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The Mandatory Pretrial Release Provision of the Adam Walsh Act Amendments: How "Mandatory" Is It, and Is It Constitutional?

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THE MANDATORY PRETRIAL RELEASE PROVISION OF THE ADAM WALSH ACT AMENDMENTS: HOW "MANDATORY" IS IT, AND IS IT CONSTITUTIONAL?

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Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[1]

–Justice Louis D. Brandeis

INTRODUCTION

On July 27, 2006, the twenty-fifth anniversary of the abduction of Adam Walsh,[2] President George W. Bush signed the Adam Walsh Child Protection and Safety Act of 2006 ("AWA" or

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[1] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967) *and* Berger v. New York, 388 U.S. 41 (1967).

[2] Adam John Walsh was the son of John Walsh, host of the acclaimed television show *America's Most Wanted*. *About John Walsh*, AM. MOST WANTED, http://www.amw.com/about_amw/john_walsh.cfm (last visited Jan. 5, 2012). On July 27, 1981, a stranger abducted six-year-old Adam from a suburban Florida shopping mall. *Id.* Two weeks later, law enforcement authorities found Adam's remains in a canal 120 miles away from his home. *Adam Walsh Case Closed After 27 Tortuous Years*, PITTSBURGH POST-GAZETTE, Dec. 17, 2008, at A1. Adam's death garnered national publicity, and his parents soon became prominent advocates for child victims of violent crime, helping to combat child abduction and exploitation across the country. *See* Laura Berman, *Locking up Sex Offenders, Throwing Away Key*, CHI. SUN TIMES, May 26, 2010, at C5; *Suspect Scrutinized in Slaying of Adam Walsh*, N.Y. TIMES, June 15, 1995, at A15.

the "Act").[3] The Act is a recent addition to an array of laudable federal programs designed to combat sexual violence and child exploitation in America.[4] Its stated purposes are to "protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims."[5] The Act greatly expanded the role of the federal government in sex offender policy. Among other things, it created an intricate National Sex Offender Registry and established a new crime for failing to register;[6] created a new federal civil commitment system;[7] formed regional task forces to combat the use of the internet to commit crimes against children;[8] made substantive changes to obscenity prohibitions and sexual abuse, exploitation, and transportation crimes;[9] expanded federal jurisdiction over such crimes;[10] limited or removed potential defenses and restricted the scope of discovery by defendants in certain cases;[11] and increased statutory

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[3] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 42 U.S.C.).

[4] *See* Press Release, White House, Statement by President George W. Bush upon Signing H.R. 4472 (July 27, 2006).

[5] 120 Stat. at 587. Upon its passage, Senator Orrin Hatch described the Act as "the most comprehensive child crimes and protection bill in our Nation's history." 152 CONG. REC. S8012–02 (daily ed. July 20, 2006). Former Representative Mark Foley proclaimed: "It used to be that we tracked library books better than we do sex offenders, but this bill will even that score." 152 CONG. REC. H5725 (daily ed. July 25, 2006).

[6] The Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16913 (2006); *see also* 42 U.S.C. § 16920 (2006) (directing Attorney General to establish national sex offender registry); 42 U.S.C. § 16911 (2006) (establishing SORNA as the federal registration requirements of the Adam Walsh Act); 18 U.S.C. § 2250(a) (2006) (making failure to register as a sex offender a federal crime).

[7] 18 U.S.C. § 4248 (2006); *see also* United States v. Comstock, 130 S.Ct. 1949, 1965 (2010) (upholding constitutionality of Section 4248 under the Necessary and Proper Clause).

[8] 42 U.S.C. § 5771 (2006 & Supp. II).

[9] *See, e.g.*, 18 U.S.C. § 1201(a)(1) (2006) (expanding federal crime of kidnapping to include all instances of crossing state lines or using any means, facility or instrumentality of interstate commerce during the commission or furtherance of the kidnapping); 18 U.S.C. § 1465–66 (2006) (expanding obscenity crimes to include more intrastate conduct).

[10] *See* 18 U.S.C. 1465 (expanding federal jurisdiction to include criminal conduct occurring entirely within one state).

[11] *See* 18 U.S.C. § 3509(m) (2006 & Supp. III) (establishing new discovery rules for computer-based child pornography cases).

minimum and maximum sentences for a variety of offenses.[12] States that do not substantially comply with the Act's provisions are penalized with a reduction in federal funding.[13]

The AWA also amended the Bail Reform Act of 1984[14] in several significant ways, albeit without a stated purpose or any supporting congressional findings. Most pertinent to this Article, a particular provision of AWA Amendments—the undesignated paragraph of 18 U.S.C. § 3142(c)(1)(B)—automatically imposes certain pretrial release conditions for all persons charged with an AWA-enumerated offense, even if the district court would find those conditions unwarranted during a bail hearing.[15] There is no other provision in American law that predetermines bail conditions based entirely upon the crime charged.

Although many have debated the post-incarceration restrictions imposed by the AWA,[16] no one questions the beneficent intentions behind the Act. What has received less attention, however, is the extent to which the Act, in its zeal to protect children, may have ignored fundamental constitutional safeguards routinely afforded criminal defendants at the *pretrial* stage.[17] Has Congress exalted order at the cost of liberty to those presumed innocent? This Article addresses that question.

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[12] Sentences were increased in the following areas: 18 U.S.C. § 1591(b)(1) (2006 & Supp. II) (sex trafficking of minors by force, fraud, or coercion); 18 U.S.C. §§ 2241(c), 2242, 2243 (2006 & Supp. I) (sexual abuse of a minor or ward, and aggravated sexual abuse of children); 18 U.S.C. § 2244(a)(5) (2006 & Supp. I) (various forms of abusive sexual contact against minors); 18 U.S.C. § 2251(e) (2006 & Supp. II) (sexual exploitation offenses against children, including attempt and conspiracy crimes); 18 U.S.C. § 2252B (2006) (using a misleading internet domain name with the intent to deceive a person into viewing obscene material); 18 U.S.C. § 2258 (2006) (failure to report an incidence of child abuse); 18 U.S.C. § 2260(c)(1) (2006 & Supp. II) (production of sexually explicit depictions of a minor for importation into the United States); 18 U.S.C. § 3559(f)(1) (2006) (crimes of violence against minors).

[13] 42 U.S.C. § 16925(a) (2006). The Attorney General recently extended the deadline for complying after not a single state had achieved a sufficient level of compliance as of July 7, 2009. *See* Kristi Jourdan, *States Struggle To Comply with Sex Offender Database*, WASH. TIMES, July 7, 2009, at A1.

[14] 18 U.S.C. § 3142 (2006 & Supp. II).

[15] *Id.* § 3142(c)(1)(B). I refer to this provision by its citation or as the undesignated paragraph of the AWA Amendments.

[16] *See infra* notes 17, 20, and 23 and accompanying text.

[17] *See* J. Elizabeth McBath, *A Case Study in Achieving the Purpose of Incapacitation-Based Statutes: The Bail Reform Act of 1984 and Possession of Child Pornography*, 17 WM. & MARY J. WOMEN & L. 37, 84 (2010) (criticizing various aspects of the Bail Reform Act of 1984, as amended, including its treatment of child pornography possession offenses compared to other federal sex crimes against

To date, seventeen courts have addressed the constitutionality of the mandatory pretrial release provision of the AWA Amendments, focusing primarily on the Excessive Bail Clause of the Eighth Amendment, the Due Process Clause of the Fifth Amendment, and the separation of powers doctrine.[18] One

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children, but explaining that "[t]he constitutionality of [the AWA Amendments] is beyond the scope of this article"); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 472 (2010) (focusing primarily on the post-incarceration regulation of sex offenders but also noting, in passing, that due process attacks against the AWA's mandatory bail rules "have received the least attention by courts and scholars").

[18] *See* United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *9 (N.D.N.Y. Aug. 10, 2011) (finding mandatory curfew and electronic monitoring conditions of the AWA Amendments facially unconstitutional under the Due Process Clause of the Fifth Amendment and unconstitutional as-applied under Excessive Bail Clause of Eighth Amendment); United States v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *12 (D.S.D. May 27, 2010) (upholding constitutionality of the AWA Amendments in first and only reported case involving charges of aggravated sexual abuse of a child and abusive sexual contact); United States v. Polouizzi, 697 F. Supp. 2d 381, 395 (E.D.N.Y. 2010) (finding mandatory curfew and electronic monitoring conditions of AWA Amendments unconstitutional under Fifth and Eighth Amendments as applied to Defendant); United States v. Rondeau, Cr. No. 10-147-S, 2010 WL 5253847, at *2 (D.R.I. Dec. 16, 2010) (finding mandatory home detention and electronic monitoring conditions constitutional as applied to defendant previously convicted of child kidnapping and indecent assault where magistrate judge "heard Defendant and considered a number of individualized factors before imposing his release conditions");United States v. Stephens, No. CR09-3037-MWB, 2009 WL 3568668, at *2 (N.D. Iowa Oct. 27, 2009) (finding mandatory curfew and electronic monitoring conditions facially unconstitutional under the Fifth and Eighth Amendments), *motion to revoke order denied*, 669 F. Supp. 2d 960 (N.D. Iowa 2009) (same as to Fifth Amendment), *rev'd and remanded*, 594 F.3d 1033 (8th Cir. 2010) (upholding facial constitutionality of AWA Amendments on non-constitutional grounds, expressing "no view as to any as-applied challenge"); United States v. Crites, No. 8:09CR262, 2009 WL 2982782, at *2 (D. Neb. Sept. 11, 2009) (finding mandatory curfew and electronic monitoring conditions constitutional as applied to Defendant where magistrate judge specifically "analyzed whether the [disputed] conditions were appropriate for this Defendant," and properly determined that they were); United States v. Cossey, 637 F. Supp. 2d 881, 892 (D. Mont. 2009) (upholding mandatory curfew and electronic monitoring conditions on non-constitutional grounds); United States v. Peeples, No. CR 10-29-M-DWM (D. Mont. Oct. 19, 2010) (upholding AWA Amendments based entirely on decision in *Cossey*), *aff'd*, 630 F.3d 1136 (9th Cir. 2010) (per curiam) (upholding AWA on non-constitutional grounds); United States v. Merritt, 612 F. Supp. 2d 1074, 1080 (D. Neb. 2009) (finding mandatory curfew and electronic monitoring conditions constituted facial and as-applied violations of Fifth Amendment); United States v. Rueb, 612 F. Supp. 2d 1068, 1074 (D. Neb. 2009) (same), *rev'd in part*, 2009 U.S. Dist. LEXIS 50495 (D. Neb. June 16, 2009); United States v. Smedley, 611 F. Supp. 2d 971, 977 (E.D. Mo. 2009) (finding same conditions facially unconstitutional under the Due Process Clause of the Fifth Amendment); United States v. Arzberger, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008)

additional court has tackled the statutory interpretation question of whether the mandatory pretrial release provision applies in blanket fashion to all of the offenses listed in the undesignated paragraph of § 3142(c)(1)(B), or if that provision is limited to crimes committed against actual, as opposed to fictitious, minor victims.[19]

This Article analyzes each of those decisions and, by way of two hypothetical cases, addresses the applicability and constitutionality of the AWA Amendments.[20] Part I examines the

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(finding mandatory curfew, electronic monitoring, surrender of firearm, and no-contact conditions facially unconstitutional under the Due Process Clause of the Fifth Amendment, but rejecting separation of powers argument); United States v. Kennedy, 593 F. Supp. 2d 1221, 1233 (W.D. Wash. 2008) (finding same conditions of the AWA Amendments unconstitutional under Fifth and Eighth Amendments as applied to defendant and also violative of separation of powers doctrine), *motion to revoke order denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 Fed. Appx. 706 (9th Cir. 2009) (unpublished memorandum); United States. v. Torres, 566 F. Supp. 2d 591, 601–02 (W.D. Tex. 2008) (finding mandatory curfew and electronic monitoring conditions constituted a facial violation of Fifth Amendment and an as-applied violation of Eighth Amendment); United States v. Vujnovich, No. 07-20126-01-CM-DJW, 2007 WL 4125901, at *3 (D. Kan. Nov. 20, 2007) (finding mandatory electronic monitoring conditions unconstitutional as applied to the defendant under the Fifth Amendment and Eighth Amendment, and violative of the separation of powers doctrine), *motion to revoke order denied*, 2008 WL 687203 (D. Kan. March 11, 2008); United States v. Gardner, 523 F. Supp. 2d 1025, 1036 (N.D. Cal. 2007) (upholding constitutionality of the Amendments); United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *11 (W.D.N.Y. Dec. 7, 2006) (same as *Vujnovich*). *Karper*, *supra*, was decided just as this Article was sent to press.

This Article does not include the circuit decisions in *Kennedy*, *Stephens*, and *Peeples* in the list of seventeen, as the panels in these cases either applied the constitutional avoidance doctrine or did not meaningfully address the constitutional questions raised.

[19] *See* United States v. Kahn, 524 F. Supp. 2d 1278, 1283–84 (W.D. Wash. 2007) (holding that the mandatory pretrial release conditions of the Adam Walsh Act were inapplicable to a case not involving a "minor victim"). *But see* United States v. Rizzuti, 611 F. Supp. 2d 967, 970–71 (E.D. Mo. 2009) (holding that AWA Amendments applied, and term "involves a minor victim" included an undercover police officer posing as a minor, where underlying charge, 18 U.S.C. § 2422(b), included an attempt provision, and had "been construed by the Eighth Circuit Court of Appeals . . . to include conduct directed by defendants unknowingly at undercover law enforcement officers"). For reasons explained below, this Article eschews an exhaustive analysis of the unique ruling in *Rizzuti*. *See infra* note 88 and accompanying text.

[20] This Article focuses on the applicability and constitutionality of the mandatory pretrial release provision of the AWA Amendments. It does not enter the debate regarding the perceived harshness of the mandatory registration requirements, residency restrictions, and increased sentences imposed by the AWA, nor does it address other potential problems with the Act, such as the

applicability of the "mandatory" pretrial release conditions of the AWA Amendments, concluding that the conditions are not as automatic as Congress may have wished. Part II sets forth a brief history of the Bail Reform Act and discusses the seminal constitutional attacks made upon its bail provisions, including those made in *United States v. Salerno*.[21] Part III applies the lessons learned from *Salerno* and its progeny to the recent attacks on the AWA Amendments under the Excessive Bail Clause of the Eighth Amendment, the Due Process Clause of the Fifth Amendment, and the separation of powers doctrine. It concludes that the mandatory pretrial release provision is facially unconstitutional under the Fifth and Eighth Amendments or, at the very least, unconstitutional as applied to the vast majority of defendants charged with an AWA-enumerated offense, and that the provision violates the separation of powers doctrine if it has the effect of mandating detention without any role for the district court in the bail calculus. Recognizing the lack of political room for meaningful legislative reform on the criminal war against sex crimes,[22] the Conclusion of this Article calls instead for Congress to repeal or redraft the mandatory pretrial release provision of the AWA Amendments to cure the unconstitutional defects that are poisoning our criminal justice system at the pretrial stage. In the alternative, the Conclusion urges Congress to bolster the legislative record of the Amendments with findings that explain why mandatory—as opposed to discretionary—conditions are necessary to fulfill the AWA's goal of protecting children from sexual exploitation and violent crime.

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constitutionality of § 2250(a) of SORNA, various aspects of the Jimmy Ryce Civil Commitment Program, or the effect of 18 U.S.C. § 3509(m)'s restrictions on a defendant's ability to gather evidence to defend against child pornography charges. For excellent discussions on many of these matters, see generally Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993 (2010); Mary Prescott, *Invasion of the Body Snatchers: Civil Commitment After Adam Walsh*, 71 U. PITT. L. REV. 839 (2010); Yung, *supra* note 17; Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369 (2009); Ian N. Friedman & Kristina Walter, *How the Adam Walsh Act Restricts Access to Evidence*, CHAMPION, Jan./Feb. 2007, at 12.

[21] 481 U.S. 739, 754 (1987).

[22] *See infra* notes 522–24 and accompanying text.

Beyond assisting Congress or opening the scholarly debate on this topic, this Article will be useful to the practitioners and judges who face these cases on a regular basis. The issues raised in this Article should give pause and provide guidance to the federal bench and bar in an area where sex offense legislation grows more complex and onerous;[23] where law enforcement technology evolves rapidly, yet unevenly; and where unconstitutional dangers lurk behind even the most well-intentioned laws.

I. HOW "MANDATORY" ARE THE MANDATORY CONDITIONS?

A. *Applicable Provisions of the Adam Walsh Act Amendments*

Section 216 of Title II of the AWA amended the Bail Reform Act to require that defendants charged with one of twenty-one enumerated crimes be automatically placed on a prescribed set of pretrial release conditions.[24] The applicable portion of the Bail Reform Act now reads, in relevant part:

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[23] This includes a myriad of less serious actions that are now classified as sex offenses. *See, e.g.*, Yung, *supra* note 17, at 456 (lamenting the "one-size-fits-all approach to regulating and punishing sex offenders," including examples such as public urination prosecuted as public indecency or flashing, teenagers "sexting"—or transmitting suggestive cell phone images—prosecuted as distribution of child pornography, and parents prosecuted as accessories to statutory rape for allowing their daughter's boyfriend to move in with the family). Pedophiles are classified in the same category as high school students guilty of statutory rape by having sexual relations with their underage boyfriends or girlfriends. *See, e.g.*, Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1455–56 (1999) (noting that under most sex offender registration laws, "the term [sex offender] is not limited in application to rapists and child molesters: [t]he nineteen-year old who has consensual sex with his fifteen-year-old girlfriend who claims to be eighteen is labeled a sex offender; a woman convicted of prostitution is labeled a sex offender; [and] a man who engages in consensual sodomy with an adult female is labeled a sex offender").

[24] These AWA-enumerated offenses include failure to register under SORNA, 18 U.S.C. § 2250, and the following offenses: 18 U.S.C. § 1201 (kidnapping), § 1591 (sex trafficking of children or by way of force, fraud, or coercion), § 2241 (aggravated sexual abuse), § 2242 (sexual abuse), § 2244(a)(1) (abusive sexual contact), § 2245 (Title 18 offense resulting in death), § 2251 (sexual exploitation of children), § 2251A (buying or selling children for purposes of sexual exploitation), § 2252(a)(1) (transporting child pornography in interstate or foreign commerce), § 2252(a)(2) (receiving child pornography transported in interstate or foreign commerce), § 2252(a)(3) (sale or intent to sell child pornography in interstate or foreign commerce), § 2252A(a)(1) (transporting child pornography shipped in interstate or foreign commerce), § 2252A(a)(2) (receipt of child pornography shipped in interstate

(c) Release on conditions.—(1) If the judicial officer determines that the release described in subsection (b) of this section[25] will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

. . . .

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

. . . .

(iv) abide by specified restrictions on personal associations, place of abode, or travel;
(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
(vii) comply with a specified curfew;
(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

. . . .

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1),

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or foreign commerce), § 2252A(a)(3) (reproduction of child pornography shipped in interstate or foreign commerce), § 2252A(a)(4) (possession or sale of child pornography shipped in interstate or foreign commerce), § 2260 (production of sexually explicit depictions of a minor for importation into the United States), § 2421 (transportation of an individual to engage in prostitution or any illegal sexual activity), § 2422 (coercion or enticement of individual to travel in interstate or foreign commerce to engage in prostitution or in any illegal sexual activity), § 2423 (transportation of a minor to engage in criminal sexual activity or travel with the same to engage in illicit sexual conduct), and § 2425 (use of interstate facilities to transmit information about a minor under sixteen for purposes of enticing, encouraging, offering, or soliciting any sexual activity). Bail Reform Act, 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II).

[25] Subsection (b) of the Bail Reform Act governs unconditional releases, or releases without any of the conditions discussed in this Article, such as release on personal recognizance or upon execution of unsecured appearance bond in an amount specified by the bail judge. *See id.* § 3142(b).

> *2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).*[26]

According to the undesignated paragraph italicized above, for any release beyond personal recognizance or an unsecured appearance bond, the terms of the statute provide that the normally discretionary[27] pretrial release conditions become mandatory—upon mere charging—in cases "involv[ing] a minor victim."[28] A most interesting statutory interpretation question, then, is presented by the mandatory conditions of the AWA Amendments as they relate to offenses chargeable *without* the existence of a "minor victim," as that term is used in the undesignated paragraph of 18 U.S.C. § 3142(c)(1)(B). This might include certain virtual child pornography offenses,[29] as well as crimes in which undercover law enforcement personnel pose as minors.[30] In these situations, how "mandatory" are the mandatory conditions?

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[26] *Id.* § 3142(c)(1)(B) (emphasis added). The term "any release order" in this section appears to be a misnomer, unless it refers only to any releases orders containing conditions. If the undesignated paragraph of § 3142(c)(1)(B) were held to also apply to release orders on personal recognizance or unsecured bond under § 3142(b)—which section expressly authorizes release *without* conditions—the former provision would emasculate the latter, contrary to "the elementary canon of [statutory] construction that a statute should be interpreted so as not to render one part inoperative." *See* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979)) (internal quotation marks omitted).

[27] That is, the imposition of such conditions is historically within the discretion of the bail judge and subject to a rebuttable presumption. *See* 18 U.S.C. § 3142(e)–(f); *see also* discussion *infra* Parts II.A. and IV.A–B. These orders are typically entered by United States magistrate judges, who have original jurisdiction over matters regarding detention or release of arrestees pending trial. *See* 28 U.S.C. § 636(a)(2) (2006 & Supp. III).

[28] 18 U.S.C. § 3142(c)(1)(B); *see also* 18 U.S.C. § 3142(b) (governing conditions for release on personal recognizance or unsecured appearance bond).

[29] *See, e.g.*, 18 U.S.C. § 2252A(a)(1)–(4) (2006 & Supp. III). It should be noted, however, that certain *possession*-only crimes, such as Possession of Visual Depictions of Minors Engaging in Sexually Explicit Conduct, in violation of 18 U.S.C. § 2252(a)(4), (b)(2), are not subject to the mandatory conditions of the AWA Amendments.

[30] *See* 18 U.S.C. §§ 2422, 2423, 2425 (2006).

B. *Hypothetical*

A hypothetical helps illustrate the issues presented. Suppose that the United States government charges an adult male with the crime of interstate travel with the intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b). Suppose further that the person with whom he intended to engage in such conduct, thought by him to be a minor, was actually an adult posing as a fictitious minor on an internet site. Assume that the defendant has no prior criminal record, and does not otherwise pose a danger to the community. Finally, assume that United States Pretrial Services[31] has recommended release with conditions, which do *not* include curfew or electronic monitoring, and that the district court[32] is prepared to set a secured appearance bond in some amount greater than zero, with certain conditions of release. Do the mandatory conditions of the AWA Amendments apply?

C. *Potential Arguments*

Three initial observations are clear. First, the question is obviously one of statutory interpretation. Second, the issue is, save for two recent rulings,[33] a matter of first impression nationwide.[34] Third, legislative history concerning this particular AWA provision is non-existent; the mandatory pretrial release conditions were added to the bill's language a mere seven days prior to its final passage, without stated purposes, substantive debate, or any meaningful congressional findings.[35]

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[31] In 1974, Congress created Pretrial Services as an experiment under the Speedy Trial Act. *See* 18 U.S.C. §§ 3152–3154 (2006). In providing supervision to arrestees, Pretrial Services's purpose was to make certain that while bail was granted whenever possible, it did not result in defendants becoming fugitives. *See* H.R. REP. NO. 93-1508, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7402.

[32] These orders are commonly entered by United States magistrate judges. *See* 28 U.S.C. § 636(a)(2); *supra* note 27.

[33] United States v. Rizzuti, 611 F. Supp. 2d 967 (E.D. Mo. 2009); United States v. Kahn, 524 F. Supp. 2d 1278 (W.D. Wash. 2007).

[34] Novelty is a problem in the legal landscape of pretrial detention. Because pretrial detention orders are often issued by magistrate judges and rarely appealed, there may be very few published orders or opinions on this topic from the judges who actually hold these hearings. *See supra* note 27.

[35] *Kahn*, 524 F. Supp. 2d at 1282 n.4 ("Any effort to examine the legislative history of the particular Walsh Act Amendment at issue in this case would be futile, because it appears that no such history exists. . . . *See* 152 CONG. REC. S8012 (daily ed. July 20, 2006) (debate following passage of Sen. Hatch's amendment in the

1. The Government's Position

The government's position in such a case would likely be to harmonize the term "minor victim" with the language of the charged offense in such a way as to not distinguish between actual and intended victims. In other words, the government would be wise to advance an argument that defines the phrase "minor victim" broadly, making the mandatory conditions applicable to the largest degree of listed offenses. To do so, it should focus on three interrelated issues: (1) the overriding purpose of the Adam Walsh Act; (2) the principles frustrated by a cramped reading of the AWA Amendments in conjunction with the purposes of the Bail Reform Act; and (3) the wide-ranging statutory evidence that supports eliminating any distinction between actual victims and intended victims.

First, the government should stress that the mandatory conditions of the Amendments are designed, in the words of the AWA itself, "[t]o protect children from sexual exploitation and violent crime."[36] This broad purpose is no doubt furthered by the government's interest in preventing such crimes by those arrested and charged with one or more of the offenses listed in the undesignated paragraph of 18 U.S.C. § 3142(c)(1)(B),[37] particularly if congressional findings can establish a heightened

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nature of a substitute that included the mandatory conditions)."). Title II, Section 216 of the AWA—the section that amended the applicable provisions of the Bail Reform Act—provides no support for those amendments. Nothing in the congressional record supports the addition of the mandatory conditions. *See* 152 CONG. REC. S8012-02 (daily ed. July 20, 2006). Here, one must distinguish between legislative record support for the AWA in general—such as in its enhanced penalty provisions—and support for the added pretrial release conditions. The only mention of the mandatory conditions came from Senator Hatch of Utah, who was speaking to the issue of *post-conviction* release when he suggested the addition of electronic monitoring. *See* 152 CONG. REC. S8012-02, 8017 (statement of Sen. Hatch) ("If we send Martha Stewart home with an electronic bracelet on her ankle, we can't do that to violent sex offenders . . . ?"). In light of this dearth of legislative support, a strong argument can be made that there is no identifiable government interest in the imposition of the mandatory pretrial release conditions of the Adam Walsh Act, much less a valid interest.

