Chief:

It seems to me that your memorandum of this date does not take into account the fact that we now know that the attorney who argued this case on the assumption that he could properly represent both Salerno and Cafaro may well have been unaware of a serious conflict between the interest of his two clients. There may be many reasons why he could not bring the facts in the Eggleston affidavit to our attention. It is also possible that the Solicitor General has not been advised of the relevant facts in view of the "Chinese Wall" that is repeatedly referred to in the affidavit. Although I am not disposed to set the case down for further briefing or argument at this point, it does seem to me that it may well be appropriate to invite the Solicitor General to comment on what appears to be a real possibility that the case is in fact moot.

Respectfully,

John

The Chief Justice

Copies to the Conference

5 Chs - To go out Monday

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Dear Chief,
I agree with your memo as to the status of this case.

March 27, 1987

Memorandum to the Conference

Re: No. 86-87, United States v. Salerno

I do not believe that there is a substantial question of mootness or collusion presented in this case. To my mind, it is not difficult at all to reconcile the affidavit circulated yesterday with the government's representations in this Court. The Solicitor General maintained that Cafaro was temporarily released. Reply Brief, at 1-2, n. 1. The affidavit of the former Assistant United States Attorney only confirms this: "the Government consented to Mr. Cafaro's temporary release on bail." Affidavit of Eggleston, ¶10 (emphasis added). We have no reason to disbelieve the Solicitor General's representation that Cafaro was and still is "subject to the pretrial detention order." Reply Brief, at 1-2, n. 1.

I do not think that this speculation about Cafaro's cooperation with the government warrants our delving into the fine points of an ongoing criminal investigation in the Southern District of New York. Both the Solicitor General and Respondents' attorney have an obligation to inform this Court about developments that affect our jurisdiction to decide the case. Neither of these parties has made any representation whatsoever on this point. We are, after all, an appellate court, and not an investigative bureau. The Salerno case was properly presented to us, and I think we ought to decide its merits.

Sincerely,

WEB

March 30, 1987

86-87 United States v. Salerno

Dear Chief:

I agree with your memo as to the status of this case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 4, 1987

No. 86-87

United States v. Salerno

Dear Thurgood,

Please join me.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

86-87 United States v. Salerno

CJ for the Court 1/27/87
1st draft 2/18/87
2nd draft 3/5/87
3rd draft 3/10/87
4th draft 5/4/87
Joined by BRW 2/18/87
LFP 2/19/87
HAB 3/2/87
SOC 3/10/87
AS 3/10/87

TM dissenting
1st draft 4/30/87
2nd draft 5/6/87
Joined by WJB 5/4/87

JPS dissenting
1st draft 5/20/87

TM will dissent 2/18/87

SOC plans to concur in the judgment and perhaps Parts I and IIB.

JPS awaiting TM's dissent 2/20/87