[36] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 42 U.S.C.); *see also* § 154, 120 Stat. at 611; § 501, 120 Stat. at 624 ("The government has a compelling State interest in protecting children from those who sexually exploit them . . . .").

[37] *See* United States v. Gardner, 523 F. Supp. 2d 1025, 1029–30 (N.D. Cal. 2007) (citing United States v. Salerno, 481 U.S. 739, 749 (1987)); *see also* De Veau v. Braisted, 363 U.S. 144, 155 (1960) (noting that the government's interest in preventing crime by arrestees is both legitimate and compelling).

risk of post-arrest criminal activity.[38] In that light, a statutory interpretation that limits the meaning of the term "minor victim" to cases involving actual, and not intended,[39] minor victims would clash with Congress's above-stated purpose—to ensure *greater* protection to the victim and community in situations where pretrial release of dangerous individuals is appropriate.

Second, the government should emphasize that such a narrow definition of the term "minor victim" produces a result *weaker* than that which might normally occur under the discretionary provisions of the Bail Reform Act.[40] In the hypothetical outlined above, the government should argue that the defendant poses no less of a danger to the community because the minor for whom he traveled hundreds of miles to have sex with was not an actual but merely an intended—or fictitious—victim. Such a fact would ordinarily be irrelevant to the bail court's evaluation, under the Bail Reform Act, of the danger presented to "the safety of any other person or the community."[41] Indeed, the very features that make the defendant dangerous in this regard are his intent and willingness to act. Facts about the victim of which the defendant was unaware play no role in, and thus should not undercut, that conclusion.[42] Because the same danger remains, the same protection is necessary.

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[38] This was a major emphasis for the Bail Reform Act, Congress having determined that arrestees of certain extremely serious crimes were "far more likely to be responsible for dangerous acts in the community after arrest." *See Salerno*, 481 U.S. at 749–50. This determination was based in part on what Congress deemed the "disturbing rate of recidivism among released defendants." S. REP. NO. 98-225, at 6–7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189 ("In a recent study of release practices in eight jurisdictions, approximately one out of every six defendants in the sample . . . were rearrested during the pretrial period—one-third of these defendants were rearrested more than once, and some were rearrested as many as four times.").

[39] As a litigation strategy, the government's use of "intended" victim, rather than "fictitious" victim, is important at this juncture. The former term mirrors the language of the underlying offense in our hypothetical, *see* 18 U.S.C. § 2423(b) (2006), and maintains focus on the acts of the defendant. The latter term runs the risk of focusing on the ruse, emphasizing the nonexistent minor, and highlighting the impossibility of causing harm to an actual victim.

[40] *See* 18 U.S.C. § 3142(e) (2006 & Supp. II).

[41] *See id.* § 3142(b).

[42] *Cf.* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 11.5 (2d ed. 2007) (explaining that when a defendant's mental state matches that of a person guilty of the completed crime, the defendant "by committing the acts in question[,] demonstrate[s] his readiness to carry out his illegal venture").

Third, the government should reference similar federal statutory and regulatory provisions to argue that Congress, by employing the broad term "minor victim" in § 3142(c)(1)(B), did not intend to create a distinction between actual victims and intended victims. Congress knows how to specify the situations in which an actual victim is required, such as in cases involving the Child Pornography Prevention Act of 1996,[43] where the question of whether an image depicts an actual child or a digitally-manipulated adult has enormous constitutional consequences.[44] In those circumstances, Congress has explicitly employed statutory terms distinguishing between actual and intended—or artificial—victims.[45] It has not minced words. Furthermore, courts have routinely held that an actual minor victim is not required for a conviction under many of the child exploitation crimes included in the AWA Amendments, such as 18 U.S.C. § 2251 (actual or attempted sexual exploitation of a minor),[46] § 2422(b) (actual or attempted persuasion of a minor to engage in illicit sexual activity),[47] and the offense charged in the

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[43] The Child Pornography Prevention Act of 1996 was part of the Omnibus Consolidated Appropriations Act of the same year. Pub. L. No. 104-208, 110 Stat. 3009, 3009-26 to 3009-31 (1996) (amending 18 U.S.C. §§ 2241, 2243, 2251, 2252, 2256, 42 U.S.C. § 2000aa, and adding 18 U.S.C. § 2252(A)).

[44] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 256–58 (2002) (striking down as unconstitutional portions of CPPA that banned virtual child pornography, and holding that if an image purporting to depict a minor does so only in the virtual sense—such as computer-generated images of non-humans—it receives First Amendment protection). Furthermore, the amended CPPA now provides an affirmative defense based on the argument that the putative child pornography was not produced using any actual minors. *See* 18 U.S.C. § 2252A(c)(2) (2006 & Supp. III); *see also, e.g.*, Free Speech Coal. v. Reno, 198 F.3d 1083, 1090 n.5 (9th Cir. 1999). This Article does not analyze the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, nor does it address the "morphing" provision defined in 18 U.S.C. § 2256(8)(C).

[45] *Compare* 18 U.S.C. § 2256(1) (2006 & Supp. II) (defining "minor" as "any person under the age of eighteen years"), *with* 18 U.S.C. § 2256(8) (including definitions of "child pornography" that distinguish between actual, morphed, and computer-generated images of minors), *and* 18 U.S.C. § 2256(9) (defining "identifiable minor" as, *inter alia*, a minor person "who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature").

[46] *See, e.g.*, United States v. Crow, 164 F.3d 229, 234–36 (5th Cir. 1999) (noting that conviction for attempted sexual exploitation of a minor, 18 U.S.C. § 2251(a) and (d), does not require "that the individual exploited or that the defendant attempted to exploit had to actually be a minor").

[47] *See* United States v. Hubbard, 480 F.3d 341, 346 (5th Cir. 2007) ("When a statute criminalizes conduct because the victim or intended victim is a minor, . . . it

hypothetical outlined above, § 2423(b) (interstate travel with the intent to engage in illicit sexual conduct).[48] In such cases, courts have found it "contrary to the purpose of the statute to distinguish the defendant who attempts to induce an individual who turns out to be a minor from the defendant who, through dumb luck, mistakes an adult for a minor."[49] Finally, a broad definition of "minor victim" is also consistent with the definitions under the United States Sentencing Guidelines applicable to sexual exploitation offenses that, in "focus[ing] on the intended harm, and not only the actual harm committed,"[50] define "minor" and "victim" as including fictitious persons.[51]

2. Problems with the Government's Position

The government's position is tenuous. First, under statutory interpretation canons, it forces the prosecution to argue on one hand that the phrase "involves a minor victim" is ambiguous or

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is of no moment that the person with whom a defendant attempted to engage in prohibited conduct was actually an adult as long as the defendant believed the intended victim to be a minor . . . ."); United States v. Helder, 452 F.3d 751, 756 (8th Cir. 2006) ("[A]n actual minor victim is not required for an attempt conviction under § 2422(b)."); United States v. Tykarsky, 446 F.3d 458, 461 (3d Cir. 2006) ("[W]e join several sister courts of appeals in holding that the involvement of an actual minor, as distinguished from a government decoy, is not a prerequisite to conviction under 18 U.S.C. § 2422(b) (actual or attempted persuasion of a minor to engage in illicit sexual activity) or 18 U.S.C. § 2423(b) (traveling for the purpose of engaging in illicit sexual activity)."); United States v. Sims, 428 F.3d 945, 959–60 (10th Cir. 2005) (holding same); United States v. Meek, 366 F.3d 705, 717–20 (9th Cir. 2004) (holding that § 2242(b) conviction for use of the internet to attempt to induce minor to engage in sexual activity does not require an actual minor victim); United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002) (holding that "belief that a minor was involved is sufficient to sustain an attempt conviction under 18 U.S.C. § 2422(b)"); United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001) (noting that legal impossibility is normally not a defense to an attempt to violate § 2422(b)).

[48] *See* United States v. Vail, 101 F. App'x. 190, 192 (9th Cir. 2004) (extending rationale in *Meek* to a conviction under 18 U.S.C. § 2423(b)).

[49] *Meek*, 366 F.3d at 718; *see also Tykarsky*, 446 F.3d at 461 ("[T]he involvement of an actual minor, as distinguished from a government decoy, is not a prerequisite to conviction under 18 U.S.C. § 2422(b) . . . or 18 U.S.C. § 2423(b) . . . .").

[50] United States v. Spruill, 296 F.3d 580, 591 (7th Cir. 2002) ("The commentary to U.S.S.G. § 2G1.1(d) provides that a sentencing court may consider an undercover law enforcement officer as a 'victim' for sentencing purposes.").

[51] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL, § 2A3.1–.5, § 2G1.3, § 2G2.1–.2, § 2G3.1, application n.1 (2007) (defining "minor" as, inter alia, "an individual, *whether fictitious or not*, who a law enforcement officer represented to a participant") (emphasis added); *id.* § 2A3.1, § 2G1.1, application n.1 (" 'victim' includes an undercover law enforcement officer.").

leads to an absurd result,[52] and on the other, that Congress clearly knew what it was doing when it used the all-encompassing term "minor victim," rather than distinguish between actual and intended minor victims. The result is an argument tied in a knot.

Second, the government's position is so dependent on the larger legislative framework—so reliant on *other* statutory provisions, terms, and histories[53]—that losing the ambiguity argument effectively destroys its case, unless the government can seriously contend that the nonexistent legislative history of the AWA Amendments "clearly indicates that Congress meant something other than what it said."[54] This is because courts cannot reach legislative history if the terms of a statute are

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[52] *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) ("[I]n all statutory construction cases, . . . [t]he first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (citations omitted) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)) (internal quotation marks omitted)); *see also* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 227 (2008) (viewing unfavorably the parties' "attempt to create ambiguity where the statute's text and structure suggest none"); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " (alteration in original) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

[53] Most of which, it should be noted, involve attempt crimes. *See supra* note 47 and accompanying text.

[54] Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 877 (9th Cir. 2001) (approving resort to legislative history in such a circumstance) (quoting Perlman v. Catapult Entm't, Inc. (*In re* Catapult Entm't, Inc.), 165 F.3d 747, 753 (9th Cir. 1999)) (internal quotation marks omitted).

And while "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality," International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961), "[i]t is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; ' "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . " or judicially rewriting it.' " Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964)); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 458 (2001) (stating that constitutional doubt canon does not apply where statute is clear); Miller v. French, 530 U.S. 327, 341 (2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (quoting United States v. Locke, 471 U.S. 84, 96 (1985)) (internal quotation marks omitted)); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (noting that constitutional doubt canon only applies where statute is ambiguous).

plain.[55] Furthermore, references to attempt crimes and the judicial treatment of such allegedly analogous provisions during the *conviction* or *penalty* stage[56] does little for an analysis that must tackle the question at the *pretrial* stage, where the presumption of innocence is at its peak.[57] The result is an argument that fails to come to terms with the language of § 3142.

3. The Defendant's Position: *United States v. Kahn*

a. Background

The strengths of the defendant's arguments and weaknesses of the government's were on display in *United States v. Kahn*.[58] Defense counsel should embrace *Kahn* when faced with a dispute over the applicability of the mandatory pretrial release conditions of the AWA Amendments.

The facts in *Kahn* are strikingly similar to those in our hypothetical, save for a few important wrinkles. Mr. Kahn was arrested after traveling from Vancouver, British Columbia to Seattle, Washington to have sex with "Jackie," an undercover Seattle Police detective posing as a thirty-eight-year-old female, and "Jenny," her fictitious thirteen-year-old daughter.[59] Mr. Kahn was charged with traveling in foreign commerce with the intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b).[60] At his initial appearance, the government and Pretrial Services recommended detention.[61] They did so based on the mandatory electronic monitoring requirement of the AWA Amendments, paired with Pretrial Services' inability to conduct global positioning satellite ("GPS") electronic monitoring of Mr. Kahn in Canada.[62] Furthermore, although the

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[55] *See, e.g., Sigmon Coal Co.*, 534 U.S. at 450.

[56] *See* cases cited *supra* notes 47–50.

[57] *See* 18 U.S.C. § 3142(j) (2006 & Supp. II) ("Nothing in this section [of the Adam Walsh Amendments] shall be construed as modifying or limiting the presumption of innocence."); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (citation omitted)).

[58] 524 F. Supp. 2d 1278 (W.D. Wash. 2007).

[59] *Id.* at 1279.

[60] *Id.*

[61] *Id.* at 1279–80.

[62] *Id.*

government appeared willing to release him within the Western District of Washington, the United States Citizenship and Immigrations Services ("USCIS") refused to agree to a probationary visa.[63] Thus, the legal requirements of the Amendments, coupled with the practical limitations of Canadian law enforcement technology and the stance of USCIS, threatened to turn a mandatory condition of *release* into detention by default.

After recognizing this issue as one of first impression,[64] the court posed its first—and ultimately, the last—question in the case: "whether the mandatory pretrial release conditions of the Walsh Act Amendments apply to the offense of interstate travel with the intent to engage in illicit sexual conduct with another person when that person, though thought to be a minor, is actually an adult posing as a fictitious minor."[65]

The government answered that question in the affirmative. It interpreted the term "minor victim" broadly, "without distinguishing between cases involving actual and intended [minor] victims," and insisted that Congress intended the same.[66] The government argued that this approach, as discussed above,[67] was most faithful to the Bail Reform Act's goal of reasonably assuring "the appearance of the [defendant] and the safety of any other person and the community"[68]—a mission it claimed was only strengthened by the AWA Amendments.[69] Furthermore, the government argued that "because no actual minor victim is necessary to *convict* under [18 U.S.C.] § 2423(b), no such victim [was] necessary to trigger the mandatory pretrial release

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[63] *Id.* at 1280.

[64] *See id.* at 1281 n.3 ("The decisions in *United States v. Gardner*, *United States v. Vujnovich*, and *United States v. Crowell* do not change this result. None of these cases dealt with [anything close to] the offense outlined in 18 U.S.C. § 2423(b), particularly as it relates to a fictitious 'minor victim.' " (citations omitted)).

[65] *Id.* at 1281; *see also id.* at 1279 (noting the constitutional questions argued by the parties, i.e., whether the AWA was unconstitutional "because [it] violates the Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the separation of powers doctrine"). These unreached constitutional questions make up Part III of this Article.

[66] *Id.* at 1281.

[67] *See* discussion *supra* Part I.C.1.

[68] 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II).

[69] *Kahn*, 524 F. Supp. 2d at 1281–82 (summarizing the government's argument).

conditions of the [AWA] Amendments," citing only post-trial cases to support its argument.[70] The government's approach was expansive and elusive; light on construction, heavy on purpose.

Mr. Kahn, on the other hand, stressed the language of the statute. He argued that the express terms of the undesignated paragraph of 18 U.S.C. § 3142(c)(1)(B) precluded application of the mandatory pretrial release conditions to his case.[71] Mr. Kahn argued that

> because § 3142(c)(1)(B) mandates the imposition of certain pretrial release conditions only in cases "involv[ing] a minor victim," that provision is inapplicable to the present case, where the alleged "victim" is an adult undercover police detective posing as an adult prostitute with feigned access to a fictitious thirteen year-old prostitute daughter.[72]

b. The Court's Decision

The fact that the court in *Kahn* began its discussion with the plain terms of the AWA Amendments, rather than with some notion of the "overriding purpose" of the Act, did not bode well for the government. The court opened its analysis as follows:

> As a general matter, the meaning of a statute is found in the actual language used therein. This is precisely how a legislature gives expression to its wishes. When the language of a given statute is plain, "the sole function of the courts is to enforce it according to its terms."[73] To this end, "courts must presume that a legislature says in a statute what it means and means in a statute what it says."[74]

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[70] *Id.* at 1281. To support this argument, the government cited post-trial cases involving certain exploitation offenses subject to the mandatory pretrial conditions of the AWA Amendments. *See, e.g.*, United States v. Meek, 366 F.3d 705, 717 (9th Cir. 2004) ("[A]n actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b)." (quoting United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002)) (internal quotation marks omitted)); United States v. Vail, 101 F. App'x. 190, 192 (9th Cir. 2004) (extending *Meek*'s rationale to a conviction under 18 U.S.C. § 2423(b)).

[71] *Kahn*, 524 F. Supp. 2d at 1281.

[72] *Id.* (quoting 18 U.S.C. § 3142(c)(1)(B)).

[73] *Id.* at 1282 (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)) (internal quotation marks omitted).

[74] *Id.* (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

The court then observed that "[n]either the Walsh Act nor the amended Bail Reform Act defines the phrase 'minor victim,' "[75] which meant that, under Ninth Circuit law, the court would be charged with interpreting the words of the statute in such a way as to "give effect to the intent of Congress. . . . [I]f the disputed statutory term [was] plain, the court [w]ould construe that term in accordance with its ordinary, contemporary, common meaning."[76] It noted that "[o]nly if an ambiguity exists in the statute, or when an absurd construction results, does this court refer to the statute's legislative history."[77]

The court's task was therefore to construe "minor victim" in accordance with its plain meaning, embracing the legislative history only if an absurd construction resulted. Utilizing *Black's Law Dictionary*,[78] the court defined "minor" as "[a] person who has not reached full legal age,"[79] and "victim" as a "person harmed by a crime, tort, or other wrong."[80] Accordingly, the court defined "minor victim" as "a child harmed by a crime,"[81] and concluded that the plain meaning of that term did "not encompass the undercover detective or her fictitious thirteen year-old daughter."[82] It decided that "[t]he former [person],

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[75] *Id.*

[76] *Id.* (quoting San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)) (internal quotation marks omitted).

[77] *Id.* (quoting *San Jose Christian Coll.*, 360 F.3d at 1034) (internal quotation marks omitted). Any doubt regarding the legislative history was foreclosed by the court's fourth footnote, which explained

> [a]ny effort to examine the legislative history of the particular Walsh Act Amendment at issue in this case would be futile, because it appears that no such history exists. The mandatory pretrial conditions now in dispute were added to the bill's language only seven days prior the bill's final passage. The amendment including the mandatory pretrial conditions was passed without substantive debate or supporting congressional reports. *See* 152 CONG. REC. S8012 (daily ed. July 20, 2006) (debate following passage of Sen. Hatch's amendment in the nature of a substitute that included the mandatory conditions).

Id. at 1282 n.4.

[78] *See id.* at 1282 ("To determine the 'plain meaning' of a term undefined by a statute, resort to a dictionary is appropriate." (citing United States v. Jackson, 480 F.3d 1014, 1022 (9th Cir. 2007); Cleveland v. City of L.A., 420 F.3d 981, 989 (9th Cir. 2005))).

[79] *Id.* (alteration in original) (quoting BLACK'S LAW DICTIONARY 1017 (8th ed. 2004)) (internal quotation marks omitted).

[80] *Id.* (quoting BLACK'S LAW DICTIONARY 1598 (8th ed. 2004)) (internal quotation marks omitted).

[81] *Id.*

[82] *Id.*

though perhaps a victim, [was] not a minor."[83] The latter person was not a person, and was therefore "neither a victim nor a minor under the 'ordinary, contemporary [and] common meaning' of those terms."[84]

The court noted that the government's broad argument "might [have been] persuasive were the disputed statutory provision amorphous, or its terms unclear."[85] Because the provision was plain, however, the court eschewed a diversion into the legislative history of the Act.[86] By its express terms, § 3142(c)(1)(B) removed the discretion ordinarily granted the bail judge only in "case[s] . . . involv[ing] a minor victim."[87] Because *Kahn* did not involve a minor victim, judicial discretion remained intact, and the mandatory pretrial release conditions of the AWA Amendments did not apply.[88]

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[83] *Id.*

[84] *Id.* (alteration in original) (quoting United States v. Smith, 155 F.3d 1051, 1057 (9th Cir. 1998)).

[85] *Id.* at 1283.

[86] *Id.* at 1284 ("Because the result here is not absurd, the plain language controls." (citing San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004))). Indeed, although not addressed by the Court, the potential for an "absurd" result was more likely under the broad definition urged by the government. For example, interpreting the term "minor victim" to include fictitious persons would clash with the mandatory condition requiring the defendant to "avoid all contact with an alleged victim of the crime," 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II), as it would force the court to enter an order requiring Mr. Kahn to avoid contact with a fictitious entity.

[87] *Id.* at 1283 (first alteration in original) (quoting 18 U.S.C. § 3142(c)(1)(B)) (internal quotation marks omitted).

[88] *Id.* ("The plain language of § 3142 demonstrates that Congress did not intend that all persons charged with a violation of § 2423(b) be subject to the mandatory pretrial conditions imposed by the Walsh Act. By inserting the qualifying language 'involves a minor victim,' Congress specifically limited the cases in which those conditions, as mandatory conditions, are to be imposed."). *But see* United States v. Rizzuti, 611 F. Supp. 2d 967, 970 (E.D. Mo. 2009) (holding that AWA Amendments applied, and term "involves a minor victim" included an undercover police officer posing as a minor, where underlying charge, 18 U.S.C. § 2422(b), included an attempt provision, and had "been construed by the Eighth Circuit Court of Appeals . . . to include conduct directed by defendants unknowingly at undercover law enforcement officers" (citing United States v. Spurlock, 495 F.3d 1011, 1013 (8th Cir. 2007))). Due to the obvious differences in the offenses charged, as well as the unique treatment of § 2422(b) within the Eighth Circuit, I distinguish the magistrate judge's opinion in *Rizzuti* as limited to its peculiar circumstances.

The court exposed additional flaws in the government's argument by distinguishing, as a matter of statutory construction, the very statute Mr. Kahn was alleged to have violated—18 U.S.C. § 2423(b):

> The operative phrase "involves a minor victim" differs markedly from the language of § 2423(b), which criminalizes "travel for the purpose of engaging in any illicit sexual conduct with another person," whether or not the victim is a minor or the prohibited conduct actually occurs. Under the government's reading of § 3142(c)(1)(B), the term "minor victim" has no meaning, because in any case where a violation of § 2423(b) is charged, the Walsh Act Amendment's mandatory pretrial release conditions would be automatic.[89]

The court rejected the government's argument that a minor victim was unnecessary to trigger the mandatory conditions because no such victim was necessary to *convict* under § 2423(b), explaining that it was "not surprised that such a noticeable language dichotomy exists between the pretrial and post-conviction stages of criminal litigation involving §§ 3142(c) and 2423(b): [T]he presumption of innocence and its concomitant liberty concerns, while at their peak during the former stage, are at their lowest ebb by the latter."[90] Such an obvious distinction, in the court's view, rendered the post-conviction decisions in *United States v. Meek* and *United States v. Vail* less persuasive.[91]

Notwithstanding the government's appeal to a broad reading of "minor victim," the court understood the government's position as requiring it "to ignore or read out that phrase, violating the cardinal principle of statutory interpretation that courts must

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[89] *Kahn*, 524 F. Supp. 2d at 1283 (citations omitted).

[90] *Id.* at 1283–84 (citation omitted) (citing 18 U.S.C. § 3142(j) ("Nothing in this section [of the Adam Walsh Amendments] shall be construed as modifying or limiting the presumption of innocence.")).

[91] *See id.* at 1284 n.5 ("[A]n actual minor victim is not required for an attempt *conviction* under 18 U.S.C. § 2422(b)." (alteration in original) (quoting United States v. Meek, 366 F.3d. 705, 717 (9th Cir. 2004)) (internal quotation marks omitted)); United States v. Vail, 101 F. App'x. 190, 192 (9th Cir. 2004) (same as to a *conviction* under 18 U.S.C. § 2423(b)). According to the court, "[t]he same [could] be said for cases applying the United States Sentencing Guidelines." *Kahn*, 524 F. Supp. 2d at 1284 n.5 (citing United States v. Butler, 92 F.3d 960, 963 (9th Cir. 1996)). For another related decision, see also United States v. Pool, 645 F. Supp. 2d 903, 914–15 (E.D. Cal. 2009) (distinguishing liberty interest in "post-arrest, post-release booking procedure for identification purposes only" from "terms and condition[s] of release which last[ ] throughout the pre-trial process" and "restrict an individual's movement or impose an excessive bail condition").

give effect, if possible, to every clause and word of a statute."[92] This was so despite the court's acknowledgement that Mr. Kahn likely "pose[d] no less of a danger to the community merely because the thirteen year-old [minor] with whom he allegedly intended to engage in sexual conduct was a fictitious person."[93] The court tiptoed around this fact by recognizing that, pursuant to the Bail Reform Act, it retained the traditional discretion to order electronic monitoring should it deem such a condition necessary to assuage the risk of flight or concerns regarding safety of the community.[94] Furthermore, "[b]y inserting the qualifying language 'involves a minor victim[ ]' [into § 3142(c)(1)(B),] Congress specifically limited the cases in which those [listed] conditions, as mandatory conditions, are to be imposed."[95] Congress therefore "did not intend that all persons charged with a violation of § 2423(b) be subject to the mandatory pretrial conditions imposed by the Walsh Act."[96]

For better or worse, Congress's use of the term "minor victim" tied the government's tongue and the bail judge's hands. The court in *Kahn* was attentive to both the broad purpose behind the AWA and the institutional reality that "the drafting of statutory language to carry out prevailing policy preferences is a legislative, not a judicial, function."[97] In this regard, the government was stuck between the Scylla of ignoring plain language and the Charybdis of urging the court to substitute its judgment for that of Congress. The court did neither.[98]

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[92] *Kahn*, 524 F. Supp. 2d at 1283 (quoting Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 21 (2006)) (internal quotation marks omitted).

[93] *Id.*

[94] *Id.* ("The Court recognizes that § 3142(c)(1)(B) specifically emphasizes the safety of the community when outlining the Court's discretion to impose a condition or combination of conditions listed in § 3142(c)(1)(B)(i) through (xiv)."). This discretion applied only in cases falling outside of the undesignated paragraph of the AWA, as such conditions were otherwise mandatory upon charging. *See* 18 U.S.C. § 3142(c)(1)(B). The constitutionality of those conditions is addressed *infra* Part III.

[95] *Kahn*, 524 F. Supp. 2d at 1283.

[96] *Id.*

[97] *Id.* at 1284.

[98] *See id.* Specifically, the court concluded as follows:

> Because the statutory language at issue today is plain, the sole function of this Court is "to enforce [that language] according to its terms." *Ron Pair Enters., Inc.*, 489 U.S. at 241, 109 S.Ct. 1026. The government advocates the temporary abandonment [of] this deeply-rooted prerogative, and would instead have this Court substitute its judgment for the plain language used

II. CONSTITUTIONAL CHALLENGES TO THE BAIL REFORM ACT OF 1984

Resolution of the statutory interpretation problem in *Kahn* avoided the questions vigorously argued by the parties concerning the constitutionality of the AWA Amendments.[99] However, one simple alteration to the facts in *Kahn* can revive the question of whether unconstitutional dangers lurk behind this well-intentioned law: Assume the victim was in fact an actual minor. This altered fact pattern presents an entirely new situation, rife with constitutional questions unanswered by most of the federal judiciary. In such a circumstance, the AWA Amendments apply and, of particular significance to our hypothetical, the electronic monitoring and curfew conditions, among others, present legal and logistical problems.

To date, seventeen federal courts have addressed the constitutionality of the mandatory conditions imposed by the undesignated paragraph of the AWA Amendments.[100] Seven have held that the AWA Amendments violate the Excessive Bail Clause of the Eighth Amendment,[101] eleven have found Fifth Amendment due process violations,[102] three have determined that the Amendments contravene the separation of powers doctrine,[103] and only two of these decisions have been reversed.[104] Part III analyzes these decisions in detail. Before doing so, a brief background of the Bail Reform Act is necessary to better understand the constitutional questions that loom.

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by Congress. The Court refuses to do so. *Cf. Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 96 L.Ed. 469 (1952) (courts "do not sit as . . . super-legislature[s]").

Id. (first and last alteration in original).

[99] *Id.* ("[I]n light of the Court's holding that the mandatory pretrial release conditions of the Walsh Act are not applicable to this case, it is unnecessary to address the constitutionality of that statute as applied to the defendant in this case.").

[100] *See* cases cited *supra* note 18. This number does not include the three court of appeals decisions in *Kennedy*, *Stephens*, and *Peeples*, *see supra* note 18, as the panels in these three cases applied the constitutional avoidance doctrine rather than meaningfully address any of the constitutional questions raised. *See* discussion *infra* Parts IV.A.5 and B.4.

[101] *See infra* note 193 and accompanying text.

[102] *See infra* note 464 and accompanying text.

[103] *See infra* note 480 and accompanying text.

[104] *See infra* notes 283–91, 416–431 and accompanying text.

A. *The Bail Reform Act of 1984*

"In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception."[105] Bail is the rule, and pretrial detention is disfavored and strictly limited by statute.[106] This is in keeping with the theory of freedom before conviction,[107] which is rooted in the common law. In seventeenth-century England, pretrial release was a matter within the sound discretion of the trial judge.[108] This tradition continued in America with the Judiciary Act of 1789, which permitted bail to be set by a judge "who shall exercise . . . discretion . . . regarding the nature and circumstances of the offence."[109] Federal district courts have long possessed the authority to detain an arrestee "to ensure his presence at trial,"[110] and to impose conditions, such as reasonable bail,[111] before releasing him.[112] Many pretrial

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[105] United States v. Salerno, 481 U.S. 739, 755 (1987).

[106] *See* 18 U.S.C. § 3142(f)(1)(A)–(D), (f)(2)(A),(B) (2006 & Supp. II).

[107] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (explaining that the right to bail permits, *inter alia*, "the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction").

[108] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 293–97 (1769); *see also* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 966 (1965) (noting movement from mandatory nonbailable crimes to judicial discretion, explaining that "the most critical steps in this process—the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689—grew out of cases which alleged abusive denial of freedom on bail pending trial").

[109] Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789) (repealed 18 U.S.C. §§ 3141–51 (1986)) (making all noncapital offenses bailable and granting courts the discretion to grant bail in a capital case); *see also* 4 BLACKSTONE, *supra* note 108, at 294 ("[I]t is expressly declared by statute . . . that excessive bail ought not to be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine.").

[110] Bell v. Wolfish, 441 U.S. 520, 536 (1979). "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." *Stack*, 342 U.S. at 5.

[111] *See Stack*, 342 U.S. at 4 ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.") (citing *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835)).

[112] *See, e.g.*, United States v. Scott, 450 F.3d 863, 865 (9th Cir. 2006) (citing United States v. Salerno, 481 U.S. 739, 754 (1987)). The first federal bail provision was enacted by the first Congress as part of the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91 (repealed by 18 U.S.C. §§ 3141–51 (1986)). The Judiciary Act defined all bailable offenses and established judicial limits on the setting of bail. *Id.* Under the act, all noncapital offenses were bailable, and the decision to grant bail to an arrestee charged with a capital offense was left to the

detainees freely consent to such conditions, opting to relinquish certain rights in order to sleep in the comfort of their own beds pending trial.[113]

In time, the fear that more pretrial releases would result in the commission of more crimes came to dominate the national crime debate in the United States. As alternatives to monetary bail were implemented and avenues of judicial review over pretrial conditions increased, it became more likely—or at least more emphasized—that defendants viewed by many as dangerous would obtain freedom pending trial.[114] Statistics emerging during America's "War Against Crime"[115] added to this fear, and changed the focus of the national discussion on the issue of pretrial release.[116] Reappearance at trial became a secondary consideration in the bail calculus, and the issue of preventative detention took center-stage in the bail reform debate.

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discretion of the court. *Id.* No major changes were made to the federal bail law until 177 years later, when Congress adopted the Bail Reform Act of 1966. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (codified as amended at 18 U.S.C. §§ 3141–51), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. § 3141).

[113] *Scott*, 450 F.3d at 865–66.

[114] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.3 (5th ed. 2009).

[115] President Richard Nixon, Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 8, 12 (Jan. 22, 1970).

[116] *See generally* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1 (1985) (examining the public safety focus of bail reform laws prior to mid-1980s and evaluating the implication for pretrial release in the future); Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1 (1989) (reviewing bail reform statistical data and court impact studies of detention procedures conducted in various federal districts and nationwide); *see also* Steven R. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J.L. & PUB. POL'Y 173, 177–78 (1986) (noting varying percentages of persons arrested while on pretrial release).

In 1984, a new Bail Reform Act repealed the most recent revision to the federal bail statute, the Bail Reform Act of 1966.[117] The new Act was designed primarily to combat "the alarming problem of crimes committed by persons on release," to correct the regrettable practice of mandatory monetary bails, and to provide courts with "adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."[118] According to Congress, "providing for [judicial] flexibility in setting conditions of release appropriate to the characteristics of individual defendants" was vital to achieving these ends.[119]

The Bail Reform Act of 1984 covers the gamut of detention and release in federal criminal cases.[120] It establishes standards governing "the pretrial phase of a case, the period between conviction and sentencing, and the period during the pendency of an appeal by either side. It prescribes consecutive penalties for failure to appear and for committing offenses while on release" and "establishes standards and procedures governing material witnesses."[121] The Act altered significantly the prior federal bail law by directing the bail court to specifically consider whether the defendant poses a future danger to other persons or the

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[117] Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. § 3141) (repealing Bail Reform Act of 1966, 18 U.S.C. §§ 3141–51). For an excellent history of both Acts, see Scott, *supra* note 116, at 5 ("In adopting this Act, Congress for the first time permitted judicial officers to consider danger to the community, as well as the risk of flight, in establishing conditions of pretrial release in noncapital cases."); *id.* at 3–6 ("The 1966 Act was an attempt by the eighty-ninth Congress to set reasonable conditions of pretrial release and eliminate bond requirements, especially for indigent defendants. However, the Act failed to address what many felt was a pressing social problem—crimes committed by those who were awaiting trial.").

The congressional precursor to the Bail Reform Act of 1984 was the District of Columbia Court Reform and Criminal Procedures Act of 1970. D.C. CODE § 23-1322 (2001); Paul D. Borman, *The Selling of Preventive Detention 1970*, 65 NW. U. L. REV. 879, 885–96 (1971) (describing the D.C. Act).

[118] S. REP. NO. 98-225, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. *See also id.* at 3, 1984 U.S.C.C.A.N. 3187–88 (explaining that Act is designed, *inter alia*, to "deemphasize the use of money bonds . . . and to provide a range of alternate forms of release."). The practice of money bonds and the lack of nonfinancial pretrial release options were "perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants." *Id.*

[119] *Id.* at 3, 1984 U.S.C.C.A.N. 3188.

[120] JOHN L. WEINBERG, FEDERAL BAIL AND DETENTION HANDBOOK § 1:3 (2011).

[121] *Id.*

community;[122] by establishing more rigid tests for determining whether a defendant should be released or detained pending appeal of his conviction or pending sentence;[123] and by imposing new penalties for defendants who commit new offenses while on pretrial release,[124] violate their conditions of release,[125] or fail to appear.[126]

Under the Act, when a person charged with a federal crime appears before the court, the judge must

> order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community.[127]

The government bears the burden of proving that the defendant is a flight risk or otherwise poses a risk of harm preventing release or, if the defendant is to be released pending trial, that certain conditions should accompany such release.[128] Where public safety, rather than flight, is at issue, the government bears the burden of demonstrating, by clear and convincing evidence, that the specific defendant charged poses a danger.[129] If that defendant is not detained, but the government meets its burden with respect to conditions of release, the court must order release subject to "the least restrictive further condition, or combination of conditions," that will reasonably ensure both reappearance and the safety of the community, which "may" include some or all of the conditions set forth in § 3142(c)(1)(B)(i) through (xiv).[130]

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[122] 18 U.S.C. § 3142(g) (2006 & Supp. II). Ironically, however, the same statute does not expressly authorize the court to hold a detention hearing based solely on an allegation of an arrestee's danger to the community. *Id.* § 3142(f).

[123] 18 U.S.C. § 3143 (2006).

[124] 18 U.S.C. § 3147 (2006).

[125] 18 U.S.C. § 3148 (2006).

[126] 18 U.S.C. § 3146 (2006).

[127] 18 U.S.C. § 3142(b).

[128] 18 U.S.C. § 3142(f) (noting "clear and convincing" burden of proof).

[129] *Id.* In cases involving defendants previously convicted of certain crimes of violence, there is a rebuttable presumption that such a risk of danger or nonappearance exists. *See id.* § 3142(e)(1)–(2).

[130] *Id.* § 3142(c)(1)(B).

It bears repeating that when the Bail Reform Act of 1984 imposed new penalties, expanded the list of statutory release conditions, and fashioned new factors for the bail court to consider, it did so while strengthening, not diminishing, the critical role played by the court in this process. The "judicial officer," not the prosecution or Congress, is charged with the responsibility of determining the appropriateness of detention or any specific condition of release in a case-by-case fashion.[131] Guided but not controlled by statutorily enumerated factors, the court itself is charged with determining whether the government has demonstrated probable cause to believe that the charged crime has indeed been committed by the arrestee.[132] Thereafter, the government must convince the court, by clear and convincing evidence during a full-blown adversarial hearing, that no conditions of release can reasonably assure the safety of the community or any person from the specific and articulable threat posed by the arrestee.[133] Only then may the court, in its discretion, take steps to disable the arrestee from executing that threat.[134] In making this determination, the court must undertake an independent and particularized assessment of the nature and circumstances of the offense charged,[135] the weight of the evidence against the accused,[136] the history and characteristics of the arrestee,[137] and the nature and seriousness of danger that would be posed by the arrestee's re-entry into the community.[138] The answers to these questions are not predetermined by the Act, but rather, are the sole province of the

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[131] *Id.* § 3142(e)–(g).
[132] *Id.* § 3142(e).
[133] *Id.* § 3142(f).
[134] *Id.* § 3142(e).
[135] *Id.* § 3142(g)(1).
[136] *Id.* § 3142(g)(2).
[137] *Id.* § 3142(g)(3). This includes such considerations as:

> the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and [ ] whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law . . . .

Id. § 3142(g)(3)(A)–(B).
[138] *Id.* § 3142(g)(4).

bail judge. Should the answers lead to a conclusion of detention, the court must "include written findings of fact and a written statement of the reasons" for the decision to detain.[139]

As discussed below in Part III, this degree of judicial involvement and individualized assessment stands in stark contrast to the AWA Amendments, which mandate certain automatic conditions of release upon mere charging of an offense involving a minor victim, even if the presiding judge would find those conditions unwarranted.

B. United States v. Salerno

It did not take long for the constitutionality of the Bail Reform Act of 1984 to reach the United States Supreme Court.[140] The potential constitutional problems presented by the AWA Amendments necessitate a brief review of perhaps the most well-known case involving the Bail Reform Act: *United States v. Salerno*.[141]

The question presented in *Salerno* was whether a defendant's Fifth and Eighth Amendment rights are violated when the bail court considers his future dangerousness in determining whether to grant pretrial release.[142] The defendants in *Salerno* were members of the Genovese crime family of La Cosa Nostra who had been charged with several counts of racketeering activity, including conspiracy to commit murder.[143] The defendants, ordered detained by the district court but

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[139] *Id.* § 3142(i)(1).

[140] Indeed, the constitutional limits of preventative detention were being litigated as soon as the ink dried. *See, e.g.*, United States v. Portes, 786 F.2d 758, 766 (7th Cir. 1985) ("We join all the other courts in the country that have either implicitly or explicitly held that the Bail Reform Act does not violate the fifth or eighth amendment. No court has held the Act unconstitutional."); United States v. Jessup, 757 F.2d 378, 385, 387 (1st Cir. 1985) (holding that the Act's rebuttable presumption of flight was not a denial of liberty without due process), *abrogated on other grounds by* United States v. O'Brien, 895 F.2d 810 (1st Cir. 1990); United States v. Payden, 598 F. Supp. 1388, 1391–97 (S.D.N.Y. 1984) (holding that the Act did not violate Ex Post Facto Clause, Excessive Bail Clause, or procedural due process, and was not unconstitutionally vague), *rev'd on other grounds*, 759 F.2d 202 (2d Cir. 1985); United States v. Hazzard, 598 F. Supp. 1442, 1448–53 (N.D. Ill. 1984) (similar; Act also not violative of the Fifth Amendment's equivalent Equal Protection Clause).

[141] 481 U.S. 739 (1987).

[142] *Id.* at 746.

[143] *Id.* at 743.

released by the Second Circuit,[144] challenged § 3142(e) of the Bail Reform Act. This provision permits a federal district judge to detain an arrestee charged with certain serious felonies pending trial if the government demonstrates by clear and convincing evidence that "no release conditions 'will reasonably assure . . . the safety of any other person and the community.' "[145] Specifically, the *Salerno* Court was faced with the question of whether the Bail Reform Act's authorization of detention on the ground that the arrestee was likely to commit future crimes violated the Due Process Clause of the Fifth Amendment and/or the Excessive Bail Clause of the Eighth Amendment.[146] The Court ultimately answered this question in the negative, rejecting a facial challenge to the Act and avoiding the question of whether the Act could be unconstitutional as applied in a particular case.[147]

The Supreme Court first tackled the Fifth Amendment argument by the respondents that the Bail Reform Act violated substantive due process by authorizing "punishment" in the form of detention before trial.[148] Resolution of this general dispute,

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[144] United States v. Salerno, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986), *rev'd*, 794 F.2d 64 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987). Although the stated reason for granting *certiorari* in *Salerno* was the "conflict among the Courts of Appeals regarding the validity of the Act," the Supreme Court was quick to recognize that the divide was more of a sliver than a true split. *See Salerno*, 481 U.S. at 741 & n.1 ("Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge." (citing United States v. Walker, 805 F.2d 1042 (11th Cir. 1986)); United States v. Rodriguez, 803 F.2d 1102 (11th Cir. 1986); United States v. Simpkins, 801 F.2d 520 (D.C. Cir. 1986); United States v. Zannino, 798 F.2d 544 (1st Cir. 1986); United States v. Perry, 788 F.2d 100 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986); United States v. Portes, 786 F.2d 758 (7th Cir. 1985))). *But see Salerno*, 794 F.2d at 71–72 (finding § 3142(e) of Bail Reform Act facially unconstitutional under the Substantive Due Process Clause of the Fifth Amendment insofar as it authorized pretrial detention solely on the ground of future dangerousness, as opposed to a risk of flight).

[145] *Salerno*, 481 U.S. at 741 (alteration in original) (quoting 18 U.S.C. § 3142(e) (2006 & Supp. II)). As mentioned above, *supra* note 27, this determination is commonly made upon the recommendation of a United States magistrate judge. *See* 28 U.S.C. § 636(a)(2) (2006 & Supp. III).

[146] *Salerno*, 481 U.S. at 746.

[147] *Id.* at 745 n.3, 755 ("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.").

[148] *Id.* at 746.

first pondered in *Bell v. Wolfish*,[149] hinged on whether the provisions in question were impliedly punitive or regulatory.[150] Absent an intent to punish, the question takes the form of a balancing test that is still used today: "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]."[151]

After examining the legislative history of the of the Bail Reform Act of 1984, the Supreme Court first determined that Congress did not devise the pretrial detention provision as punishment for dangerous arrestees, but instead, "perceived pretrial detention as a potential solution to a pressing societal problem[:] . . . preventing danger to the community."[152] Accordingly, the Court concluded that the provision advanced not a penal solution, but rather, a legitimate regulatory goal.[153] It was therefore not "punishment" in the constitutional sense of that word.[154]

Second, using the balancing test from *Bell*, the Court concluded that "the incidents of pretrial detention" mandated by the Bail Reform Act were not excessive in relation to

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[149] 441 U.S. 520 (1979). *Bell*, a class action conditions-of-confinement suit brought by detainees in a federally operated custodial facility, gave the Supreme Court its first chance to rule on the conditions of pretrial detention in this posture. *Id.* at 523–24. In addition to finding that the presumption of innocence did not apply to pretrial detainees, the Court also concluded that pretrial detention was not automatically considered punishment and hinted that securing an arrestee's appearance at trial might not be "the *only* objective that may justify restraints and conditions." *Id.* at 540 ("If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention." (quoting Campbell v. McGruder, 580 F.2d 521, 529 (1978)) (internal quotation marks omitted)). That said, the Court acknowledged "that the Fifth Amendment includes freedom from punishment within the liberty of which no person may be deprived without due process of law," such that as a general matter, "punishment can only follow a determination of guilt after trial or plea." *Id.* at 536 n.17 (listing exceptions such as the contempt power). This conclusion did not change the fact that the punitive/regulatory question, under *Bell*, would ultimately be one of degree. *Id.* at 537–39.

[150] *Id.* at 537. This distinction has constitutional significance, for while punitive measures cannot be constitutionally imposed prior to an adjudication of guilt, regulatory restraints may. *Id.*

[151] *Salerno*, 481 U.S. at 747 (alterations in original) (quoting Schall v. Martin, 467 U.S. 253, 269 (1984)) (internal quotation marks omitted).

[152] *Id.*

[153] *Id.*

[154] *Id.* at 748.

the legitimate regulatory goal of preventing danger to the community.[155] In contrast to the categorical imperative set forth by the Second Circuit,[156] the Supreme Court underscored that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[157] According to the Court, this result was obtained because the Act "narrowly focuses on a particularly acute problem [(i.e., crime committed by arrestees)] in which the Government interests are overwhelming,"[158] "carefully limits the circumstances under which detention may be sought to the most serious of crimes,"[159] and mandates a multitude of procedures "specifically designed to further the accuracy of [the bail court's] determination[s]" on a case-by-case basis.[160] Importantly, the Court reemphasized that "the arrestee is entitled to a prompt" and "full-blown adversary hearing,"[161] at which "the Government

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[155] *Id.* at 747–49.

[156] United States v. Salerno, 794 F.2d 64, 71 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987) ("[T]he 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.").

[157] *Salerno*, 481 U.S. at 748–49 (citing Addington v. Texas, 441 U.S. 418 (1979); Jackson v. Indiana, 406 U.S. 715, 731–39 (1972); Greenwood v. United States, 350 U.S. 366 (1956); Carlson v. Landon, 342 U.S. 524, 537–42 (1952); Ludecke v. Watkins, 335 U.S. 160 (1948); Moyer v. Peabody, 212 U.S. 78, 84–85 (1909); Wong Wing v. United States, 163 U.S. 228 (1896) (contemplating enemy combatants or aliens during times of war and insurrection, dangerous resident aliens pending removal proceedings, juveniles and mentally unstable persons who pose a present danger to the public, dangerous defendants who are deemed incompetent to stand trial, and even competent adults suspected of a crime).

[158] *Id.* at 750 ("Congress specifically found that [individuals arrested for a specified category of extremely serious crimes] are far more likely to be responsible for dangerous acts in the community after arrest." (citing S. Rep. No. 98-225, at 6–7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3187–88)).

[159] *Id.* at 747 (including "offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders") (citing 18 U.S.C. § 3142(f) (2006 & Supp. II)).

[160] *Id.* at 751. The procedures enumerated included: (1) the arrestee's right to counsel; (2) the arrestee's right to be heard, to testify, and to present information by proffer or otherwise; (3) the arrestee's right to cross-examine witnesses; (4) the requirement that the government prove its case by clear and convincing evidence; (5) the requirement that the court be guided by the statutorily enumerated factors; (6) the requirement that the court make written findings of fact and a statement of reasons for detention; and (7) immediate appellate review of such a decision. *Id.* at 751–52 (citing 18 U.S.C. §§ 3142(f), (g), (i), & 3145(c)).

[161] *Id.* at 747, 750.

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."[162]

The Supreme Court's repeated emphasis on the individualized assessment and procedural protections afforded by the Act, together with its conclusion that this challenge requires a balancing of the "more particularized governmental interest" against the individual's fundamental "interest in liberty," suggests that a more expansive and less particularized pretrial detention statute may run afoul of the *Salerno* test and violate the Eighth and/or Fifth Amendment.[163] The mandatory release provision of the AWA Amendments fulfills that potential, as this Article will explain in Part III.

The *Salerno* Court next addressed the respondents' Eighth Amendment argument. The Genovese family respondents insisted that because the Eighth Amendment's Excessive Bail Clause grants arrestees a right to bail calculated solely on considerations of risk of flight, the new Bail Reform Act violated the Clause by allowing a court to set bail at an infinite amount for reasons unrelated to flight.[164] This argument was forged thirty-five years prior through a statement by the Court in *Stack v. Boyle* that "[b]ail set at a figure higher than an amount reasonably calculated to [ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment."[165]

Although the *Salerno* Court agreed that a "primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants," it rejected the contention that the Excessive Bail Clause precludes the government from "pursuing other admittedly compelling interests," such as preventing danger to the community, through the curtailment of pretrial

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[162] *Id.* at 750 (citing 18 U.S.C. § 3142(f)). The Court embraced these same safeguards to conclude that the Bail Reform Act survived a procedural due process attack as well. *See id.* at 751–52.

[163] *Id.* at 750. *But see* United States v. Stephens, 594 F.3d 1033, 1038–39 (8th Cir. 2010) (opining that *Salerno* has little applicability to procedural due process challenges).

[164] *Salerno*, 481 U.S. at 752–53.

[165] *Id.* at 752 (alterations in original) (quoting Stack v. Boyle, 342 U.S. 1, 5 (1951)) (internal quotation marks omitted). As explained below, "excessive bail," can be reflected in more than purely monetary terms. It may exist in other limitations such as curfews, no-contact orders, limits on employment, travel restrictions, or electronic monitoring.

release.[166] The Court determined that its 1951 language provided the respondents no refuge, explaining that the "*dictum* in *Stack v. Boyle* is far too slender a reed on which to rest" the contention that the Eighth Amendment grants a right to bail calculated solely on considerations of flight,[167] particularly considering the Court's interpretive holding four months after *Stack* in *Carlson v. Landon*[168] which, by referencing the English Bill of Rights Act,[169] embraced a narrower reading of the Excessive Bail Clause.[170] The Court in *Salerno* ultimately concluded that it did not need to decide

> 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. We believe

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[166] *Id.* at 753.

[167] *Id.*

[168] 342 U.S. 524, 545–46 (1952).

[169] *See* Yale Law Sch., *English Bill of Rights 1689*, AVALON PROJECT, http://avalon.law.yale.edu/17th_century/england.asp (last visited June 16, 2012) ("[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.]").

[170] *Salerno*, 481 U.S. at 754 ("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." (quoting *Carlson*, 342 U.S. at 545–46) (internal quotation marks omitted)).

> 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.[171]

Accordingly, the Excessive Bail Clause requires that "the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil" from releasing the arrestee.[172] In *Salerno*, this threshold was not crossed. The Supreme Court concluded that while "liberty is the norm, and detention prior to trial . . . is the carefully limited exception," the pretrial detention provisions of the Bail Reform Act of 1984 fell "within that carefully limited exception."[173] In so holding, the Court once again emphasized procedural safeguards. It explained that the Act authorized pretrial detention of a limited class of arrestees charged with serious felonies who are found only "after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel."[174] So long as "[t]he numerous procedural safeguards detailed above . . . attend[ed] this adversary hearing" for each defendant, the Court would find that the disputed provisions of the Bail Reform Act did not violate the Fifth or Eighth Amendment.[175] Those individualized safeguards sealed the fate of the Genovese family defendants.

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[171] *Id.* at 754–55 (emphasis added) (citation omitted) (citing *Stack*, 342 U.S. at 5).

[172] *Id.* at 754. Were it otherwise, the government could circumvent the Clause simply by refusing to release detainees on any condition(s).

[173] *Id.* at 755.

[174] *Id.* The court elaborated that the Act is not

> 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.

Id. at 750 (citing 18 U.S.C. § 3142(f)).

[175] *Id.* at 755.

III. CONSTITUTIONAL CHALLENGES TO THE ADAM WALSH ACT AMENDMENTS

As explained in Part I above, the addition of an actual minor victim triggers the mandatory pretrial release conditions of the AWA Amendments to the Bail Reform Act of 1984.[176] These conditions are mandatory upon charging and can therefore be imposed without a predicate finding of dangerousness or flight.

A new hypothetical will better address the questions presented in this Part. First, assume that the defendant has been charged with one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).[177] Next, assume the government presented no evidence of risk of flight or any threat posed by the arrestee to the community other than those accompanying the nature of the charges leveled against him. Assume that Pretrial Services has recommended release with conditions that do not include electronic monitoring or curfew, and that the government concurs. Further assume that the court sets a secured appearance bond in an amount greater than zero and, after reviewing the evidence submitted by both parties and the recommendation of Pretrial Services, releases the defendant subject to several pretrial conditions, but *not* electronic monitoring or curfew as mandated by the undesignated paragraph of the AWA Amendments, § 3142(c)(1)(B). Next, assume that after noticing the unambiguous language of that section, the government moves to modify the conditions of release to include every condition listed therein, notwithstanding the court's earlier finding that certain of those conditions were not required. The government admits that the only reason for its motion is to comply with the provisions of the AWA Amendments. The court agrees with the government, and grants the motion.

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[176] 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph).

[177] *See* 18 U.S.C. § 2252(a)(4)(B) (2006 & Supp. II) (making it a crime for any person to "knowingly possess[ ], or knowingly access[ ] with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction [of child pornography] that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce . . . by any means[,] including by computer").

Did the court's initial appearance bond transgress the requirements of the undesignated paragraph of § 3142(c)(1)(B)? Did its subsequent application of that section violate the constitutional rights of our defendant? Further, are the AWA Amendments facially unconstitutional, or unconstitutional as applied to our defendant?[178]

Three constitutional arguments come to mind. First, under *Salerno*, do the AWA Amendments violate our defendant's right to be free from excessive bail, in violation of the Eighth Amendment, because its mandatory electronic monitoring and curfew conditions are excessive in relation to the government's interest or the "perceived evil" which may occur by his release?[179] Second, do the AWA Amendments violate our defendant's Fifth Amendment Due Process rights by providing that a simple criminal charge, without more, irrebuttably establishes that certain unnecessary pretrial conditions are required? Third, do the Amendments contravene the separation of the powers doctrine by allowing Congress to mandate pretrial release conditions that effectively strip the judiciary of its fundamental role in determining whether a particular arrestee is to be detained or released, and if released, which conditions shall apply? This Part addresses these challenges in turn.

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[178] In a successful as-applied challenge, the provision at issue is unconstitutional when applied literally to the facts of the case. *See, e.g.*, Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411 (2006) (per curiam). In a successful facial challenge, on the other hand, there are "no set of circumstances," under which the statute would be valid. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (quoting *Salerno*, 481 U.S. at 745). There is, however, ongoing disagreement within the Supreme Court concerning the viability of the *Salerno* standard in connection with facial challenges to the validity of legislative acts. *See id.* (noting that "some Members of the Court have criticized the *Salerno* formulation"); City of Chi. v. Morales, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court . . . ."); Washington v. Glucksberg, 521 U.S. 702, 739–40 & n.7 (1997) (Stevens, J., concurring) (explaining that "[t]he appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court" and arguing that the Court has never applied the *Salerno* standard, even in *Salerno* itself).

[179] *See Salerno*, 481 U.S. at 754.

A. The Excessive Bail Clause of the Eighth Amendment

To the law-trained reader, closely reasoned brevity is usually considered a virtue. No amendment to the Constitution is shorter than the Eighth Amendment, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[180] Yet no amendment is more linguistically baffling than the Eighth.[181] It contains, as the late Professor Caleb Foote noted, "some of the most ambiguous language in the Bill of Rights."[182] Its six-word

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[180] U.S. CONST. amend. VIII. The constitutional prohibition against excessive bail finds roots in the English Bill of Rights of 1689 and Clause 9 of the Virginia Declaration of Rights, which adopted verbatim the English provision. *See* Yale Law Sch., *English Bill of Rights 1689*, AVALON PROJECT, http://avalon.law.yale.edu/17th_century/england.asp (last visited June 16, 2012) ("[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.]"). The statutory right to bail emerged from the Massachusetts Body of Liberties of 1641 and the Northwest Ordinance of 1787. *See* Massachusetts Body of Liberties, cl. 18 (1641), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 71, 73–74 (1971); An Ordinance for the Government of the Territory of the United States North West of the River Ohio (1787), 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, Art. II, at 340 (1936).

[181] The exception might be the Eleventh Amendment. *See, e.g.*, Bryan Dearinger, Note, *The State of the Nation, Not the State of the Record: Finding Problems with Judicial "Review" of Eleventh Amendment Abrogation Legislation*, 53 DRAKE L. REV. 421, 424 n.12 (2005) (collecting sources discrediting the Supreme Court's extratextual interpretation of the Eleventh Amendment, but conceding that even the Supreme Court "ha[s] long 'understood the Eleventh Amendment to stand not so much for what it says, but [rather] for the presupposition . . . which it confirms' " (alterations in original) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996)) (internal quotation marks omitted)).

[182] Foote, *supra* note 108, at 969. For example, does the Eighth Amendment itself import a fundamental right to bail, or merely prohibit an excessive sum in cases in which the court actually sets bail (or in cases made bailable by other statutes)? *Id.* at 969–70. This language has long been debated in the context of pretrial detention. *Compare* Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 397–406 (1970) (arguing that preventative detention based on anticipated dangerousness violates the Eighth Amendment), *with* John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1224, 1230–31 (1969) (arguing that preventative detention is constitutional), *and* Hermine H. Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1381, 1455–56 (1972) [hereinafter Meyer, *Part II*] (same; explaining why Excessive Bail Clause does not imply right to bail). The question of a fundamental constitutional right to bail was often argued by resort to the English Bill of Rights of 1689. *See* LAFAVE ET AL., *supra* note 114, § 12.3(c). As an interpretational matter, the question is whether the Excessive Bail Clause of the Eighth Amendment was modeled after the English law, which was designed primarily to curb judicial abuse of the protections of the English Habeas Corpus Act, or whether it was a new, distinctively American provision that, because it was contained in the Bill of Rights, primarily concerned curtailing the powers of the

opening clause—the Excessive Bail Clause—is one of the least litigated provisions in the Bill of Rights,[183] the Supreme Court having directly addressed the Clause only three times since the Amendment's adoption.[184] The controversy created by these three decisions, however, has generated forests of law review articles.[185] This Article chops at a single tree: whether the mandatory conditions of the AWA Amendments subject our hypothetical defendant, and perhaps those like him, to "excessive bail" in violation of the Eighth Amendment.

National Legislature, not the Judiciary. *Id.* Regardless of one's position on this matter, there can be little disagreement that since at least the Judiciary Act of 1789, the determination of excessiveness has been left with the courts. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789), (repealed 18 U.S.C. §§ 3141–51 (1986); BLACKSTONE, *supra* note 108, at 294 ("[I]t is expressly declared by statute that excessive bail ought not to be required," and "what bail should be called excessive, must be left to the courts, on considering the circumstances of the case, to determine." (citation omitted)).

[183] *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 603 (2005). Equally scarce are any reports of debates during the adoption of the Excessive Bail Clause of the Eighth Amendment. Indeed, such debate produced only one recorded comment over the Clause, which was made by U.S. Representative Samuel Livermore of New Hampshire: "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?" 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834).

[184] *See generally Salerno*, 481 U.S. 739; Carlson v. Landon, 342 U.S. 524 (1952); Stack v. Boyle, 342 U.S. 1 (1951). Indeed, owing to the uncertainty in this area, the Supreme Court has only indirectly applied the Clause to the states through the Fourteenth Amendment. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (dictum).

[185] *See generally* Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004); Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?:* United States v. Salerno, *107 S. Ct. 2095 (1987)*, 78 J. CRIM. L. & CRIMINOLOGY 1048 (1988); Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1 (2005); Meyer, *Part II*, *supra* note 182; Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335 (1990). Prior to the Supreme Court's decision in *Salerno*, much of the scholarly debate centered on whether the Framers intended to provide a constitutional right to bail. *Compare, e.g.*, Hermine H. Meyer, *The Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1190–94 (1972) (arguing that the Framers did not provide for such a right), *with* Foote, *supra* note 108, at 972 ("There is . . . no evidence in the concurrent consideration of the Bill of Rights and Judiciary Act of any deliberate congressional intention to exclude a right to bail under what became the eighth amendment.").

Salerno explains that the only "substantive limitation of the Bail Clause is that the Government's proposed conditions of release . . . not be 'excessive' in light of the perceived evil" Congress has sought to prevent.[186] The "excess" which the Clause prohibits can include monetary terms or other limitations on an arrestee's freedom such as curfews, house arrests, no contact conditions, limits on employment, electronic monitoring, and the like.[187] In order to prevail on an Eighth Amendment challenge, a defendant must either show that the ostensible governmental interest is invalid, or that the conditions of release are excessive in relation to that interest.[188] In our new hypothetical, the government should stress that Congress's compelling interest is, in the words of the AWA itself, to "protect children from sexual attacks and other violent crimes."[189] Of course, this argument presents a congressional intent slight-of-hand because: (1) Congress made no such findings when it decided to add the mandatory conditions to the Bail Reform Act,[190] and (2) even if the larger purpose behind the AWA itself is invoked to support to the conditions, it does not help answer the question of why they should be mandatory as opposed to discretionary. But if this argument is accepted by the court—and practice shows it has been[191]—it will be difficult for defendants to argue that the

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[186] *Salerno*, 481 U.S. at 754.

[187] *See, e.g.*, United States v. Polouizzi, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010).

[188] *See* discussion *supra* Part II.B; *see also, e.g.*, Galen v. Cnty. of L.A., 477 F.3d 652, 660 (9th Cir. 2007) (holding that bail may not be set to achieve an invalid interest or in an amount that is excessive in relation to the interests desired); United States v. Gardner, 523 F. Supp. 2d 1025, 1029 (N.D. Cal. 2007) (same); United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *5 (W.D.N.Y. Dec. 7, 2006) (same).

[189] Adam Walsh Child Safety and Protection Act of 2006, Pub. L. No. 109-248, tit. II, 120 Stat. 587, 611.

[190] Defendants charged with an AWA-enumerated offense would be wise to notify the court of this fact. Indeed, Congress gave no reasons, conducted no substantive debate, and made no legislative record in support of the Amendments. *See* United States v. Kahn, 524 F. Supp. 2d 1278, 1282 n.4 ("Any effort to examine the legislative history of the particular Walsh Act Amendment at issue in this case would be futile, because . . . no such history exists.") (citing 152 CONG. REC. S8012 (daily ed. July 20, 2006))).

[191] *See, e.g.*, *Gardner*, 523 F. Supp. 2d at 1029–30 ("The government's interest in imposing the conditions mandated by the Adam Walsh Act is valid . . . [whereby] preventing crimes by arrestees is a 'legitimate and compelling' interest." (quoting *Salerno*, 481 U.S. at 749)); United States v. Kennedy, 593 F. Supp. 2d 1221, 1227 (W.D. Wash. 2008) ("It cannot possibly be argued that this interest is not valid or of

governmental interest is invalid. The question will then become whether the conditions legislatively imposed in our hypothetical are excessive in relation to the government's valid interest.

The government, tied to *Salerno*, will have no choice but to recycle the rationale from that case by arguing that the mandatory pretrial conditions of the AWA Amendments are not excessive in relation to the regulatory goal of protecting children from sexual exploitation, abuse, and other violent crimes. By contrast, the defendant's argument can move more freely, attacking Congress's oversight or overreach in adding amendments to the Bail Reform Act that removed the procedural safeguards and individualized judicial determinations that narrowly saved the Act from demise in *Salerno*.[192] The few reported judicial opinions on this issue have overwhelmingly shown that the Eighth Amendment rationale in *Salerno* benefits the defendant, not the government, in these cases. To date, defendants have prevailed at the trial level in seven of the nine Eighth Amendment challenges considered by courts.[193]

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great importance."), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum); United States v. Torres, 566 F. Supp. 2d 591, 600 (W.D. Tex. 2008) ("[T]here is a legitimate Government interest promoted by these conditions of release, i.e., protecting the safety of children.").

[192] *See Salerno*, 481 U.S. at 751.

[193] *See* United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *9 (N.D.N.Y. Aug. 10, 2011) (finding mandatory curfew and electronic monitoring conditions of AWA Amendments facially unconstitutional under Fifth Amendment and unconstitutional as-applied under Eighth Amendment); United States v. Polouizzi, 697 F. Supp. 2d 381, 394–95 (E.D.N.Y. 2010) (finding same conditions unconstitutional under Fifth and Eighth Amendments as applied to the defendant); United States v. Stephens, No. CR09-3037-MWB, 2009 WL 3568668, at *1–2 (N.D. Iowa Oct. 27, 2009) (finding same conditions facially violative of the Fifth and Eighth Amendments), *motion to revoke order denied*, 669 F. Supp. 2d 960 (N.D. Iowa 2009), *rev'd and remanded*, 594 F.3d 1033 (8th Cir. 2010); *Kennedy*, 593 F. Supp. 2d at 1233 (finding same conditions of the AWA Amendments unconstitutional under Fifth and Eighth Amendments as applied to defendant and also violative of separation of powers doctrine); *Torres*, 566 F. Supp. 2d at 602 (finding mandatory curfew and electronic monitoring conditions constituted a facial violation of Fifth Amendment and an as-applied violation of Eighth Amendment); United States v. Vujnovich, No. 07-20126-01-CM-DJW, 2007 WL 4125901, at *3 (D. Kan. Nov. 20, 2007) (finding mandatory electronic monitoring conditions unconstitutional as applied to the defendant under the Fifth Amendment and Eighth Amendment and a violation of the separation of powers doctrine); *Crowell*, 2006 WL 3541736, at *11 (same). *But see* United States v. Rondeau, Cr. No. 10-147-S, 2010 WL 5253847, at *2 (D.R.I. Dec. 16, 2010) (upholding constitutionality of mandatory curfew and electronic monitoring conditions to defendant previously convicted of child

1. *United States v. Crowell*

In the first case to address the constitutionality of the AWA Amendments, *United States v. Crowell*,[194] the court considered the challenge made by three defendants charged with child pornography offenses which subjected them to the mandatory conditions set forth in the undesignated paragraph of the Amendments, § 3142(c)(1)(B).[195] At each defendant's initial appearance, Pretrial Services did not recommend pretrial detention, nor did the government move for it, as none of the defendants were believed to present a risk of flight or danger to the community.[196] Instead, the court and the parties agreed upon the conditions recommended by Pretrial Services, which did *not* include electronic monitoring, house arrest, or curfew as mandated by the AWA Amendments.[197] No objections were made to these conditions of release, and no motion for reconsideration was filed. A short time later, however, the government recognized that it had neglected to seek the mandatory conditions of the AWA Amendments, and it immediately requested that the court modify its order to include these conditions for each defendant.[198] The defendants challenged the

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kidnapping and indecent assault where magistrate judge "heard Defendant and considered a number of individualized factors before imposing his release conditions"); *Gardner*, 523 F. Supp. 2d at 1036 (upholding constitutionality of the Amendments). I do not include the decision in *Cossey* within this group, as the defendant's made no articulable Eighth Amendment argument in that case, and the Excessive Bail Clause did not figure into the court's decision. *See* United States v. Cossey, 637 F. Supp. 2d 881, 892 & n.4 (D. Mont. 2009) (deciding case largely on non-constitional grounds); *see also* United States v. Peeples, 630 F.3d 1136, 1137–39 (9th Cir. 2010) (per curiam) (upholding AWA based on *Cossey* and non-constitutional grounds).

[194] Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736 (W.D.N.Y. Dec. 7, 2006). If the court in *Crowell* was not the first such decision, it nonetheless was the first to issue a written order on the topic. *See generally supra* notes 27 and 34.

[195] Specifically, defendant Andrew Crowell was charged with knowingly transporting and shipping or attempting to ship child pornography in interstate or foreign commerce, 18 U.S.C. § 2252(a)(1)(A)–(B) and § 2252(b)(1); defendant William Swiat was charged with possession, receipt and distribution of child pornography, § 2252A(a)(2)(B) and § 2252A(a) (5)(B)); defendant Bruce Bremer was charged with possession and distribution of the same. *Crowell*, 2006 WL 3541736, at *1. The court's decision in *Crowell* covered all three defendants. *See id.*

[196] *See id.* at *1–2.

[197] *Id.*

[198] Pursuant to 18 U.S.C. § 3145, the prosecution may seek review, in the district court, of a magistrate judge's order setting a defendant's conditions of

proposed conditions as violative of, among other constitutional provisions, the Eighth Amendment's Excessive Bail Clause as applied to them.[199]

The court agreed.[200] After underscoring the mandatory nature of the undesignated paragraph of § 3142(c)(1)(B) and acknowledging the expanded bail function of ensuring safety of both the victim and community,[201] the court applied the *Salerno* test to the proposed conditions in relation to the government interest in "protecting children from potential sexual abuse and exploitation through the creation of pornographic images for distribution."[202] The government was found to have failed that test as applied to the case.[203] Importantly, the court emphasized the parties' original consensus that the defendants' risk of flight and threat to the community—including minor children—could be properly addressed by conditions considerably "less stringent than those required by the Adam Walsh Amendments," making the requested conditions excessive in relation to the putative government interest.[204] The court ultimately concluded that

> [a]lthough the additional conditions sought . . . would further advance the public's valid interest in protecting children from sexual abuse and exploitation . . . and, as such, are not *per se* violative of the Eighth Amendment's prohibition against excessive bail, the imposition of such conditions on all defendants charged with certain crimes, regardless of the personal characteristics of each defendant and circumstances of the offense, without any consideration of factors demonstrating that those same legitimate objectives cannot be achieved with less onerous release conditions . . . are, in the court's judgment, unnecessary, to excessive bail in violation of the Eighth Amendment.[205]

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release. *See* 18 U.S.C. § 3145(a)(1) (2006) (permitting the government to file "a motion for revocation of [an] order [of release] or amendment of the conditions of release" with "the court having original jurisdiction over the offense").

[199] *See Crowell*, 2006 WL 3541736, at *2.

[200] *Id.* at *3.

[201] *Id.* at *4–5 (citing Stack v. Boyle, 342 U.S. 1, 4 (1951); United States v. Montalvo-Murillo, 495 U.S. 711, 714 (1990)).

[202] *Id.* at *6 (citing United States v. Boos, 127 F. 3d 1207, 1211 (9th Cir. 1997)).

[203] *See id.* at *7 ("[T]he proposed additional conditions of release sought to be imposed by the terms of the Amendments violate the Eighth Amendment's prohibition against excessive bail.").

[204] *Id.*

[205] *Id.*

2. *United States v. Vujnovich*

The same result was obtained in *United States v. Vujnovich*,[206] despite the fact that the defendant was subjected to the mandatory condition of electronic monitoring from the outset.[207] The defendant asked the court to remove the mandatory electronic monitoring condition of the AWA Amendments.[208] The magistrate judge in *Vujnovich* had made no specific findings as to the necessity of this condition, but rather viewed it mandatory upon charging and ultimately found any factual differences between the case and *Crowell* immaterial.[209] The court adopted the *Crowell* analysis in full, concluding that "insofar as the Adam Walsh Amendments mandate the imposition of specific conditions for . . . pretrial release, the Act violates . . . the Excessive Bail Clause of the Eighth Amendment."[210] The district judge upheld this ruling on appeal, limited to the "dispositive" procedural due process violation as applied to the defendant.[211]

3. *United States v. Gardner*

Crowell and *Vujnovich* are tough to reconcile with *United States v. Gardner*.[212] In *Gardner*, the court granted the government's motion to amend the pretrial release conditions in light of the AWA Amendments and, in so doing, found no Eighth Amendment violation as applied to the defendant.[213] Defense counsel's objection, which relied on *Crowell*,[214] was unavailing.[215]

The defendant in *Gardner*, indicted on sex trafficking charges, was granted pretrial release subject to numerous conditions, including voice identification curfew, but not

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[206] No. 07-20126-01-CM-DJW, 2007 WL 4125901 (D. Kan. Nov. 20, 2007).

[207] *Id.* at *1. In *Vujnovich*, the defendant was charged with receipt and possession of child pornography in violation of 18 U.S.C. § 2252(a)(2). *See id.*

[208] *Id.*

[209] *Id.* at *2.

[210] *Id.* at *3.

[211] *Id.* at *2–3 & n.2.

[212] 523 F. Supp. 2d 1025 (N.D. Cal. 2007).

[213] *Id.* at 1031.

[214] United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *11 (W.D.N.Y. Dec. 7, 2006) (finding mandatory conditions of Adam Walsh Act violated Excessive Bail Clause of the Eighth Amendment, procedural due process protections of the Fifth Amendment, and separation of powers doctrine).

[215] *Gardner*, 523 F. Supp. 2d at 1034.

electronic monitoring.[216] Over two months later, the government made the "subsequent realization" that the AWA Amendments "mandated electronic monitoring, notwithstanding the Court's finding that it was not required."[217] The practical result of the new condition was that the defendant's compliance with the curfew would be enforced via real time monitoring, rather than the periodic phone monitoring which required her to answer multiple automated phone calls per day.

After assuming that the Excessive Bail Clause applied to conditions of release,[218] the court applied the *Salerno* test, which required the defendant to show that the government's interest in protecting children from sexual attacks and other violent crimes "is an invalid government interest or that electronic monitoring is excessive in relation to this interest."[219] The court determined that the government interest in the case was valid, although it conceded that this interest might be weaker in the case of the AWA Amendments than that of the Bail Reform Act in *Salerno* due to the dearth of legislative findings in support of the Amendments.[220] Next, the court concluded that the release conditions of the AWA Amendments were not facially unconstitutional, citing a single circumstance wherein imposition of each condition would be necessary—i.e., "where a court determines [that] all the minimum conditions mandated by the [Amendments] are in fact warranted."[221] Finally, the court

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[216] *Id.* at 1026 (citing "order setting conditions of release and appearance of bond"). The defendant was indicted on one count of sex trafficking under 18 U.S.C. § 1591, and one count of conspiracy to engage in the same under 18 U.S.C. § 371. *Id.*

[217] *Id.* at 1027.

[218] The court appeared somewhat skeptical of this position. It found "no case law directly on point," but reasoned that if detention was amenable to scrutiny under the Clause, conditions of release should be as well. *Id.* at 1029.

[219] *Id.*

[220] *Id.* at 1030 ("In contrast [to the Bail Reform Act of 1984], the Adam Walsh Act contains no such express legislative findings or evidence. While this fact may speak to the strength of the government's interest, it does not negate the validity of the interest.").

[221] *Id.* at 1030 & n.3. Thus, even in explaining its conclusion, the *Gardner* court implicitly emphasized the limited application of its ruling to future cases where a court found, at some relevant time, that imposition of every condition was unnecessary which, by a plain reading of the Act, is a decision that the bail court is not authorized to make. *See* 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II) (undesignated paragraph) (listing certain offenses which, upon charging, "*shall* contain, at a minimum, a condition of electronic monitoring and" personal association restrictions, place-of-abode and travel restrictions, no-contact

reached the as-applied question of whether the mandatory electronic monitoring condition was "excessive in relation to the government's interest," concluding that it was not.[222]

In finding the "singular addition of electronic monitoring" was " 'reasonably calculated' to fulfill [the government's interest],"[223] the *Gardner* court relied heavily on the fact that the defendant was already under curfew from the initial detention hearing[224]:

> Consistent with this Court's policies and practices, that curfew is enforced by monitoring. In this case, monitoring is established by voice identification which requires her to answer her home phone during the hours of her curfew to demonstrate compliance with the curfew. Under current conditions of release, electronic monitoring merely changes the manner in which her curfew is enforced. Instead of enforcement via automated telephone calls, Ms. Gardner's curfew would be enforced through electronic monitoring which provides real time rather than periodic monitoring. The monitoring, while slightly more intrusive, does not change the substantive restrictions on her liberty—she is to comply with the curfew irrespective of how it is monitored. At the same time, because electronic monitoring provides real time information to Pretrial Services, it provides added insurance against violations of bond conditions, thus furthering the government's valid interest.[225]

To the *Gardner* court, the difference between curfew monitoring and electronic monitoring was not night and day.[226] Electronic monitoring imposed only an "incremental degree of intrusiveness, including the physical inconvenience of having to wear a bracelet or anklet," which itself did not amount to "a

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restrictions, reporting and curfew requirements, and firearm restrictions (emphasis added)); *see also* United States v. Torres, 566 F. Supp. 2d 591, 595 (W.D. Tex. 2008) ("The plain language of the Adam Walsh Amendments, specifically the unenumerated paragraph at the end of 18 U.S.C. § 3142(c)(1)(B), . . . establishes that Congress has attempted to *mandate* the court's imposition of certain pretrial release conditions for those arrestees allegedly involved in certain crimes . . . ." (emphasis added)).

[222] *Gardner*, 523 F. Supp. 2d at 1030.

[223] *Id.* at 1031 (quoting Stack v. Boyle, 342 U.S. 1, 4–5 (1951)).

[224] *Id.* at 1030.

[225] *Id.*

[226] *Id.*

substantive restriction in her movement."[227] Thus the impact of the additional condition was of no constitutional significance in the unique context of the case.[228]

By focusing on the "singular condition" of electronic monitoring to a pretrial release that already included the remaining mandatory conditions, the *Gardner* court limited its rationale as an exemplar for future cases[229]—a fact that was recently confirmed by two district court rulings that unequivocally limited the usefulness of *Gardner* when addressing Eighth Amendment challenges.[230]

4. *United States v. Torres*

In *United States v. Torres*,[231] the only post-trial AWA decision analyzed in this Article, the court distinguished *Gardner* in a failure-to-register case brought pursuant to the Sex Offender Registration and Notification Act ("SORNA"),[232] which also falls under the undesignated paragraph of § 3142(c) of the AWA

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[227] *Id.*

[228] The *Gardner* court also rejected the defendant's subsidiary arguments that: (1) the lack of an individualized judicial assessment of the need for electronic monitoring ran afoul of the Excessive Bail Clause as interpreted by *Salerno*; and (2) that the Clause required she be released "on the least restrictive conditions" possible. *Id.* at 1031. The court treated the former argument as more properly informed by defendant's due process claim, and dismissed the latter as unsupported by the Bail Reform Act of 1966, by the plain language of the Excessive Bail Clause, or by Supreme Court precedent interpreting the Clause. *Id.*

[229] *Id.* at 1034. Indeed, the court later seemed to explain that were it considering whether *both* electronic monitoring and a curfew the outcome of the case would have been different. *See id.*

[230] *See* United States v. Kennedy, 593 F. Supp. 2d 1221, 1228–29 (W.D. Wash. 2008), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 Fed. Appx. 706 (9th Cir. 2009) (unpublished memorandum); United States v. Torres, 566 F. Supp. 2d 591, 599 n.2 (W.D. Tex. 2008).

[231] 566 F. Supp. 2d 591 (W.D. Tex. 2008).

[232] SORNA is found at Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587. It creates an independent federal obligation on individuals convicted of a specified "sex offense" to register with a sex offender registry. Section 141(a) of SORNA, codified at 18 U.S.C. § 2250, imposes criminal penalties of up to ten years imprisonment on individuals required to register under SORNA who travel in interstate commerce and knowingly fail to register or update their registration. 18 U.S.C. § 2250(a) (2006). Prior to the enactment of SORNA, sex offender registration systems were the province of state law, although they were provided funding through the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §170101, 108 Stat. 1796, 2038–43 (codified at 42 U.S.C. § 14071 (2006)).

Amendments.[233] The defendant in *Torres* was convicted of sex offenses under the Uniform Code of Military Justice.[234] Upon release from custody, Torres, as a resident of Texas, was subject to the Texas Sex Offender Registration Program, which required him to update his registration every ninety days.[235] Although there was no dispute that Torres "regularly and timely" updated his registration with Texas law enforcement authorities, the government brought a complaint against Torres under SORNA after learning that he had failed to also disclose his employment to New Mexico authorities.[236] (Peculiarly, the entrance to the defendant's worksite was in El Paso, Texas, but the company's headquarters was located just outside the state line in Sunland Park, New Mexico.)[237]

After the initial hearing, the magistrate judge ordered the defendant's release, subject to the mandatory conditions of the AWA Amendments, but shortly thereafter removed them on the defendant's motion, finding that automatic imposition of the curfew and electronic monitoring conditions violated the procedural Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the separation of powers doctrine.[238]

The district court upheld the magistrate judge's ruling on the first two grounds and found no need to address the third.[239] In so doing, the court first made clear that by including the undesignated paragraph of § 3142(c), "Congress has attempted to *mandate* the court's imposition of certain pretrial release conditions" upon the mere charging of one of the enumerated offenses.[240] Second, the court distinguished *Gardner* as a case that "did not actually analyze the constitutionality of the Adam Walsh Amendments," but rather merely evaluated the increased

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[233] *See* 18 U.S.C. § 3142(c) (2006 & Supp. II).

[234] *Torres*, 566 F. Supp. 2d at 592.

[235] *Id.* at 593.

[236] *Id.* The registration obligations of SORNA require sex offenders to register in *any* jurisdiction where he or she resides, works, or is a student. 42 U.S.C. § 16913(a) (2006).

[237] *Torres*, 566 F. Supp. 2d at 593.

[238] *Id.* at 593–94.

[239] *Id.* at 602. Specifically, the district court held that the AWA Amendments violated the Due Process Clause of the Fifth Amendment on their face, and the Eighth Amendment's Excessive Bail Clause as applied. *Id.*

[240] *Id.* at 595 (emphasis added).

monitoring conditions over that which the *Gardner* court had initially imposed, which did not conform to the AWA Amendments in the first place.[241]

The government argued that because *Salerno* established that the Eighth Amendment does not preclude Congress from achieving compelling interests (beyond reappearance) through certain conditions of pretrial release, the mandatory pretrial release provision of the AWA Amendments, with its emphasis on the protection of children, likewise does not violate the Excessive Bail Clause.[242] Torres, however, contended that the Amendments violated the Eighth Amendment both facially and as applied to his case.[243] Specifically, he argued that the mandatory conditions were unconstitutional in all cases because: (1) Congress specified no reasons and made no findings in support of the Amendments, and (2) mandating the conditions in his and every case was *per se* excessive under the *Salerno* test.[244]

The court split its decision, holding that the mandatory conditions were not facially violative of the Eighth Amendment, but unconstitutional as applied to the defendant.[245] In declining to find a facial violation, the court perpetuated the congressional intent slight-of-hand by explaining that while the AWA Amendments were passed without congressional debate or a record of any kind,[246] the legislative findings pertaining to the Act itself provided a valid governmental interest sufficient to defeat the defendant's argument that no such interest existed.[247] Second, the court rejected the defendant's argument that mandating conditions of release in all cases met the "no set of

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[241] *Id.* at 599 n.2. Indeed, the *Torres* court went even further, concluding that the holding in *Gardner*, if not inapplicable, would only *support* its decision that mandatory conditions of the Amendments were unconstitutional. *See id.* ("In fact, the court in *Gardner* stated that were it to consider both electronic monitoring and the curfew, the outcome of that case would have been different." (citing United States v. Gardner, 523 F. Supp. 2d 1025, 1034 (N.D. Cal. 2007))).

[242] *Id.* at 599.

[243] *Id.*

[244] *Id.* at 600–01.

[245] *Id.* at 602.

[246] *Id.* at 600 (citing *Gardner*, 523 F. Supp. 2d at 1030 n.2).

[247] *See id.* (stating government interest in providing additional protection to children "from sexual attacks and other violent crimes" (quoting Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. II, 109 Stat. 587, 611)); *see also* United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *7 (W.D.N.Y. Dec. 7, 2006) (recognizing this interest of the AWA as a valid interest for the AWA Amendments to the Bail Reform Act of 1984).

circumstances" test for facial invalidity,[248] finding, as *Gardner* did, that there were circumstances in which a court could determine that the conditions of release would not be " 'excessive' in light of the perceived evil and would impose these conditions of release upon [the] accused, or, at least, would not object to their mandated application."[249]

The court's finding of an as-applied violation of the Eighth Amendment tracked *Crowell* and emphatically rejected the government's attempt to use *Salerno* as support for the mandatory conditions of the AWA Amendments. In determining that the mandatory application of the conditions "would be excessive in light of the perceived evil,"[250] the court highlighted the folly of the government's position in the case: that while the defendant had properly registered and re-registered with the Texas law enforcement authorities, the government nevertheless insisted that the *Salerno* test would be served by enforcing a failure-to-register offense stemming from the defendant's failure to *also* register with New Mexico authorities, despite the fact that defendant was a citizen and resident of Texas and "the only way into or out of [the defendant's worksite was] through an entrance road located in the state of Texas."[251] Under these facts, the court concluded that application of the mandatory conditions of release, "particularly the curfew and electronic monitoring [conditions,]" were "more stringent than what is required to achieve the Government's objectives," and "violate[d] Torres's right to be free from excessive bail under the Eighth Amendment."[252] Once again, *Salerno* cut against the

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[248] *Torres*, 566 F. Supp. 2d at 595, 600–01. This conclusion came after the court's detailed analysis of the state of the law concerning facial challenges outside of the First Amendment context, including whether the "no set of circumstances" test constitutes the proper analysis. *See id.* at 595 & n.1. As mentioned above, this discussion falls outside the scope of this Article.

[249] *Id.* at 601. It is fair to say that the latter conclusion was as tenuous as the former, particularly in light of the court's admission that Congress had *taken away* a bail court's ability to make these determinations in the first place. *See id.* at 595, 601 (noting that Congress has attempted to displace the judiciary's individualized determination in all cases where bail court requires a secured bond).

[250] *Id.* at 601 (quoting United States v. Salerno, 481 U.S. 739, 754 (1987)) (internal quotation marks omitted).

[251] *Id.* As mentioned above, the entrance to the defendant's worksite was in El Paso, Texas, but the company's headquarters were located just outside the state line in Sunland Park, New Mexico. *See id.* at 593; *supra* note 237 and accompanying text.

[252] *Id.* at 601–02.

government's position and provided another example of how the well-meaning but one-size-fits-all pretrial release scheme of the AWA Amendments can lead to unconstitutional results.

5. *United States v. Kennedy*

United States v. Kennedy[253] likewise rejected the *Gardner* analysis for that of *Crowell*, *Vunjovich*, and *Torres*. *Kennedy* involved an as-applied challenge to the mandatory conditions—including electronic monitoring, curfew, place-of-abode, and firearm restrictions—that arose as a result of a superceding indictment invoking the undesignated paragraph of the AWA Amendments.[254] The defendant, Joshua Kennedy, was a thirty-one-year-old longshoreman and lifelong resident of Seattle, Washington.[255] He had no prior criminal record and had maintained full-time employment with the same employer for nearly fifteen years.[256]

Kennedy was initially indicted for one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5), after his laptop was seized and examined at Sea-Tac Airport upon his re-entry into the United States from travel abroad.[257] He surrendered voluntarily to United States Immigration and Customs Enforcement ("ICE") agents and was arraigned the same day.[258] The Pretrial Services report in the case recommended that the defendant be placed on a personal recognizance bond with supervision and particular conditions of release that did *not* include the mandatory conditions of the AWA Amendments—an admission that such conditions were unnecessary.[259] The government did not seek detention, nor did it request conditions such as electronic monitoring or travel,

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[253] 593 F. Supp 2d 1221 (W.D. Wash. 2008), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum).

[254] *Id.* at 1224–25.

[255] *Id.* at 1225.

[256] *Id.*

[257] *See id.* at 1224.

[258] *Id.*

[259] *Id.*

abode, firearm, or curfew restrictions.[260] There being no disagreement, the magistrate judge's appearance bond included none of these conditions.[261]

One week later, the defendant was charged in a superceding indictment which added a count of transporting child pornography, in violation of 18 U.S.C. § 2252(a)(1) and § 2256.[262] The government admitted that the additional charge was based on no new facts, no new evidence, and no post-seizure transmission of the alleged pornography.[263] It did, however, invoke the mandatory conditions of the AWA Amendments.[264]

The government immediately filed a motion to amend the appearance bond to conform with the additional release conditions mandated by the AWA Amendments, including curfew and electronic monitoring, travel and place-of-abode restrictions, and a firearms prohibition.[265] The government conceded that "the sole reason" for the motion and supplement was to comply with the mandatory provisions of the AWA Amendments.[266] At the modification hearing, Pretrial Services stated that the defendant had been in full compliance with the terms of his original bond.[267] The defendant expressed concern that the mandatory conditions would interfere with his employment, which required him to travel outside Washington multiple times per month.[268] Pretrial Services acknowledged this employment situation and confirmed that the defendant would need to be

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[260] *Id.*

[261] *Id.* The release conditions ordered by the court included

> submitting to drug and alcohol testing; undergoing a mental health evaluation; no possession of sexually explicit material; no access to a computer or the internet without permission of Pretrial Services; no frequenting of places primarily used by persons under the age of 18 without approval of Pretrial Services; no employment or volunteer activity that causes [the defendant] to regularly contact persons under the age of 18; and no contact with any person under the age of 18 without permission of Pretrial Services.

Id.

[262] *Id.*

[263] *Id.* at 1224–25.

[264] *Id.* at 1225.

[265] *Id.* Pretrial Services filed a supplement report which concurred with the government's request for an amended appearance bond. *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

detained for "perhaps over a week" until a proper home telephone system could be installed for the curfew, and "would not be able to board an airplane with an electronic monitoring device."[269]

Applying the *Salerno* test and referencing the stated congressional purpose of the AWA itself, the court concluded that protecting minors "from sexual attacks and other violent crimes" was a valid government interest,[270] which narrowed the scope of the inquiry to whether "the mandatory conditions legislatively imposed by the Congress are excessive in relation to the government's valid interest."[271] In a detailed opinion, the magistrate judge concluded that the conditions were excessive under *Salerno*, and therefore constituted an as-applied violation of the Excessive Bail Clause, due to the severe restrictions they placed on the defendant's liberty compared to the government's basis for the added conditions.[272] First, the court emphasized the concession by both the government and Pretrial Services that the defendant would be satisfactorily bound by the original release conditions but for the superceding indictment.[273] That indictment, however, was based on no new facts.[274] The government had therefore essentially admitted that its interest was best met by the original conditions. Nothing had changed: The superceding indictment was not based on any facts unknown to the government at the time of the original indictment and the defendant was not shown to be any more of a flight risk or threat to the community than during his initial hearing.[275] Accordingly,

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[269] *Id.* at 1225, 1229.

[270] *Id.* at 1227 (quoting Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. II, 109 Stat. 587, 611) (internal quotation marks omitted). The court also referenced *Gardner*'s conclusion regarding the validity of the government's interest. *See id.* ("In the context of the Walsh Act Amendments relating to conditions of release, the government's specific interest is to prevent such crimes and attacks by those arrested and charged with one or more of the listed offenses." (quoting United States v. Gardner, 523 F. Supp. 2d 1025, 1029 (N.D. Cal. 2007))).

[271] *Id.*

[272] *Id.* at 1227–29.

[273] *Id.* at 1225, 1227.

[274] *Id.* at 1228.

[275] *Id.* at 1224–25, 1227.

it was impossible to conclude that the government's AWA interest in protecting minors could not be met by the conditions imposed by the court's original appearance bond.[276]

Second, the court distinguished *Gardner* as a ruling "necessarily limited to the unique facts of that case."[277] The *Kennedy* court recounted that the defendant in *Gardner* was already functioning under a curfew with periodic monitoring as part of her conditions of release when the court upheld the "singular addition of electronic monitoring," which it determined as "only slightly more intrusive" than the conditions originally imposed.[278] Kennedy, on the other hand, was under no such conditions prior to the government's request that the conditions of electronic monitoring, abode, curfew, and firearm restrictions be added to comply with the AWA Amendments, despite nothing having changed.[279] The court concluded that unlike the situation in *Gardner*, the additional AWA conditions sought by the government would "severely restrict the Defendant's liberty[,] . . . interfere with his present employment[,] . . . exact a significant toll on Defendant's present freedom," and would therefore "*not* represent an 'incremental' or 'slightly more intrusive' restriction on his liberty."[280]

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[276] *Id.* at 1227 ("[T]here has been no showing that Defendant is any more of a flight risk or threat to the community now than he was at the time of his original appearance bond.").

[277] *Id.* at 1228; *see also* United States v. Torres, 566 F. Supp. 2d 591, 599 n.2 (2008) (noting similarly).

[278] *Kennedy*, 593 F. Supp. 2d at 1228 (quoting United States v. Gardner, 523 F. Supp. 2d 1025, 1030–31 (N.D. Cal. 2007)) (internal quotation marks omitted) (noting that the addition of electronic monitoring in *Gardner* "merely changes the manner in which [the preexisting] curfew [was] enforced." (quoting *Gardner*, 523 F. Supp. 2d at 1030 (N.D. Cal. 2007) (internal quotation marks omitted)).

[279] *Id.* at 1227–28.

[280] *Id.* at 1228–29 (emphasis added).

The government's motion to revoke the magistrate judge's release order in *Kennedy* was denied by the district judge,[281] who adopted the magistrate judge's analysis regarding the constitutionality of the AWA Amendments,[282] handing the government another stinging defeat.

However, in a vague and unpublished memorandum opinion, a panel of the Ninth Circuit Court of Appeals vacated the district court's order and remanded the case for a modification of the terms of release, without addressing the constitutional questions presented.[283] Perhaps confused by the language of the undesignated paragraph of the AWA Amendments, the nature of bail determinations generally, or by the specific conditions at issue in *Kennedy*, the Ninth Circuit placed undue emphasis on the fact that "[m]any of the terms of the Walsh Act are undefined."[284] This allowed the court to imagine what the statute *should say*, even what it *used to say*, in order to avoid the very issue presented in every case mentioned above—that is, whether it was constitutional for Congress to impose the automatic conditions upon mere charging. The fact, for example, that the statute mandated electronic monitoring, but "does not require or define that condition to be continuous or limited to a particular locality," or that it required a curfew, but without specifying "a certain time of day or night or number of hours per day," convinced the Ninth Circuit that the Amendments somehow "permitted an individualized determination by the district court

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[281] Kennedy, 593 F. Supp 2d 1233, 1235 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum); *see also* 18 U.S.C. § 3145(a)(1)–(2) (2006) (permitting the government to file "a motion for revocation of [an] order [of release] or amendment of the conditions of release . . . with the court having original jurisdiction over the offense").

[282] *See Kennedy*, 593 F. Supp. 2d at 1235. Indeed, the district judge concluded that "the additional evidence presented and proffered at the evidentiary hearing strengthens Judge Donohue's Eighth Amendment analysis because it is clear that the mandatory conditions sought by the Government *would* interfere with the Defendant's employment," and likewise strengthened the due process analysis because the new evidence more clearly revealed "the degree to which the mandatory conditions pose a substantial restriction on the Defendant's liberty." *Id.* (noting that Judge Donohue had merely concluded that such conditions " '*could* interfere with [Defendant's] present employment.' " (alteration in original) (quoting *Kennedy*, 593 F. Supp. 2d at 1228))).

[283] *See* United States v. Kennedy, 327 F. App'x 706, 708 (9th Cir. 2009).

[284] *Id.* at 707.

to set appropriate parameters" for these conditions "based upon the particular facts and circumstances of each case."[285] This despite the fact that the statute says the exact opposite.[286]

By highlighting the lack of a detailed definition accompanying each mandatory release condition, the Ninth Circuit was able to shift focus away from whether those conditions could be required in an automatic, across-the-board fashion.[287] The court's inquiry was entirely academic, of course, because the nature of the constitutional challenge was to the automatic imposition of the conditions themselves, not the parameters of their implementation. It was also clearly extratextual, as the statute makes plain that the enumerated conditions are imposed automatically upon maintenance of a mere charge, without consideration of whether they are necessary to satisfy any legitimate government objectives.

No matter for the Ninth Circuit, however, as it bumbled along for the remainder of its two-page unpublished order. It did so under the contradictory assumption that the AWA Amendments "require the district court to exercise its *discretion*, to the extent practicable, in applying the *mandatory* release

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[285] *Id.*

[286] *See* 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II) (undesignated paragraph) (listing certain offenses which, upon charging, "shall contain, at a minimum, a condition of electronic monitoring and" personal association restrictions, place-of-abode and travel restrictions, no-contact restrictions, reporting and curfew requirements, and firearm restrictions); *see also, e.g.*, United States v. Polouizzi, 697 F. Supp. 2d 381, 386 (E.D.N.Y. 2010) (noting that the conditions of release are "plain, unambiguous, and mandatory"); United States v. Torres, 566 F. Supp. 2d 591, 593, 595 (W.D. Tex. 2008) ("The plain language of the Adam Walsh Amendments, specifically the unenumerated paragraph at the end of 18 U.S.C. § 3142(c)(1)(B), . . . establishes that Congress has attempted to mandate the court's imposition of certain pretrial release conditions for those arrestees allegedly involved in certain crimes . . . ."); United States v. Gardner, 523 F. Supp. 2d 1025, 1027 (N.D. Cal. 2007) (noting that Congress, through the AWA Amendments "require[s]" the enumerated conditions for defendants charged with certain listed crimes, and that the government conceded this to be true); United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *7 (W.D.N.Y. Dec. 7, 2006) (similar). *But see* United States. v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *9 (D.S.D. May 27, 2010) ("Construing the Adam Walsh Act to require a court to exercise its *discretion*, when applying the *mandatory* release conditions, including those relating to electronic monitoring and curfew, avoids the need to pass on the constitutionality of the Act and its amendments as applied here." (emphasis added)).

[287] *See Kennedy*, 327 F. App'x at 707.

conditions,"[288] despite the fact that the statute provides neither discretion nor any clues as to how the court's "practicable" application might be accomplished.[289] The Ninth Circuit held that the district court would be required on remand to include all six mandatory release conditions, "exercis[ing] its discretion" in applying four of the six conditions: "(1) define a condition of electronic monitoring; (2) specify restrictions on personal associations, place of abode, or travel; (3) set a reporting requirement; and (4) specify a curfew."[290] The Ninth Circuit's

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[288] *Id.* (emphasis added). In order to make this conclusion, the court embraced "the established principle that a statute should be read to avoid serious constitutional issues." *Id.* (citing St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981) ("A statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality."). The court assumed so, however, by treating the government's position as a "concession" that this judicial discretion existed, without analyzing whether such a construction was fairly possible under the language of the undesignated paragraph of AWA § 3142(c)(1)(B). *Id.* Even the *Gardner* decision belies any such possibility. *See Gardner*, 523 F. Supp. 2d at 1027 (explaining that the government conceded that the AWA Amendments *"mandated* electronic monitoring, *notwithstanding the Court's finding that it was not required."* (emphasis added)).

[289] *Kennedy*, 327 F. App'x at 707. The regrettable disconnect between appellate and district courts on this subject was voiced, for the first time, in a decision handed down just as this Article was sent to press:

> As a Court that is tasked with determining whether a person will be detained or released, and is obligated to follow the Adam Walsh Act as well, I strongly yet respectfully disagree with those appellate courts. First, when the Adam Walsh Act is at play, there is no judicial discretion to be exercised in any respect. Second, the Act mandates the location where curfew and electronic monitoring will take place—it is the accused's home or residence. There is no deviation from that point. And, to suggest that the statute does not say how long curfew may occur, or that a court has the discretion "to manipulate" setting the location and the time period for the curfew is unrealistic, without basis, and unconstitutionally shallow when you consider that there are substantial constitutional liberties at stake. Actually, if I were to follow these courts' logic, it would be conceivable for this Court to set curfew at the offices of pretrial services for an hour each week. Obviously that would be an absurd result, but nevertheless feasible under the Eighth's and Ninth Circuit's reasoning. For these reasons, this Court does not find these precedents persuasive.

United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *6 n.6 (N.D.N.Y. Aug. 10, 2011).

[290] *Id.* The court somehow determined that two of the six mandatory conditions "are absolute"—the no contact order and firearms restriction. *Id.* (citing 18 U.S.C. § 3142(c)(1)(B)(v), (viii)). In exercising its "discretion" as to the non-"absolute" conditions, the bail court was to consider "all relevant factors," including the defendant's employment-related needs; "the time of day or number of hours in specifying a curfew, or whether the curfew must be connected to a particular address[;]" and the "appropriate condition of electronic monitoring that would enable

instructions neglected to mention that these "specifics" are set forth in the report of Pretrial Services, to which the bail court usually grants deference.[291] On remand, the district court entered an amended appearance bond that included the six mandatory conditions, which it added by quoting verbatim from the AWA Amendments themselves.[292]

Limited only by its imagination, the Ninth Circuit's order in *Kennedy* asks district courts to read out the mandatory nature of the AWA's undesignated paragraph to save the statute. It does so by claiming that "mandatory" actually means "discretion[ary]."[293] By ignoring or failing to understand the Amendments' express changes to the Bail Reform Act, by flouting the district court's original release determination, and by judicially re-crafting the undesignated paragraph of the Amendments to fit its conclusion, the Ninth Circuit was able to sheepishly avoid the constitutional questions presented, ensuring that district courts under it will have massive responsibilities but no sound guidance when faced with similar legal arguments in the future.[294]

6. *United States v. Arzberger*

One of the more recent published decisions to address the constitutionality of the AWA Amendments, *United States v. Arzberger*,[295] may have bridged the gap between the statutory-based decisions in *Crowell*, *Vujnovich*, and *Torres* and the Ninth Circuit's extratextual rationale in *Kennedy*. But it did so by inserting a pre-AWA Bail Reform Act provision into the

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defendant to continue his employment," despite Pretrial Services' statements on the impossibility of such a condition. *Id.* at 707–08. *Compare id.*, *with* United States v. Kennedy, 593 F. Supp. 2d 1221, 1225 (W.D. Wash. 2008) (noting Pretrial Services' conclusion that defendant "would not be able to board an airplane with an electronic monitoring device").

[291] *See* 18 U.S.C.A. § 3154(1) (West 2011).

[292] *See* Appearance Bond, United States v. Kennedy, No. CR08-354RAJ (W.D. Wash. May 12, 2009).

[293] *Kennedy*, 327 F. App'x at 707.

[294] A similar result was recently obtained in *Peeples*, where a panel of the Ninth Circuit repeated its oxymoronic rationale from *Kennedy* that because the AWA Amendments *"require[d]* the district court to exercise its *discretion* in applying the mandatory release conditions," the Constitution was not violated in a case where the magistrate judge "took significant steps to ensure that the monitoring and curfew conditions did not interfere with Peeples's work- and school-related needs." United States v. Peeples, 630 F.3d 1136, 1139 (9th Cir. 2010) (emphasis added).

[295] 592 F. Supp. 2d 590 (S.D.N.Y. 2008).

undesignated paragraph of § 3412(c)(1)(B). In *Arzberger*, the defendant was charged with possessing and receiving child pornography in violation of 18 U.S.C. § 2252A(a)(1)(B) and § 2252A(a)(2)(B).[296] After the defendant's initial appearance, the magistrate judge released him on a secured bond, subject to the conditions of drug testing and treatment, mental health treatment, no unsupervised contact with minors, limited travel, and computer usage monitoring.[297] Upon the defendant's release, the government moved the court to modify his bail by adding the mandatory conditions of the AWA Amendments, with particular emphasis on a curfew, electronic monitoring, no contact with potential witnesses, and a firearm restriction.[298]

The court quickly rejected the facial challenge under the Eighth Amendment for the same reason set forth in *Gardner* and *Torres*—to wit, there being situations in which a defendant was found to constitute a flight risk or public danger without maintenance of such conditions.[299] It was far less definitive, however, regarding the defendant's as-applied attack. With a reference to the Supreme Court's decision in *Stack*—the precursor to *Salerno*—the court concluded that if the Excessive Bail Clause were to mean anything, "it must preclude bail conditions that are (1) more onerous than necessary to satisfy legitimate governmental purposes and (2) result in deprivation of the defendant's liberty."[300] The government's requested conditions, in the court's opinion, could very well fail this test:

> [T]he price of [defendant's] freedom pending trial would be the surrender of his constitutional rights to travel, to bear arms, and to associate freely. Conditioning pretrial release on the relinquishment of constitutionally protected rights in circumstances where the conditions are not necessary to satisfy legitimate governmental purposes would constitute excessive bail in violation of the Eighth Amendment.[301]

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[296] *Id.* at 592–93.

[297] *Id.* at 593–94 ("I declined to require electronic monitoring.").

[298] *Id.* at 592, 594.

[299] *Id.* at 604; *see also* United States v. Torres, 566 F. Supp. 2d 591, 600 (W.D. Tex. 2008); United States v. Gardner, 523 F. Supp. 2d 1025, 1030 n.3 (N.D. Cal. 2007).

[300] *Arzberger*, 592 F. Supp. 2d at 605 (citing Stack v. Boyle, 342 U.S. 1 (1951).

[301] *Id.* at 605–06. In a footnote accompanying the above-quoted passage, the *Arzberger* court intimated that the AWA-mandated conditions requested by the government might also "be construed as violating the specific constitutional rights

Such conditioning could also fail the *Salerno* test, for while the government had articulated a legitimate purpose in enacting the AWA—"the protection of the public in general and of minors in particular"—the determination of whether its response was permissible or excessive "cannot be determined without an *individualized determination* of Mr. Arzberger's characteristics."[302] Accordingly, any ruling on the as-applied challenge had to await such a hearing. For the *Arzberger* court, the way to save the undesignated paragraph of the AWA Amendments was not to invoke the constitutional avoidance doctrine; instead, it was to not apply the Amendments. *Arzberger*, like the Ninth Circuit in *Kennedy*, dodged the fact that for charges falling under the undesignated paragraph of the AWA Amendments, such an individualized determination is neither contemplated nor provided under the provision and, even if held, would be pointless because the mandatory conditions are irrebuttable, resting solely on the crime charged, irrespective of any balancing of interests à la *Salerno*. If the *Arzberger* court wanted to turn back the clock to the rebuttable presumption provided by the pre-AWA Bail Reform Act, it should have struck down the Amendments.

7. Eighth Amendment Summary

The foregoing decisions expose the central flaw of the undesignated paragraph of the AWA Amendments as it relates to a challenge under the Excessive Bail Clause of the Eighth Amendment. Not a single court concluded that the 2006 Congress, in passing the AWA Amendments, determined that maintenance of a mere charge changed the *Salerno* calculus. Congress did not intend to overturn *Salerno*, yet it had somehow forgotten what saved the Bail Reform Act from demise in that very case: the requirement that the applicable conditions of release be proven case-by-case with particularity in order for "the Government's proposed conditions of release" not to be

impinged upon." *Id.* at 606 n.7. In this case, that meant the constitutional rights protected by the Second Amendment (the firearm restriction), the First Amendment right of association (the no contact condition), and the right to interstate travel and/or free movement implicit in the Fifth Amendment term "liberty" (the curfew with electronic monitoring). *Id.* at 600–04. Our hypothetical would include the third liberty, at the very least. For a discussion regarding the Second Amendment issue, see *infra* note 331.

[302] *Arzberger*, 592 F. Supp. 2d at 606 (emphasis added).

" 'excessive' in light of the perceived evil" from releasing the arrestee.[303] It also betrayed the most deeply-rooted device for independently protecting against excessive bail: leaving to the *judiciary* the definition of "excessive" in its calculation of appropriate bail.[304]

Congress can correct this problem by either repealing the undesignated paragraph of the AWA Amendments or by including within that paragraph a rebuttable presumption in favor of the conditions unless the defendant can meet the burden of establishing that maintenance of one (or all) of the mandatory release conditions would violate the *Salerno* test. Such a provision does not currently exist in the undesignated paragraph, despite its longstanding existence in other sections of the Bail Reform Act dealing with defendants previously *convicted* of certain violent crimes.[305] Instead, the heart of the Bail Reform Act is tossed aside and the judicial consideration contemplated by that Act is foreclosed. Questionable pretrial release conditions are keyed to a mere charge rather than the arrestee's particularized risk of danger, re-offense, or flight. For these specified offenses, no individualized consideration need be given to the nature and circumstances of the offense charged,[306] the weight of the evidence against the accused,[307] the history and

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[303] *See* United States v. Salerno, 481 U.S. 739, 754 (1987); discussion *supra* Part II.B.

[304] *See supra* notes 107–12 and accompanying text.

[305] *Compare* 18 U.S.C. § 3142(e)(1)–(2) (2006 & Supp. II) (providing rebuttable presumption in favor of detention to assure reappearance and safety of community of defendants previously convicted of certain violent crimes), *with* 18 U.S.C. § 3142(c)(1)(B) (providing *irrebuttable* presumption that all listed conditions are required to assure reappearance of sex offense arrestee and safety of community).

[306] *Id.* § 3142(g)(1).

[307] *Id.* § 3142(g)(2).

characteristics of the defendant,[308] or the nature and seriousness of danger that would be posed by his release into the community.[309]

Until Congress corrects this severe oversight, cases automatically conditioning release on the relinquishment of longstanding constitutional liberties when it has been shown that the condition does not advance the government's interest, or is not necessary to satisfy that interest, will result in a win for the defendant. While this could occur in almost any case, the excessive nature of the AWA Amendments to the "perceived evil" of the offense charged will be particularly acute when a defendant is charged with viewing-only offenses, such as child pornography possession or receiving charges under 18 U.S.C. § 2252A(a)(5)(B) and § 2252A(a)(2)(B).[310] Mandatory pretrial release conditions limiting, for example, travel, outside contact, and the freedom to associate, do not relate to such charges, and would be clearly excessive in relation thereto,[311] as

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[308] *Id.* § 3142(g)(3). This makes irrelevant the considerations outlined by the Bail Reform Act, such as

> the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and . . . whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law[.]

Id. § 3142(g)(3)(A)–(B).

[309] *Id.* § 3142(g)(4).

[310] It is important to note that of the seventeen challenges to the AWA Amendments, all but two involved viewing/possession-only offenses. *See* United States v. Rondeau, Cr. No. 10-147-S, 2010 WL 5253847, at *2 (D.R.I. Dec. 16, 2010) (AWA challenge by a defendant convicted of child kidnapping and indecent assault); United States v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *1 & n.1 (D.S.D. May 27, 2010) (noting its status as the first—and at the time, the only—due process challenge to the AWA involving actual physical harm to a minor).

[311] *See, e.g.*, United States v. Kennedy, 593 F. Supp 2d 1221, 1227–28 (W.D. Wash. 2008), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum); *cf.* United States v. Rueb, 612 F. Supp. 2d 1068, 1070, *rev'd in part*, 2009 U.S. Dist. LEXIS 50495 (D. Neb. 2009); United States v. Merritt, 612 F. Supp. 2d 1074, 1076 (D. Neb. 2009). Any comparison to the facts in *Salerno* would be ineffective in this situation, for *Salerno* involved the relation of much different offenses to the defined congressional goal of preventing offenders arrested on extremely serious charges to have the opportunity to engage in equally "dangerous acts in the community after arrest." United States v. Salerno, 481 U.S. 739, 750 (1987).

would the private liberty-infringing impact of an electronic (or GPS) monitoring device physically attached to every arrestee upon a mere charge, rather than an individualized determination of the arrestee's dangerousness. *Salerno* provides that the greater the government's intrusion, the narrower that intrusion must be tailored to protect the putative government interest.[312] In these circumstances, defense counsel has a very strong Eighth Amendment argument that the government's objectives can be achieved with much less onerous conditions.

B. The Due Process Clause of the Fifth Amendment

Salerno dealt with the dangerous Genovese family defendants; the Supreme Court's ruling hinged on the multitude of procedural protections provided by the Bail Reform Act. While the Court conceded that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest,"[313] such a result was tolerated in *Salerno* only because the Bail Reform Act "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming,"[314] "carefully limit[ed] the circumstances

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[312] *Salerno*, 481 U.S. at 752.

[313] *Id.* at 748–49 (citing Addington v. Texas, 441 U.S. 418 (1979); Jackson v. Indiana, 406 U.S. 715, 731 (1972); Greenwood v. United States, 350 U.S. 366, 367–69 (1956); Carlson v. Landon, 342 U.S. 524, 537–42 (1952); Ludecke v. Watkins, 335 U.S. 160, 186–87 (1948); Moyer v. Peabody, 212 U.S. 78, 84–85 (1909); Wong Wing v. United States, 163 U.S. 228, 235 (1896)) (contemplating cases involving enemy combatants or aliens during times of war and insurrection, dangerous resident aliens pending removal proceedings, juveniles and mentally unstable persons who pose a present danger to the public, dangerous defendants who are deemed incompetent to stand trial, and even competent adults suspected of a crime).

[314] *Id.* at 749. *Compare id.* at 750 ("Congress specifically found that [individuals arrested for a specified category of extremely serious crimes] are far more likely to be responsible for dangerous acts in the community after arrest." (citing S. REP. NO. 98-225, at 6–7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189)), *with* United States v. Torres, 566 F. Supp. 2d 591, 600 (W.D. Tex. 2008) ("Congress did not engage in substantive debate nor develop supporting congressional reports with regard to the Adam Walsh Amendments . . . ." (citing United States v. Gardner, 523 F. Supp. 2d 1025, 1030 n.2 (N.D. Cal. 2007))); United States v. Polouizzi, 697 F. Supp. 2d 381, 392 (E.D.N.Y. 2010) ("[D]espite congressional debate and findings regarding other provisions of the Adam Walsh Act, there were none with respect to electronic monitoring." (citing *Gardner*, 523 F. Supp. 2d at 1030)); *and* United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) ("[T]he Adam Walsh Act does not include any Congressional findings that speak to the efficacy of the curfew requirement for persons charged with child pornography offenses." (citing United States v. Arzberger, 592 F. Supp. 2d 590, 600 (2008))).

under which detention may be sought to the most serious of crimes,"[315] and mandated a multitude of procedures "specifically designed to further the accuracy of [the bail court's] determination" on a case-by-case basis.[316] As discussed above, these "numerous procedural safeguards" included, but were not limited to, a prompt and "full-blown adversary hearing"[317] at which the government was required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release [could] reasonably assure the safety of the community or any person."[318] But what happens when a particular provision of the Bail Reform Act as amended by the AWA—i.e., the undesignated paragraph of § 3142(c)(1)(B)—does not provide for any such safeguards?

The Due Process Clause of the Fifth Amendment should answer this question. It provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[319] The Clause, and cases interpreting it, teaches that the government's exercise of power over an individual must be accompanied by a fair procedure for determining the basis for, and legality of, such action.[320] As the *Salerno* Court put it: "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. This requirement has traditionally been referred to as 'procedural' due process."[321] At its core, procedural due process ensures that parties whose rights will "be affected are entitled to be heard; and in order that they

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[315] *Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3142(f)).

[316] *Id.* at 751.

[317] *Id.* at 749–50, 754.

[318] *Id.* at 750 (citing 18 U.S.C. § 3142(f)). The *Salerno* Court was explicit about what it required, and embraced these same safeguards to conclude that the Bail Reform Act survived a procedural due process attack. *See id.* at 751–52; *see also id.* at 751 (explaining that matters concerning pretrial release or detention are subject to judicial determination, and that "the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination.").

[319] U.S. CONST. amend. V; *see also id.* U.S. CONST. amend. XIV (applying to the states).

[320] *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[321] *Salerno*, 481 U.S. at 746 (citation omitted).

may enjoy that right they must first be notified[;]"[322] and that any "opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' "[323]

In the context of our second hypothetical, the party affected is the arrestee, the deprivation is the restraint on that arrestee's liberties prior to trial caused by the mandatory electronic monitoring and curfew conditions,[324] and the meaningful opportunity to be heard would most likely be achieved through an individualized hearing and particularized finding regarding each appropriate condition of release by a "neutral and detached judge,"[325] as set forth in the Bail Reform Act.[326] Assuming the existence of a protected liberty interest,[327] the heart of the dispute will hinge on what process the defendant is due. Resolution requires application of the well-known test enunciated in *Mathews v. Eldridge*,[328] which balances three factors: (1) the private interest affected by the government's action; (2) the risk of erroneous deprivation of that interest through the procedures used by the government and the value

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[322] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863)) (internal quotation marks omitted).

[323] *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[324] At the very least, this means the right to move freely from one place to another or to simply stay put. *See* Williams v. Fears, 179 U.S. 270, 274 (1900); Kent v. Dulles, 357 U.S. 116, 126 (1958); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972). To this end, the government cannot deny that "the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint." Michael H. v. Gerald D., 491 U.S. 110, 121 (1989); *see also infra* notes 356–58 and accompanying text.

[325] Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972).

[326] 18 U.S.C. § 3142(f)–(g) (2006 & Supp. II).

[327] A liberty interest may be created by statute or "may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty.' " Wilkinson v. Austin, 545 U.S. 209, 221–22 (2005). These interests could take many forms, including, for example, the constitutional rights protected by the Second Amendment (the firearm restriction), the First Amendment right of association (the no contact condition), and right to interstate travel and/or free movement implicit in the Fifth Amendment term "liberty" (curfew, travel, and electronic monitoring conditions).

[328] 424 U.S. 319 (1976). When assessing a procedural due process claim under *Mathews*, the court considers (1) whether a constitutionally protected liberty interest is at stake and, if so, (2) whether the government has provided adequate procedural safeguards to protect it. The latter question is comprised of the familiar three-part *Mathews* balancing test.

that additional procedural protections would provide; and (3) the interest that the government seeks to achieve through its specific action.[329]

Determining what process is due requires weighing the government function involved against the private interest affected by that function.[330] In our hypothetical, the *Mathews* factors are clear. The "government function" is the requirement of the AWA Amendments that persons charged with certain crimes not be released prior to trial absent certain conditions—such as a curfew, a no contact order, and electronic monitoring—that by nature limit privacy and physical movement. The private interest is undoubtedly the constitutional right to such liberties pending trial—here, freedom from physical restraint, the freedom to move, the freedom to travel, the freedom to associate, and freedom from unwarranted invasions of privacy.[331] The key factor is the third: the risk of erroneous deprivation of these liberty interests by the undesignated paragraph of § 3142(c)(1)(B)

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[329] *Id.* at 335.

[330] Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

[331] In light of the Supreme Court's Second Amendment decision in District of Columbia v. Heller, 554 U.S. 570 (2008), an interesting question is raised by the firearm prohibition, which is also a mandatory condition of the AWA Amendments. *See* 18 U.S.C. § 3142 (c)(1)(B)(viii). The district court decisions in *Kennedy* and *Arzberger* underscore the point that, as an enumerated constitutional right, the right to possess firearms is not something that can be withdrawn by Congress without some modicum of due process. To this end, the magistrate judge in *Kennedy* commented as follows:

> In *District of Columbia v. Heller*, ... Justice Scalia noted that a law regulating a specific, enumerated right such as the right to keep and bear arms was subject to more than a rational basis level of scrutiny. If the government's position in this case is sustained, this constitutional right would be taken away not because of a conviction, but merely because a person was charged. This right would be lost notwithstanding a lack of showing that Defendant is a potentially violent individual, or that he even owns firearms. Certainly no particularized need has been established in this case that the Defendant should prohibited from possessing a firearm.

United States v. Kennedy, 593 F. Supp. 2d 1221, 1230 n.4 (W.D. Wash. 2008) (citations omitted), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum); *see also* United States v. Arzberger, 592 F. Supp. 2d 590, 602–03 (S.D.N.Y. 2008) (noting similarly in light of *Heller*: "there is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm," and concluding that the AWA Amendments "violate due process by requiring that . . . an accused person be required to surrender his Second Amendment right to possess a firearm without giving that person an opportunity to contest whether such a condition is reasonably necessary in his case to secure the safety of the community").

which, upon mere charging, imposes certain mandatory pretrial release conditions on every defendant without requiring a judicial determination or further consideration of any kind.[332]

When opposing a Fifth Amendment challenge to the mandatory pretrial release conditions of the AWA Amendments, the government should lead with its strongest point: that the procedural due process holding in *Salerno* does not control in AWA cases because *Salerno* involved detention without bail, not pretrial release.[333] Thereafter, it should hope for cases in which as-applied challenges present defendants who have (1) been previously convicted or found to be extremely dangerous, and (2) received a modicum of due process through an individualized judicial determination regarding the six mandatory conditions of the AWA Amendments.[334] In other words, the government must hope for a judge who ignores the terms of the undesignated paragraph of the AWA Amendments by applying § 3142(c) as it existed prior to the AWA,[335] or who otherwise avoids the constitutional problems presented by that provision by judicially re-crafting its terms.[336]

As set forth above, our hypothetical defendant has been charged with one count of possessing child pornography. The government has presented no evidence of a risk of danger or flight, and Pretrial Services has recommended release without electronic monitoring or curfew. Our hypothetical defendant benefits from having no prior judicial determination regarding

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[332] *See* 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph).

[333] United States v. Salerno, 481 U.S. 739, 751 (1987) (holding that pretrial detention provision of Bail Reform Act did not "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) (internal quotation marks omitted)). Of course, this statement was made by the *Salerno* Court "under the[ ] circumstances" presented in that case, including the important fact that the government, by clear and convincing evidence, had proven to the bail court, during "a full-blown adversary hearing," that the Genovese family defendants presented a serious and articulable threat to the community. *Id.* at 750–51.

[334] *See, e.g.*, United States v. Crites, No. 8:09CR262, 2009 WL 2982782, at *2 (D. Neb. Sept. 11, 2009); United States. v. Cossey, 637 F. Supp. 2d 881, 890 (D. Mont. 2009); United States. v. Gardner, 523 F. Supp. 2d 1025, 1031 (N.D. Cal. 2007).

[335] *See, e.g.*, United States v. Rondeau, Cr. No. 10-147-S, 2010 WL 5253847, at *2 (D.R.I. Dec. 16, 2010); United States v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *9 (D.S.D. May 27, 2010); *see also* discussion *infra* Part III.B.4.

[336] *See* United States v. Peeples, 630 F.3d 1136, 1139 (9th Cir. 2010); United States v. Stephens, 594 F.3d 1033, 1039 (8th Cir. 2010); *Cossey*, 637 F. Supp. 2d at 889–92; United States v. Kennedy, 327 F. App'x 706, 707 (9th Cir. 2009).

the necessity of the mandatory release conditions imposed by the AWA Amendments. He also profits from the legal landscape in this area—namely, that an overwhelming majority of courts to have substantively addressed the constitutionality of the mandatory conditions have found a Fifth Amendment violation.[337] Re-examination of these decisions illustrates why the AWA Amendments would likely be held unconstitutional under the Fifth Amendment in our hypothetical case and in the majority of those like it, absent action from Congress or guidance from the Supreme Court.

1. *Gardner–Crowell–Torres*

The Fifth Amendment claim in *Gardner* suffered an early death. As detailed above, the *Gardner* court granted the government's motion to amend the conditions of release to add electronic monitoring, viewing that "singular addition" as a mere "incremental restriction" on the defendant's prior conditions of release—which already included a curfew and voice identification monitoring—and therefore insufficient to implicate a liberty interest under the Fifth Amendment's Due Process Clause.[338] Though it was "troubled by [the] automaticity of the Adam Walsh Act in imposing certain release conditions without a judicial determination,"[339] the court never proceeded to the *Mathews* balancing test because it determined that no constitutionally

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[337] *See* cases cited *supra*, note 18; *see also* discussion *infra* Part III.B.1–6. Moreover, only eight of the seventeen trial courts to hear constitutional attacks on the AWA Amendments actually substantively addressed facial challenges under the Fifth Amendment and, of those courts, only *Frederick* rejected such a challenge. *See Frederick*, 2010 WL 2179102, at *8. I do not include the three circuit opinions in this list. *See Peeples*, 630 F.3d 1136; *Kennedy*, 327 F. App'x 706; *Stephens*, 594 F.3d 1033; *see also Rondeau*, 2010 WL 5253847, at *2 (rejecting facial challenge in cursory fashion based on failed as-applied challenge). Furthermore, due to the futile briefing by the parties, the district court in *Cossey* did not substantively rule on any Fifth Amendment attack and, indeed, decided the case on non-constitutional grounds. *See Cossey*, 637 F. Supp. 2d at 889–92 (ruling on statutory construction grounds); *see also* United States v. Peeples, No. 10-00029, 2010 U.S. Dist. LEXIS 122499 (D. Mont. Nov. 18, 2010) (upholding AWA Amendments based entirely on decision in *Cossey*), *aff'd*, 630 F.3d 1136 (9th Cir. 2010) (per curiam).

[338] *Gardner*, 523 F. Supp. 2d at 1031–32.

[339] *Id.* at 1032; *see also id.* at 1031 ("[T]he lack of any opportunity to be heard on the enumerated conditions imposed by the Act raises a closer question under the Due Process Clause than under the Excessive Bail Clause . . . .").

protected liberty interest was deprived.[340] Under *Gardner*, then, it appears that situations in which the court has at some time meaningfully considered every applicable condition of release will constitute the government's strongest case,[341] assuming of course that such consideration can be meaningful at all in light of the fact that the undesignated paragraph of the AWA Amendments forecloses such a determination.[342]

Crowell, as discussed above, involved the government's motion to modify the defendants' conditions of release—to add electronic monitoring and curfew—pursuant to the undesignated paragraph of the AWA Amendments.[343] These added conditions were not initially recommended by Pretrial Services, requested by the government, or imposed by the court, as none of the defendants were found to present a risk of flight or danger to the community.[344] Indeed, it was for this very reason that the *Gardner* court distinguished its own situation from that in *Crowell* when it explained that "[g]iven the effect of a curfew on substantive freedom [in *Crowell*], a strong case would be made that the application of the Adam Walsh Act worked a deprivation of liberty in that case."[345] The court in *Crowell* certainly agreed, as it found an as-applied violation of the Due Process Clause.[346]

The path to that conclusion in *Crowell* began with a summary of the purpose of the Bail Reform Act and the Supreme Court's holding in *Salerno*.[347] Included was a thorough discussion of congressional attempts to expand judicial power in the bail setting through the Bail Reform Acts of 1966 and 1984, emphasizing the importance of providing courts with "adequate

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[340] *Id.* at 1034. Indeed, the *Gardner* court explained that were it to consider the new addition of both a curfew and electronic monitoring—as was the case in *Crowell*—the outcome would have been different. *See id.* at 1034.

[341] Unfortunately for the government, however, the facts in *Gardner* make it an enigma of sorts. *See* discussion *supra* Part III.A.3–5 (discussing *Gardner* and its application in later cases).

[342] *See* discussion *infra* Part III.B.2–5.

[343] *See* discussion *supra* Part III.A.1.

[344] *See* United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *1–2 (W.D.N.Y. Dec. 7, 2006).

[345] *Gardner*, 523 F. Supp. 2d at 1034.

[346] *Crowell*, 2006 WL 3541736, at *10. In so deciding, the court did not exhaustively evaluate the nature of the protected liberty interest involved.

[347] *Id.* at *8–9 (noting goals of "providing for flexibility in setting conditions of release appropriate to the characteristics of [the] individual defendants" (emphasis omitted) (quoting S. REP. NO. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188)).

authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released," and "flexibility in setting conditions . . . appropriate to the characteristics of [the] individual defendants."[348] The court ultimately concluded that the AWA Amendments had eliminated the very authority Congress sought to expand through the Bail Reform Act—the same authority the *Salerno* Court relied upon to uphold the Act against a procedural due process challenge:

> The Adam Walsh Amendments' mandate imposing certain pretrial release conditions, based solely on the nature of the particular crimes charged, directly restricts the judicial discretion Congress sought to enlarge in both the Bail Reform Acts of 1966 and 1984, and which the Supreme Court has recognized as paramount to meet the requirements of procedural due process in the bail-setting process in federal courts. *See Salerno*, *supra*, at 751. In particular . . . one of the Bail Reform Act's most important changes was the addition of a requirement that arrestees charged with certain serious felonies be detained prior to trial if the government demonstrates, by clear and convincing evidence after an adversary hearing, that no bail or release conditions would reasonably assure the safety of any other person and the community. *Salerno*, *supra*, at 741 (citing 18 U.S.C. § 3142(e) ("the detention law")). In upholding the detention law against both substantive and procedural due process challenges, the Supreme Court observed that matters concerning pretrial release or detention are subject to judicial determination. *Salerno*, *supra*, at 751 (stating that the detention "procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination.").[349]

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[348] *Id.* (quoting S. REP. NO. 98-225, at 2, 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185, 3188).

[349] *Id.* at *9. In a footnote, the *Crowell* court reiterated numerous procedural safeguards which, in *Salerno*, helped save the Bail Reform Act from the due process challenge made by the Genovese family defendants:

> Defendants 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

The *Crowell* court further explained that unlike the Bail Reform Act of 1984, which created a rebuttable presumption of pretrial detention for those charged with serious felonies, the AWA Amendments create an *irrebuttable* presumption that reappearance and community safety cannot be obtained without the mandatory conditions.[350] Surprisingly, the undesignated paragraph of the AWA Amendments had removed the individualized judicial determination necessary to evaluate the presumption that lies at the heart of Bail Reform Act.[351] The most such a presumption could do was trigger an adversary hearing as described in *Salerno*.[352] Short-circuiting that process, the *Crowell* court concluded, was patently unconstitutional, as the arrest itself could do nothing by way of due process to

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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.

Id. at *9 n.7 (quoting United States v. Salerno, 481 U.S. 739, 751–52 (1987)).

[350] *Id.* (noting that the Ninth Circuit had recently struck down a similar irrebuttable presumption as "unduly interfer[ing] with judicial discretion in matters of pretrial release" in the context of the Fourth Amendment (citing United States v. Scott, 450 F.3d 863, 874 (9th Cir. 2006))); *see Scott*, 450 F.3d at 874 ("[I]f a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by a showing that defendant poses a heightened risk of misbehaving while on bail. The government cannot, as it is trying to do in this case, short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required.").

[351] *Crowell*, 2006 WL 3541736, at *9. The most recent court to address this problem explained as follows:

> In all other federal crimes that come before a federal court, whether drugs, acts of violence, or even murder, when the court is reviewing the matters of risk of flight and danger to the community as to that particular accused, the procedural due process proposition of the rebuttable presumption is omnipresent. Rebuttable presumptions assure an accused an opportunity to be heard and present evidence to the contrary, maintain the burden of proof by clear and convincing evidence upon the Government, and uphold the principle of an independent judicial review and exercise of discretion.
>
> In fact, these are the bedrock principles confirmed by the Supreme Court in *United States v. Salerno* . . . .

United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *5 (N.D.N.Y. Aug. 10, 2011); *see also Scott*, 450 F.3d at 874 ("Neither *Salerno* nor any other case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime.").

[352] *Crowell*, 2006 WL 3541736, at *10; *see also* 18 U.S.C. § 3142(f) (2006 & Supp II).

establish the necessity of the AWA conditions of release.[353] It was not "meaningful" enough, in the constitutional sense of that word.[354]

The government's Fifth Amendment position fared no better in *Torres*. As mentioned above, *Torres* involved SORNA failure-to-register charges based solely on the peculiar fact that the defendant's employer sat partially in the State of New Mexico.[355] Tellingly, the parties did not dispute the mandatory nature of the release conditions set forth in the undesignated paragraph of the AWA Amendments. Prior to applying the *Mathews* test, the court finished this thought:

> This paragraph prevents the courts from evaluating and setting relevant conditions of pretrial release, and, instead, mandates conditions which implicate significant liberty interests. Under the Amendments, . . . the court is no longer able to determine the conditions necessary to ensure an arrestee's appearance at trial nor to assess his or her dangerousness to the community. The Amendments strip away any independent judicial evaluation by mandating that every arrestee be treated the same, that is, subject to a curfew with electronic monitoring, among other conditions of release, regardless of the circumstances.[356]

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[353] The *Crowell* court also intimated that such a presumption might also violate the presumption of innocence accorded by the Due Process Clause. *See Crowell*, 2006 WL 3541736, at *10. However, this assumption might be questionable unless the presumption is treated as more than a *trial* right. *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979) (holding that presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun"). *But see Karper*, 2011 WL 7451512, at *4 (holding that the mandatory curfew and electronic monitoring conditions of the AWA Amendments unconstitutionally "dispense with the presumption of innocence at this stage of the criminal prosecution," which is a "fundamental principle implicit within our concept of ordered liberty"); *see also* 18 U.S.C. § 3142(j) ("Nothing in this section shall be construed as modifying or limiting the presumption of innocence.").

[354] *Crowell*, 2006 WL 3541736, at *10 ("[T]he Amendments, by mandating the imposition of certain pretrial release conditions, establish that an arrest on the stated criminal charges, without more, irrebuttably establishes that such conditions are required, thereby eliminating an accused's right to an independent judicial determination as to required release conditions, in violation of the right to procedural due process applicable to the instant proceedings under the Fifth Amendment.").

[355] United States v. Torres, 566 F. Supp. 2d 591, 593 (W.D. Tex. 2008).

[356] *Id.* at 596.

The *Torres* court began its *Mathews* analysis by explaining that the "freedom of movement among locations and the right to remain in a public place" were interests "fundamental to our sense of personal liberty protected by the Constitution,"[357] and that the mandatory curfew of the AWA Amendments implicated these interests by "curtailing an individual's ability to move from one place to another and to remain in a place of choice."[358] Applying the three-part balancing test under *Mathews*, the court first concluded that "[t]he private interest implicated [was] significant."[359] Second, the court explained that the risk of erroneous deprivation of the private interest was "manifest" under the AWA Amendments because without any consideration of the need for the drastic restriction on an arrestee's liberty to ensure reappearance or public safety, "there is a great risk that an arrestee will be deprived of his liberty erroneously."[360] Because the conditions of release are "based solely upon the arrestee's status as one allegedly involved in a certain crime," without any judicial determination of the arrestee's particular circumstances, "there is no means of knowing whether the deprivation is erroneous or warranted."[361] Furthermore, the court concluded that additional procedural safeguards would alleviate this problem by allowing for judicial "consideration of the arrestee's circumstances when setting the conditions of pretrial release."[362] All that was needed were the protections provided by the pre-AWA Bail Reform Act.[363] Third and finally, the court concluded that the government's basis for eviscerating those protections—"the safety of the community"—did not cut the constitutional mustard under *Mathews*:

> [I]t is not clear to the Court how removing from judicial consideration whether a curfew with electronic monitoring is necessary . . . improves [the government's stated interest]. And,

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[357] *Id.* at 597 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); Williams v. Fears, 179 U.S. 270, 274 (1900)); *see also id.* ("Indeed, an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage.'" (quoting Kent v. Dulles, 357 U.S. 116, 126 (1958)).

[358] *Id.*

[359] *Id.*

[360] *Id.* at 597–98.

[361] *Id.* at 598.

[362] *Id.*

[363] 18 U.S.C. § 3142(c)(1)(A)–(B) (2005 version).

> the burden on the Government of [providing] the greater process is minimal. After all, the greater process only involves what the Government must provide in all other cases not involving the Adam Walsh Amendments, that is, presenting argument to the court regarding what the Government believes to be the appropriate conditions of release in a given case.[364]

By removing, for all defendants, any form of procedural safeguards "critical to the constitutionality of the Bail Reform Act as explained by the Supreme Court in *Salerno*," the AWA Amendment's undesignated paragraph of § 3142(c)(1)(B) facially violated the Due Process Clause of the Fifth Amendment.[365]

2. *United States v. Rueb* and *United States v. Merritt*

The defendants in *United States v. Rueb*[366] and *United States v. Merritt*[367] were each charged with violating 18 U.S.C. § 2252(a)(2) and § 2252(a)(4)(B) for allegedly receiving and possessing photographic depictions of child pornography via their computers.[368] In both cases, the only evidence offered by the government regarding detention or release were reports prepared by Pretrial Services.[369] Despite the language of the undesignated paragraph of § 3142(c)(1)(B), the court imposed conditions of release particularly suited to the crimes charged: prohibiting access to a computer, internet, e-mail or other online communications, and requiring each defendant to submit to unannounced inspections of his computer.[370] Shortly thereafter, the court summarily granted the government's request, in both cases, to add curfew and electronic monitoring conditions

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[364] *Torres*, 566 F. Supp. 2d at 598.

[365] *Id.* at 599. The decision in *Torres* could be viewed as skirting *Salerno*'s "no set of circumstances" test for facial invalidity. *See supra* note 178 (outlining test). However, I would argue that the *Torres* opinion implicitly recognizes that the terms of the undesignated paragraph of the AWA Amendments *removes the possibility* for any circumstance where the court, after a hearing and independent evaluation of the appropriateness of every condition listed in 3142(c)(1)(B), might find every such condition warranted. The court simply cannot perform such an exercise under the AWA Amendments (as currently written). *See infra* Part III.B.4.

[366] 612 F. Supp. 2d 1068 (D. Neb. 2009).

[367] 612 F. Supp. 2d 1074 (D. Neb. 2009).

[368] *Rueb*, 612 F. Supp. 2d at 1069; *Merritt*, 612 F. Supp. 2d at 1075. The magistrate judge decided both defendants' motions to remove the conditions of release on the same day.

[369] *Rueb*, 612 F. Supp. 2d at 1069; *Merritt*, 612 F. Supp. 2d at 1075.

[370] *Rueb*, 612 F. Supp. 2d at 1069; *Merritt*, 612 F. Supp. 2d at 1075–76.

pursuant to the AWA Amendments.[371] Both defendants objected, claiming that the added conditions violated their respective due process rights under the Fifth Amendment.[372]

Upon reconsideration, the court agreed, issuing identical decisions on the same day. First, it reviewed the evidence offered by the parties. Notwithstanding the clear terms of the undesignated paragraph of the AWA Amendments, the court underscored that although both alleged victims were minors, neither defendant was charged with "any crime involving personal contact or direct observation of a minor," nor was there any evidence "before the court that [the] defendant[s] pose[d] any risk whatsoever of offending against a minor" or "pose[d] any risk of flight."[373] Regarding danger to the community, the court noted that defendant Rueb "ha[d] essentially no prior criminal history," that defendant Merritt had "only a minor criminal history," and that both had "no history of violence or assaultive or even threatening behavior."[374] There was absolutely "no evidence that [either defendant's] release pose[d] a risk of danger to any other person."[375]

Second, the court considered the utility of curfews and electronic monitoring in cases such as the two before it, noting that while such conditions may assist the government in knowing a defendant's location pending trial,

> that assistance is limited. It is unlikely, for example, that a curfew or electronic monitoring can or would serve to prevent or curtail a defendant's receipt and possession of child pornography through the use of a computer, since computers are available for public use in numerous places, and may be available to a particular person at a friend's residence. Likewise prohibited material could be brought to a defendant's house despite the defendant's curfew and electronic monitoring. Curfews and electronic monitoring are tools better suited to limit a person's movements when he is a flight risk; this

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[371] *Rueb*, 612 F. Supp. 2d at 1069–70; *Merritt*, 612 F. Supp. 2d at 1076.

[372] *Rueb*, 612 F. Supp. 2d at 1069; *Merritt*, 612 F. Supp. 2d at 1075.

[373] *Rueb*, 612 F. Supp. 2d at 1069; *Merritt*, 612 F. Supp. 2d at 1075. As to risk of flight, the court found that both defendants had very strong ties to the community as both were employed and had families in the area. *Rueb*, 612 F. Supp. 2d at 1069; *Merritt*, 612 F. Supp. 2d at 1075. Furthermore, the government presented no evidence of a risk of flight. *Rueb*, 612 F. Supp. 2d at 1069–70; *Merritt*, 612 F. Supp. 2d at 1076.

[374] *Rueb*, 612 F. Supp. 2d at 1070; *Merritt*, 612 F. Supp. 2d at 1076.

[375] *Rueb*, 612 F. Supp. 2d at 1070; *Merritt*, 612 F. Supp. 2d at 1076.

> defendant is not a flight risk. The government has failed to show that curfews and electronic monitoring are release conditions tailored to prevent any foreseeable risk of harm or flight defendant[s] Rueb [and Merritt] may pose if [they are] released pending trial.[376]

Next, the court underscored that while "the Bail Reform Act did not mandate certain conditions of release" for crimes involving minor victims, the AWA Amendments in 2006 changed course by creating an irrebuttable presumption that a defendant charged with certain enumerated offenses cannot be released without, among other conditions, a curfew and electronic monitoring.[377] This presumption, according to the court, violated every such defendant's procedural due process rights.[378] "In contrast to the due process safeguards cited in *Salerno*," a mere charge under the AWA Amendments subjected a defendant to preset conditions of release.[379] Every defendant is automatically determined to pose an unacceptable risk to the community, and "there is no evidence the defendant can offer to escape electronic monitoring and a curfew," among other mandatory conditions.[380] Any hearing by the court was therefore

> unnecessary and, if held, [would be] meaningless because the decision rests solely on the crime charged. The government need not prove, and the court need not consider, the circumstances of the offense charged, the weight of evidence against the defendant, the defendant's history and characteristics, or whether the defendant poses a risk of flight or harm to the public.[381]

Citing *Arzberger* and *Torres*, the court next held that a curfew coupled with electronic monitoring implicated the defendants' liberty interests by restricting their "ability to move about at will" or remain in a place of choice,[382] which was of great concern in light of the absence of evidence suggesting a risk of

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[376] *Rueb*, 612 F. Supp. 2d at 1070 (citing 18 U.S.C. § 3142(g) (2006 & Supp.II)); *Merritt*, 612 F. Supp. 2d at 1076 (citing 18 U.S.C. § 3142(g)).

[377] *Rueb*, 612 F. Supp. 2d at 1071 (citing United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *9 (W.D.N.Y. Dec. 7, 2006)); *Merritt*, 612 F. Supp. 2d at 1077 (citing *Crowell*, 2006 WL 3541736, at *9).

[378] *Rueb*, 612 F. Supp. 2d at 1073–74; *Merritt*, 612 F. Supp. 2d at 1079–80.

[379] *Rueb*, 612 F. Supp. 2d at 1072; *Merritt*, 612 F. Supp. 2d at 1078.

[380] *Rueb*, 612 F. Supp. 2d at 1072; *Merritt*, 612 F. Supp. 2d at 1078.

[381] *Rueb*, 612 F. Supp. 2d at 1072–73 (citing 18 U.S.C. § 3142(g) (2006 & Supp. II)); *Merritt*, 612 F. Supp. 2d at 1079 (citing 18 U.S.C. § 3142(g)).

[382] *Rueb*, 612 F. Supp. 2d at 1073; *Merritt*, 612 F. Supp. 2d at 1079.

danger or flight.[383] The court acknowledged that the government has the ability to curtail this liberty interest under certain circumstances, but held that in doing so, "it must afford the defendant procedural due process" passing muster under the *Salerno* test.[384] The AWA Amendments failed to meet this irreducible minimum:

> [A]s to those defendants charged with crimes listed in the [undesignated paragraph of § 3142(c)(1)(B) of the] Adam Walsh Amendments, the amendments eviscerate the government's duty to present evidence, the defendant's reasonable opportunity to offer opposing evidence, and the judicial review and determination otherwise required under 18 U.S.C. § 3142(g) of the Bail Reform Act. Under such circumstances, the procedural due process afforded is not only inadequate, it is non-existent.
>
> No defendant charged with a crime listed in the Adam Walsh Amendments is afforded a meaningful opportunity to present evidence to rebut the presumption that defendant's movement must be restricted by a curfew and electronic monitoring pending trial. The Adam Walsh Amendments to the Bail Reform Act are unconstitutional on their face because, as to every defendant charged with a crime listed in the amendments, the amendments foreclose any individualized judicial consideration of the interests otherwise required to be considered under 18 U.S.C. § 3142(g).[385]

The court therefore found a facial violation of the Fifth Amendment, as the mandatory nature of the Amendments made any additional procedural gesture by the court "meaningless" as a matter of due process.[386] Furthermore, because the conditions,

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[383] *Rueb*, 612 F. Supp. 2d at 1070; *Merritt*, 612 F. Supp. 2d at 1076.

[384] *Rueb*, 612 F. Supp. 2d at 1073; *Merritt*, 612 F. Supp. 2d at 1079.

[385] *Rueb*, 612 F. Supp. 2d at 1073 (citing United States v. Arzberger, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008); United States v. Torres, 566 F. Supp. 2d 591, 599 (W.D. Tex. 2008); United States v. Kennedy, 593 F. Supp. 2d 1221, 1230 (W.D. Wash. 2008), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x. 706 (9th Cir. 2009) (unpublished memorandum); United States v. Vujnovich, No. 07-20126-01-CM-DJW, 2008 WL 687203, at *3 (D. Kan. Mar. 11, 2008); United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *10 (W.D.N.Y. Dec. 7, 2006)); *Merritt*, 612 F. Supp. 2d at 1079 (citing *Arzberger*, 592 F. Supp. 2d at 601; *Torres*, 566 F. Supp. 2d at 597; *Kennedy*, 593 F. Supp. 2d at 1230; *Vujnovich*, 2008 WL 687203, at *3; *Crowell*, 2006 WL 3541736, at *10).

[386] *Rueb*, 612 F. Supp. 2d at 1072–73; *Merritt*, 612 F. Supp. 2d at 1079; *see* United States v. Salerno, 481 U.S. 739, 745 (1987) (holding that a successful facial

as applied to the facts before the court, would "not serve to 'reasonably assure' [the defendants'] appearance at trial or protect other persons or the community," those conditions were removed.[387]

3. *United States v. Smedley*

An equally emphatic result occurred in *United States v. Smedley*,[388] where the court found that the mandatory home detention and electronic monitoring conditions facially violated the Due Process Clause of the Fifth Amendment.[389] After rejecting the government's attempt to compare the case to *Gardner*,[390] the court applied the *Mathews* test to the challenged conditions.[391] Citing *Salerno* and *Torres*, the court first concluded that the defendant's liberty interest pending trial was "significant."[392] Next, the court found "substantial" the risk that the defendant's fundamental liberty interest had been deprived erroneously, "in the sense that [the] imposed conditions of release are not necessary to reasonably assure his appearance in court or to protect the public," but instead are automatically added in every case, "without any regard for, or inquiry into, the defendant's individual circumstances."[393] Finishing prong two of the *Mathews* analysis, the court concluded that the very procedures lacking in the AWA Amendments were available, "at

challenge requires a showing of "no set of circumstances" under which the statute would be valid).

[387] *Rueb*, 612 F. Supp. 2d at 1074 (quoting 18 U.S.C. § 3142(g)); *Merritt*, 612 F. Supp. 2d at 1080 (quoting 18 U.S.C. § 3142(g)).

[388] 611 F. Supp. 2d 971 (E.D. Mo. 2009).

[389] *Id.* at 977. The defendant in *Smedley* was charged with receiving and possessing child pornography under 18 U.S.C. § 2252A(a)(2) and (a)(5)(B). *Id.* at 972. His motion to modify the conditions of his pretrial release focused on the condition of home detention with electronic monitoring. *Id.* at 974.

[390] *See id.* at 976–77.

[391] *See id.* at 975–77.

[392] *Id.* at 975 ("[A]n individual's right to freedom of movement among locations and the right to remain in a public place are fundamental to our sense of personal liberty protected by the Constitution." (quoting United States v. Torres, 566 F. Supp. 2d 591, 597 (W.D. Tex. 2008)) (internal quotation marks omitted)); *see also id.* (" 'We do not minimize the importance and fundamental nature of' the individual's right to liberty" (quoting United States v. Salerno, 481 U.S. 739, 750 (1987))).

[393] *Id.*

little cost," to reduce this substantial risk while simultaneously protecting the government's interest in protecting the safety of children and the community.[394]

Specifically, the court noted that while the government's interest in safety was commensurately high, providing what was noticeably lacking from the AWA Amendments—i.e., an individualized judicial determination of the need for each mandatory condition—would not detract from such an interest. Any burden to the government would be minimal under prong three, the court concluded, for in every other criminal case, the government must provide its reasons for seeking pretrial detention or certain conditions of release.[395] "Asking the government to perform a task it must ordinarily perform is no great burden."[396]

The *Mathews* test tipped decidedly in favor of the defendant. Echoing *Rueb* and *Merritt*, the court in *Smedley* concluded that the AWA Amendments were facially unconstitutional, as the "procedural due process afforded defendants under the Adam Walsh Act 'is not only inadequate, it is non-existent.' "[397] Particularly appalling to the court was the absence of an opportunity for any defendant to meaningfully challenge the mandatory conditions or for any court to give "consideration [to] the type of factors outlined in *Salerno*."[398]

4. *United States v. Stephens*

The same result was obtained, at least initially, in *United States v. Stephens*.[399] The defendant in *Stephens* was charged with possession, transportation, and receipt of child pornography, and making false statements to the FBI.[400] At the detention

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[394] *Id.* at 975–76.

[395] *Id.*

[396] *Id.* at 976.

[397] *Id.* (quoting United States v. Merritt, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009)).

[398] *Id.*

[399] No. CR09-3037-MWB, 2009 WL 3568668, at *2 (N.D. Iowa Oct. 27, 2009) (finding mandatory curfew and electronic monitoring conditions facially violative of the Fifth and Eighth Amendments), *motion to revoke order denied*, 669 F. Supp. 2d 960, 969 (N.D. Iowa 2009) (same as to Fifth Amendment), *rev'd and remanded*, 594 F.3d 1033 (8th Cir. 2010).

[400] These offenses are set forth at 18 U.S.C. §§ 2252A(a)(5)(B), 2252A(b)(2), 2252A(a)(2)(A), 2252A(b)(1), 2252A(a)(1) and 2252A(b)(1), respectively. *Stephens*,

hearing, the prosecution moved to detain the defendant but presented no evidence in support of this request, relying instead on the Bail Reform Act's rebuttable presumption that no condition or combination would reasonably assure reappearance and community safety for persons accused of receipt of child pornography.[401] In light of the evidence presented by the defendant, however, the magistrate judge determined that "the prosecution had failed to show by a preponderance of the evidence that defendant Stephens represent[ed] a flight risk, or by clear and convincing evidence that [he] represent[ed] a danger to the community under any terms or conditions of release."[402] Accordingly, Stephens was released pending trial on conditions that did *not* include curfew or electronic monitoring.[403]

Two weeks later the prosecution moved to add these two conditions, arguing that they were required under the AWA Amendments for all defendants charged with transportation or receipt of child pornography, regardless of the lack of evidence presented to the bail court.[404] The magistrate judge disagreed, finding that mandatory application of a curfew and electronic monitoring violated the defendant's Fifth Amendment right to procedural due process and the Eighth Amendment prohibition on excessive bail.[405]

The government's motion to revoke this order was denied by the presiding district judge, who confined his analysis to the Fifth Amendment.[406] After rejecting the prosecution's argument that the *Mathews* balancing test did not apply,[407] the district

669 F. Supp. 2d at 962. The defendant in *Stephens* was also charged with the attempt provisions of these offenses. *Id.*

[401] *Id.*

[402] *Id.*

[403] *Id.* "Among other things, the magistrate judge ordered Stephens to (1) remain within a hundred miles of his residence; (2) refrain from possessing controlled substances, firearms, ammunition, destructive devices, and other dangerous weapons; (3) avoid criminals, pornography, and erotica; (4) maintain weekly contact with his attorney; and (5) consent to unannounced searches and monitoring of his computer and other electronic devices." United States v. Stephens, 594 F.3d 10333, 1035 n.1 (8th Cir. 2010).

[404] *Stephens*, 2009 WL 3568668, at *1.

[405] *Id.* at *1–2.

[406] *Stephens*, 669 F. Supp. 2d at 965–69. Although Mr. Stephens argued on reconsideration that the mandatory conditions violated the Excessive Bail Clause of the Eighth Amendment, the district court did not reach this issue.

[407] *Id.* at 966. Indeed, the government has disputed this conclusion in only two reported cases—both of which it lost. *See* United States v. Polouizzi, 697 F. Supp. 2d

court concluded that the private interest prong of that test favored the defendant because the AWA's mandatory curfew and electronic monitoring conditions "clearly impact a liberty interest 'by curtailing an individual's ability to move from one place to another and to remain in a place of choice.' "[408] Next, channeling *Torres* and *Arzberger*, the court found that the risk of an erroneous deprivation of this liberty interest was substantial because the mandatory conditions were blindly based on a charge alone, without a judicial determination as to their necessity or any other independent means to assess whether the deprivation is warranted.[409] This risk was particularly unacceptable to the court in light of the availability of additional procedural safeguards that were already in place in the unamended Bail Reform Act 1984, of which the government was well aware.[410] The court explained that while "the government has a significant interest in ensuring the safety of the community in general and specifically in protecting children from being victimized by those who commit child pornography related offenses,"[411] this interest was "in no way diminished by permitting a court to make an individualized assessment of the need for curfew and electronic monitoring restrictions based on the unique factual considerations relevant to a particular defendant," as bail courts do in every other criminal case.[412] Any burden to the government in providing this greater process would therefore be minimal.[413]

381, 388 (E.D.N.Y. 2010) (rejecting argument that the tougher standard from Medina v. California, 505 U.S. 437, 443–44 (1992) provides the proper framework in such cases because AWA challenge is not to a *state* rule of criminal procedure, thus no comity concerns exist); *Stephens*, 669 F. Supp. 2d at 966 (same).

[408] *Stephens*, 669 F. Supp. 2d at 967 (quoting United States v. Torres, 566 F. Supp. 2d 591, 597 (W.D. Tex. 2008)).

[409] *See id.* (citing United States v. Arzberger, 592 F. Supp. 2d 590, 600–01 (S.D.N.Y. 2008); *Torres*, 566 F. Supp. 2d at 597).

[410] *See id.* (citing *Arzberger*, 592 F. Supp. 2d at 600–01).

[411] *Id.* (citing Osborne v. Ohio, 495 U.S. 103, 109 (1990)) (explaining, when considering Ohio's prohibition on child pornography, that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' " (quoting New York v. Ferber, 458 U.S. 747 (1982))).

[412] *Id.* at 968 (citing United States v. Smedley, 611 F. Supp. 2d 971, 976 (E.D. Mo. 2009); *Arzberger*, 592 F. Supp. 2d at 601; United States v. Solomon, No. 09-CR-4024-DEO, at 7 (N.D. Iowa Aug. 27, 2009)).

[413] *Id.* at 967–68 (citing *Smedley*, 611 F. Supp. 2d at 976; *Arzberger*, 592 F. Supp. 2d at 601).

In closing, the district court in *Stephens* harkened back to *Salerno*, contrasting the protections provided by the Bail Reform Act and the AWA Amendments. The minimal but meaningful procedural protections sufficient to repel a due process challenge in *Salerno* sealed an opposite fate for the AWA Amendments in *Stephens*, especially absent congressional findings as to the efficacy of the mandatory conditions or a determination that courts would refuse to require them for defendants charged with child pornography offenses if the conditions were discretionary rather than mandatory.[414] After balancing the *Mathews* factors, the district court held that

> the Adam Walsh Act's mandatory electronic monitoring and curfew requirements violate the Due Process Clause of the Fifth Amendment because they require the imposition of a curfew with associated electronic monitoring without providing the defendant a fair opportunity to contest the necessity for such restrictions on the defendant's liberty. . . . "[T]he Amendments are unconstitutional on their face because the absence of procedural protections is universal: no defendant is afforded the opportunity to present particularized evidence to rebut the presumed need to restrict his freedom of movement."[415]

The government filed an interlocutory appeal of this ruling, which was reversed and remanded by the Eighth Circuit Court of Appeals in a decision that never applied the *Mathews* balancing test or grappled with the actual terms of the undesignated paragraph of the AWA Amendments.[416] The court of appeals ruled solely on the facial challenge, expressing "no view as to any as-applied challenge Stephens might assert on remand."[417]

The Eighth Circuit began its short opinion in *Stephens* by stressing the same point made by three of the five courts to have rejected facial Fifth Amendment challenges to the AWA

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[414] *See id.* at 968–69.

[415] *Id.* at 969 (quoting *Arzberger*, 592 F. Supp. 2d at 601) (citing *Solomon*, No. 09-CR-4024-DEO, at 7; *Smedley*, 611 F. Supp. 2d at 976). The district court in *Stephens* distinguished the Ninth Circuit's unpublished memorandum in *Kennedy* and the District of Montana decision in *Cossey* as cases where the *Mathews* analysis was not applied, and distinguished *Gardner* as confined to "its unique facts." *See id.* at 969 n.2; *see also supra* Part III.A.3–5 (describing the limited applicability of *Gardner*).

[416] *Stephens*, 594 F.3d at 1040. Judge Smith wrote a concurring opinion that applied a cursory version of the *Mathews* test. *See id.* at 1040–41 (Smith, J., concurring).

[417] *Id.* at 1039 (majority opinion).

Amendments: the distinction between facial and as-applied constitutional challenges.[418] Underscoring "the Supreme Court's 'disdain' for" the former, the Eighth Circuit explained that to reject a facial challenge to the AWA Amendments, it "need only find them adequate to authorize the pretrial [conditions] of at least some persons charged with crimes, whether or not they might be insufficient in some particular circumstances."[419] Applying the *Salerno*'s "no set of circumstances" test, the Eighth Circuit quickly concluded that "Stephens' facial challenge . . . fails because [he] cannot establish [that] there are no child pornography defendants for whom a curfew or electronic monitoring is appropriate."[420] According to the court, "[a]n irrebuttable presumption of curfew and electronic monitoring would be appropriate in any case in which a judicial officer conducting a detention hearing would, in fact, find curfew and electronic monitoring to be warranted,"[421] citing a single unpublished decision from the District of Nebraska.[422]

This reasoning leaves open the challenge, made in this Article, that such a hypothetical individualized judicial determination is foreclosed by the AWA Amendments. The Eighth Circuit in *Stephens* explained that an irrebuttable presumption is appropriate for all cases if, in any one case, an individualized judicial determination would still result in imposition of the conditions mandated by the undesignated paragraph of § 3142(c)(1)(B).[423] But if Congress, through that very provision, removed the bail court's ability to make such a

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[418] *See id.* at 1037–38; United States v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *6 (D.S.D. May 27, 2010); United States. v. Cossey, 637 F. Supp. 2d 881, 891 (D. Mont. 2009).

[419] *Stephens*, 594 F.3d at 1037–38 (quoting United States v. Salerno, 481 U.S. 739, 751 (1987)) (internal quotation marks omitted).

[420] *Id.*

[421] *Id.* at 1038 ("[t]here are circumstances where [the Adam Walsh] Act can be applied constitutionally—e.g., where a court determines all the minimum conditions mandated by the Adam Walsh Act are in fact warranted" (alterations in original) (quoting United States v. Gardner, 523 F. Supp. 2d 1025, 1030 n.3 (N.D. Cal. 2007))).

[422] *Id.* (citing United States v. Crites, No. 8:09CR262, 2009 WL 2982782, at *2 (D. Neb. Sept. 11, 2009)). The court in *Crites* analyzed—in extremely cursory fashion based entirely on the defendant's legal brief—whether the electronic monitoring and curfew conditions were appropriate for the particular defendant before it, and in doing so, ignored the automatic application of those conditions via 18 U.S.C. § 3142(c)(1)(B).

[423] *Stephens*, 594 F.3d at 1038.

determination and foreclosed the opportunity for defendants to challenge the mandatory conditions, how would such a case ever exist? Under the unambiguous terms of the Amendments, *every* arrestee covered must submit to electronic monitoring and a curfew—among other conditions—without any further consideration.[424] These conditions are mandatory, and the court must impose them without any regard for the defendant's individual circumstances. Indeed, as we have seen in almost every case, as soon as the government recognizes this procedural inequity, it moves to add the mandatory conditions regardless of—even in spite of—any individualized judicial consideration as to their necessity.[425] Therefore, the question of whether there exist "child pornography defendants for whom a curfew or electronic monitoring is appropriate"[426] ignores the fact that this very "set of circumstances" has been removed by the Amendments because it has already been answered by Congress.[427] Judges are nothing more than potted plants under these circumstances.

Rather than address the drastic impact of the mandatory conditions and removal of the judicial role in assessing those conditions on a case-by-case basis, the appellate court in *Stephens* broadly framed the question as whether the AWA Amendments prevented defendants from receiving a detention hearing.[428] Having reframed the issue as one of simple detention or release, the court explained that the defendant's facial

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[424] 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II) (undesignated paragraph); *see also* United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009).

[425] *See* United States v. Stephens, 669 F. Supp. 2d 960, 962–63 (N.D. Iowa 2009), *rev'd and remanded*, 594 F.3d 1033 (8th Cir. 2010); United States v. Rueb, 612 F. Supp. 2d 1068, 1069–70 (D. Neb. 2009) , *rev'd in part*, 2009 U.S. Dist. LEXIS 50495 (D. Neb. 2009); United States v. Merritt, 612 F. Supp. 2d 1074, 1075–76 (D. Neb. 2009); United States v. Arzberger, 592 F. Supp. 2d 590, 592 (S.D.N.Y. 2008); *Gardner*, 523 F. Supp. 2d at 1027; United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *2 (W.D.N.Y. Dec. 7, 2006).

[426] *Stephens*, 594 F.3d at 1038.

[427] *See* 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph). Indeed, the courts that have found no facial violation were content to answer the facial attack presented in their case with a hypothetical assuming that the bail court will provide *more* process than contemplated by the AWA Amendments; *supra* note 249 and accompanying text; *see also infra* note 467 and accompanying text.

[428] *Stephens*, 594 F.3d at 1039.

challenge to the Amendments must fail because the conditions, though expressly mandatory,[429] were somehow discretionary as well[430]:

> Stephens overestimates the impact of § 216 of the Adam Walsh Act upon the Bail Reform Act. Section 216 does not deprive child pornography defendants of a detention hearing or an individualized determination whether detention or release is appropriate. As relevant here, the only effect of § 216 is to require *a* curfew and *some* electronic monitoring. The defendant remains entitled to a detention hearing and a large number of individualized determinations—including an individualized determination as to the extent of any mandatory conditions of release.[431]

Much like the Ninth Circuit in *Kennedy*, the *Stephens* court resolved the defendant's argument by changing it, ignoring the express terms of § 3142(c)(1)(B), the precise question of whether the undesignated paragraph's use of term "shall contain" makes the conditions mandatory,[432] and whether it was constitutional for Congress to impose the curfew and electronic monitoring conditions upon mere charging, without requiring any procedural protections. The Eighth Circuit's satisfaction with "a large number of individualized determinations"[433] suggests a "good enough" due process standard that was rejected in *Salerno*.[434] Rather than address the defendant's challenge to the mandatory nature of the pretrial conditions, the Eighth Circuit explained that the mandatory conditions are not defined, and can thus be

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[429] *See* 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph) ("[A]ny release order *shall contain*, at a minimum, a condition of electronic monitoring and [five others]." (emphasis added)).

[430] *Stephens*, 594 F.3d at 1039.

[431] *Id.* The reward of "a large number of individualized determinations"—even if they existed—is empty rhetoric when the result of those determinations are preordained. *See* 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph) ("any release order *shall contain*, at a minimum, a condition of electronic monitoring and [five others]." (emphasis added)). The Eighth Circuit in *Stephens*, much like the Ninth Circuit in *Kennedy* and *Peeples*, fails to explain how this purported flexibility or discretion matters in any real case other than in those where the bail judge flat out ignores the words "shall contain" in the undesignated paragraph of 18 U.S.C. § 3142(c)(1)(B).

[432] *See* 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph) (providing that "any release order *shall contain*, at a minimum, a condition of electronic monitoring and [five others]." (emphasis added)).

[433] *Stephens*, 594 F.3d at 1039.

[434] *Salerno*, 481 U.S. at 747–51.

crafted and shaped to the particular case.[435] Or to use the court's words, the "only effect of § 216 is to require *a* curfew and *some* electronic monitoring,"[436] whatever that means.[437]

The court's use of those terms mirrors the Ninth Circuit's oxymoronic reference to judicial "discretion" in imposing "mandatory" conditions—i.e.,, the notion that "[b]ecause 'curfew' and 'electronic monitoring' remain undefined, the district court possesses many tools in its discretionary toolkit" to provide due process and remedy any other constitutional infirmity.[438] The Eighth Circuit in *Stephens* did not meaningfully define this "discretionary toolkit" or address whether it still exists after the AWA Amendments, and the court appeared to have little or no idea of what might fit inside, or how its contents would advance the mandatory terms of the Amendments rather than give district courts *more* nuanced and unguided pretrial release decisions to make. Although Congress had clearly removed that

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[435] *Stephens*, 594 F.3d at 1039.

[436] *Id.*

[437] Indeed, just as this Article was sent to press, a district court respectfully attacked this rationale set forth by the Eighth and Ninth Circuits. *See* United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *6 n.6 (N.D.N.Y. Aug. 10, 2011); *see also* United States. v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *9 (D.S.D. May 27, 2010) ("Construing the Adam Walsh Act to require a court to exercise its *discretion*, when applying the *mandatory* release conditions . . . avoids the need to pass on the constitutionality of the Act and its amendments as applied here.") (emphasis added). The *Frederick* court further justified its extra-textual reading of § 3142(c)(1)(B) by noting that the Amendments "are only at odds with the purpose of the Bail Reform Act if they are construed to require the mandatory imposition of the same conditions in every case." *Id. But see* United States v. Torres, 566 F. Supp. 2d 591, 595 (W.D. Tex. 2008) ("The plain language of [the undesignated paragraph] . . . establishes that Congress has attempted to mandate the court's imposition of certain pretrial release conditions for those arrestees allegedly involved in certain crimes . . . ."); United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *7 (W.D.N.Y. Dec. 7, 2006) (same); United States v. Polouizzi, 697 F. Supp. 2d 381, 391 (E.D.N.Y. 2010) (same); United States v. Gardner, 523 F. Supp. 2d 1025, 1027 (N.D. Cal. 2007) (noting that Congress, through the AWA Amendments "require[s]" the enumerated conditions for defendants charged with certain listed crimes and that the government conced this to be true). Even the court in *Cossey* admitted this much. United States v. Cossey, 637 F. Supp. 2d 881, 884 (D. Mont. 2009) (explaining that AWA Amendments mandate pretrial release conditions "that must include, at a minimum, electronic monitoring and the five specific conditions. *The statutory mandate is unambiguous.*") (emphasis added).

[438] *Stephens*, 594 F.3d at 1039.

toolkit in 2006, the Eighth Circuit panel refused to allow the terms of the AWA Amendments to interfere with its decision to reverse and remand the finding below.[439]

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[439] An entirely unique approach to a constitutional challenge to the AWA Amendments prevailed in *Cossey*. There, the district court rejected the government's contention—which it found unsupported by the congressional record—that any person charged with violating an AWA-enumerated offense is automatically "likely to commit hands-on sexual offenses against children." *Cossey*, 637 F. Supp. 2d at 887. Handcuffed by the parties' futile briefing, the court limited its analysis to the defendant's argument that imposition of the mandatory conditions violated the constitutional presumption of innocence—an argument comprised of a single subheading and a handful of sentences in the defendant's brief. *Id.* at 886–88. The court concluded that subsection (j) of the AWA Amendments—which provides that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence"—defeated both the government's claim that such a right exists only at trial as well as the defendant's contention that the mandatory conditions conflicted with the procedures set forth Bail Reform Act and required all persons charged with certain crimes to be treated the same. *Id.* at 888–89 (quoting 18 U.S.C. § 3142(j) (2006 & Supp. II)) (internal quotation marks omitted). *But see* United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *4 (N.D.N.Y. Aug. 10, 2011) (holding that the mandatory curfew and elecontronic monitoring conditions of the AWA Amendments unconstitutionally "dispense with the presumption of innocence at this stage of the criminal prosecution," which is a "fundamental principle implicit within our concept of ordered liberty"). The court held that because subsection (j) would be rendered inoperative if the AWA Amendments mandated certain identical pretrial release conditions upon the mere charging of certain crimes, the Amendments could not be so interpreted. *Cossey*, 637 F. Supp. 2d at 889. It based this holding on the statutory construction principle that forbade interpretation of one provision so as to render the other provision inoperative, *id.*, despite the fact that it was doing just that to reach its conclusion. *See* 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph).

Of course, enforcing one statutory provision while ignoring another presents the problem of fashioning a judicial remedy using the passage ignored. But with a little imagination and an assist from a higher authority, the court in *Cossey* was up for the task. Explaining that "[i]t is not difficult to imagine fashioning conditions of release that honor" Congress's interests in protecting children from harm "without assuming that every person . . . accuse[d] of a child pornography crime is a hands on sexual offender who will prey on children while on pretrial release," the court pointed to the only ruling at the time to have so imagined—the unpublished memorandum opinion by the Ninth Circuit in *Kennedy*. *Cossey*, 637 F. Supp. 2d at 889 (citing United States v. Kennedy, 327 F. App'x 706, 708 (9th Cir. 2009)). The court adopted the Ninth Circuit's unpublished memorandum to "construe the Walsh Act to require the district court to exercise its discretion, to the extent practicable, in applying the mandatory release conditions." *Id.* at 889–90 (quoting *Kennedy*, 327 F. App'x at 707) (internal quotation marks omitted).

Cossey provides an example of just how far a court will stretch the terms of a statute to eschew a detailed analysis of a well-intentioned but poorly-drafted statute. In laboring to make the point that it was giving neither party what it wished, the court in *Cossey* gave the government much more than it asked for: a lifeline from its own admission regarding the inflexible and mandatory nature of the AWA Amendments. *See id.* at 891–92. The court, clinging to subsection (j), conflated the

5. *United States v. Polouizzi*

One of the most recent courts to address the constitutionality of the AWA Amendments, the Eastern District of New York in *United States v. Polouizzi*,[440] delivered perhaps the most scathing indictment of the Amendments to date.[441] It was not persuaded by the ultimate dispositions in *Kennedy*, *Stephens*, or *Gardner*, and instead found the mandatory conditions unconstitutional as applied to the defendant—a man whose original conviction of receipt and possession of child pornography had been set aside in light of the Second Circuit's substantial change in the indictment.[442]

Mr. Polouizzi, a restaurant owner in Queens, New York, was originally charged with receiving and viewing child pornography on his personal computer, "in a double locked room, in the privacy of [his] garage."[443] From the outset of the case, the record reflected that "the defendant [did] not pose any danger to any minors" and there was "no evidence . . . that [he] ha[d] in any way engaged in conduct that would result in harm to any member of the community."[444] Indeed, at his detention hearing, the trial court noted that Polouizzi "has a good relationship with his wife and five sons, and has been a model citizen and . . . entrepreneur except for this one aberrant offense."[445]

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permissible individualized judicial inquiry set forth in the *pre*-AWA Bail Reform Act with the impermissible inquiry regarding the necessity of the *mandatory* conditions of the AWA Amendments, all in an imaginative attempt to save the statute from its natural demise. *See id.* at 889–91.

[440] 697 F. Supp. 2d 381 (E.D.N.Y. 2010).

[441] *See id.* at 387–95 (finding as-applied violations of the Fifth and Eighth Amendments; not addressing facial challenges brought against AWA).

[442] *See id.* at 386–87, 395; United States v. Polouizzi (*Polouizzi V*), 687 F. Supp. 2d 133, 142, 209 (E.D.N.Y.) (granting new trial on charges under 18 U.S.C. § 2252(a)(2) and (a)(4)(B)), *vacated*, 393 F. App'x 784 (2d Cir. 2010). Because his conviction had been vacated, Polouizzi was treated as charged, and thus stood in the same shoes as those arrestees discussed in previous cases in this Article.

[443] *Polouizzi*, 697 F. Supp. 2d at 384, 395.

[444] *Id.* at 385 (elipsis in original) (internal quotation marks omitted) (observation of magistrate judge regarding expert opinion offered at trial)); *see also id.* at 384 ("[H]e has never molested any person, sexually or otherwise.").

[445] United States v. Polizzi, No. 06-CR-22 (JBW), 2008 WL 1820900, at *4 (E.D.N.Y. Apr. 1, 2008) (Statement of Reasons Pursuant to 18 U.S.C. § 3553(c)(2)).

The court therefore determined that "electronic monitoring [was] not needed to avoid flight or any danger to children or to society."[446]

The court released the defendant on bail with the following conditions: (1) surrender of passport; (2) no-contact order with unattended minors; (3) random drug testing; (4) mental health treatment; (5) prohibition on entering son's bedroom; (6) prohibition on use of family's computer; and (7) a one million dollar secured bond.[447] However, when the prosecution "demanded that the defendant [also] be ordered to wear an electronic tracking bracelet in reliance on the mandate of the Adam Walsh Act," this condition was added.[448] There was no question it was required under the AWA.[449] Explaining that the terms of the undesignated paragraph of § 3142(c)(1)(B) were "plain, unambiguous, and mandatory,"[450] the court expressly rejected the ultimate decisions in *Kennedy* and *Cossey*—decisions that, despite acknowledging the mandatory nature of the conditions, allowed district courts to ignore the conditions and exercise discretion in their application to each arrestee.[451]

The court's Fifth Amendment *Mathews* analysis began with the recognition that a valid liberty interest existed in Mr. Polouizzi's "right to travel from one place to another free of hindrances," which the court considered "a well established aspect of constitutionally protected private freedom."[452] The

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[446] *Polouizzi*, 697 F. Supp. 2d at 386. The court further explained that "[s]ince his arrest in 2006, the defendant has been successfully engaged in continuing intensive mental health treatment. He has complied fully with the terms of bail and supervision . . . ." *Id.* at 385 (citing *Polouizzi V*, 687 F. Supp. 2d at 155–56 (finding of trial court); Order to Show Cause, United States v. Polizzi, No. 06-CR-22 (JBW) (E.D.N.Y. Jan. 15, 2010) (same); Transcript of Motion at 2:17-19, United States v. Polouizzi, 687 F. Supp. 2d 133 (E.D.N.Y. 2010) (No. 06-CR-22 (JBW)) (statement of probation services)). The terms included "the strict rigors of home detention." *Polouizzi*, 697 F. Supp. 2d at 395.

[447] *Polouizzi*, 697 F. Supp. 2d at 385.

[448] *Id.*

[449] *Id.* at 386. Indeed, the court noted that "[w]ithout the statutory mandate, this condition would not have been imposed." *Id.* at 385.

[450] *Id.* at 386.

[451] *Id.* (citing United States v. Kennedy, 327 F. App'x 706, 706–08 (9th Cir. 2009) ("construing the Adam Walsh Act 'to *require the district court to exercise its discretion*, to the extent applicable, *in applying the mandatory release conditions*' ") (emphasis added); United States v. Cossey, 637 F. Supp. 2d 881, 889 (D. Mont. 2009) (referencing Ninth Circuit's decision in *Kennedy*).

[452] *Id.* at 390–91 (citing and quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983); Williams v. Fears, 179 U.S. 270, 274 (1900); Ramos v. Town of Vernon, 353

court next found this liberty interest unconstitutionally thwarted by the mandatory curfew and electronic monitoring conditions of the AWA, emphatically concluding that the "[r]equired wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans."[453] Specifically, the court explained that

> [a] curfew, by its definition, restricts the ability of the defendant to move about in a public area during substantial periods of time. The condition of a mandatory curfew with an associated electronic monitoring bracelet imposed pursuant to the Adam Walsh Act substantially constrains freedom-of-movement liberty.
>
> Electronic monitoring devices that inhibit straying beyond spatial home property limits, like those used to restrain pet dogs, are intrusive. Their requirement, when mandated and unnecessary, may constitute excessive bail in particular cases. Any form of mandatory curfew with electronic monitoring may infringe the strong liberty interest in freedom of movement.[454]

The mandated yet unnecessary electronic monitoring condition in *Polouizzi* "provide[d] near certainty of erroneous deprivation of defendant's liberty interest," which the court deemed an unacceptable result, particularly in the total absence of congressional findings justifying this intrusion.[455] And despite

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F.3d 171, 172 (2d Cir. 2003) (holding that the "right to free movement is a vital component of life in an open society"); Spencer v. Casavilla, 903 F.2d 171, 174 (2d Cir. 1990) ("[T]he Constitution . . . protects the right to travel freely within a single state."); United States v. Arzberger, 592 F. Supp. 2d 590, 600–01 (S.D.N.Y. 2008); United States v. Torres, 566 F. Supp. 2d 591, 597 (W.D. Tex. 2008) ("[A]n individual's right to freedom of movement among locations and the right to remain in a public place are fundamental to our sense of personal liberty protected by the Constitution."); United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) ("[L]iberty pending trial is the private interest at issue, and that interest is significant.") (alterations in original)).

[453] *Id.* at 389; *see also* State v. Stines, 683 S.E. 2d 411, 413–14 (N.C. Ct. App. 2009).

[454] *Polouizzi*, 697 F. Supp. 2d at 391 (citations omitted).

[455] *Id.* at 391, 394–95. As previously noted, Title II, section 216 of the Adam Walsh Act—the section that amended the applicable provisions of the Bail Reform Act—provides no support for those amendments. Nothing in the congressional record supports the addition of the mandatory conditions to the Bail Reform Act. *See generally* Children's Safety and Violent Crime Reduction Act of 2006, 152 CONG. REC. S8012-02 (daily ed. July 20, 2006); *see also Polouizzi*, 697 F. Supp. 2d at 392 ("[D]espite congressional debate and findings regarding other provisions of the Adam

recognizing the compelling governmental interest in preventing harm to children, the court refused to read into a silent congressional record the assumption that district courts would only impose conditions for defendants if they were mandatory rather than discretionary.[456] To be sure, *actual* congressional findings regarding the Amendments would "be afforded great weight, but a *per se* rule that the governmental interest always outweighs the constitutional right of liberty" would systematically deny due process to every arrestee, and patently so for those unlikely to re-offend or pose a threat to the community.[457] The unfortunate result of this "basic defect" of mandatory application was, in the court's words, an "unjustified burden[ ] on all accused persons, even those who present no risks."[458]

Polouizzi provides a textbook example of how the AWA Amendments fail the *Mathews* test and violate the Due Process Clause of the Fifth Amendment. All agreed that Mr. Polouizzi presented none of the aforementioned risks.[459] The government provided no evidence that he required an electronic tracking bracelet to protect children or the public, nor did it refute the evidence presented regarding the lack of danger he posed.[460] Furthermore, there was no evidence that any presumed

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Walsh Act, there were none with respect to electronic monitoring."); United States v. Gardner, 523 F. Supp. 2d 1025, 1030 (N.D. Cal. 2007) ('[T]he Adam Walsh [Act] contains no such express legislative findings or evidence.')" (alterations in original)). The only mention of the mandatory conditions came from Senator Hatch of Utah, who was speaking to *post-conviction* release when he suggested the addition of electronic monitoring. *See* 152 CONG. REC. S8012-02, 8017 (daily ed. July 20, 2006) (statement of Senator Hatch) ("If we send Martha Stewart home with an electronic bracelet on her ankle, we can't do that to violent sex offenders . . . ?").

[456] *Polouizzi*, 697 F. Supp. 2d at 391–92 (quoting *Arzberger*, 592 F. Supp. 2d at 601); *see also id.* at 393 ("There is no reason to suspect that courts will refrain from imposing necessary restrictions in individual cases as required to protect children."); United States v. Stephens, 669 F. Supp. 2d 960, 967–68 (N.D. Iowa 2009) (noting similarly), *rev'd and remanded*, 594 F.3d 1033 (8th Cir. 2010).

[457] *Polouizzi*, 697 F. Supp. 2d at 392–93.

[458] *Id.* at 391–92, 394 (citing United States v. Rueb, 612 F. Supp. 2d 1068, 1073, *rev'd in part*, 2009 U.S. Dist. LEXIS 50495 (D. Neb. 2009); United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) ("Absent any individualized determination, there is simply no way of knowing whether the deprivation of liberty is warranted or wholly erroneous."); United States v. Torres, 566 F. Supp. 2d 591, 598 (W.D. Tex. 2008) ("[W]ithout a judicial determination . . . there is no means of knowing whether the deprivation is erroneous or warranted.") (alterations in original)).

[459] *Id.* at 392.

[460] *See id.* at 384–85, 392.

government interest in protecting children would be diminished by allowing the court to impose particular pretrial conditions as necessary, after providing for a hearing and conducting "an individual[ized] evaluation of the need" for those conditions, as it does in all other cases under the Bail Reform Act.[461]

Application of the AWA Amendments, however, provided no such discretion in Mr. Polouizzi's case. Instead, it imposed "a mandatory limit on freedom of [the] accused" upon a mere charge alone, "without permitting an 'adversary hearing[,]' . . . testimony, cross-examination, judicial weighing, or burden of proof," despite the fact that such readily available protections would have made plain that not all the conditions were necessary—a quintessential erroneous deprivation of his Fifth Amendment rights.[462] The court found the AWA Amendments unconstitutional as applied to Mr. Polouizzi, and ordered that electronic monitoring be discontinued after a ten-day appeal window, which was never exercised by the government.[463]

6. Fifth Amendment Summary

Fifth Amendment challenges to the AWA Amendments have been overwhelmingly successful. Eleven of the fourteen district courts that have addressed such a challenge have ruled in favor of the defendant,[464] and only two of those decisions have been

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[461] *Id.* at 393; *see* 18 U.S.C. § 3142(f)–(g) (2006 & Supp. II).

[462] *Polouizzi*, 697 F. Supp. 2d at 394. As the *Polouizzi* court explained:

> The basic defect of the Adam Walsh Act, as applied, is that it imposes a mandatory limit on freedom of an accused without permitting an "adversary hearing." Procedural protections embodied in the Bail Reform Act of 1984 and required by *Salerno* are far richer than those provided by the Adam Walsh Act. Under the latter, there can be no hearing, testimony, cross-examination, judicial weighing, or burden of proof.

Id. (citations omitted).

[463] *Id.* at 395. In light of this ruling, and the rule of sequential analysis, the court did not address the defendant's facial challenge to the AWA. *See id.* (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008)).

[464] United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *9 (N.D.N.Y. Aug. 10, 2011); *Polouizzi*, 697 F. Supp. 2d. at 394; United States v. Stephens, 669 F. Supp. 2d 960, 969 (N.D. Iowa 2009), *rev'd and remanded*, 594 F.3d 1033 (8th Cir. 2010); United States v. Rueb, 612 F. Supp. 2d 1068, 1074 (D. Neb), *rev'd in part*, 2009 U.S. Dist. LEXIS 50495 (D. Neb. 2009); United States v. Merritt, 612 F. Supp. 2d 1074, 1080 (D. Neb.), *rev'd* in part, 2009 U.S. Dist. LEXIS 73458 (D. Neb. 2009); United States v. Smedley, 611 F. Supp. 2d 971, 977 (E.D. Mo. 2009); United States v. Arzberger, 592 F. Supp. 2d 590, 601–04 (S.D.N.Y. 2008); United States v. Kennedy, 593 F. Supp 2d 1221, 1230–31 (W.D. Wash. 2008), *motion to*

reversed.[465] All but two federal courts to have applied the *Mathews* balancing test have ruled in favor of the defendant.[466] This success has been more than academic, as the trial courts in *Crowell*, *Vujnovich*, *Torres*, *Rueb*, *Merritt*, *Smedley*, *Kennedy*, *Stephens*, *Arzberger*, and *Polouizzi* resolved the cases before them by striking down the AWA Amendments and applying § 3142(c) of the Bail Reform Act as it existed prior to the Amendments: whether by removing the mandatory conditions upon a particular defendant's motion (*Vujnovich*, *Rueb*, *Merritt*, *Smedley*, *Polouizzi* and the district courts in *Kennedy* and *Stephens*), by refusing to add the mandatory conditions to a prior release order (*Crowell* and *Torres*), or by ordering an individualized determination of the appropriate conditions of release, notwithstanding the unambiguous terms of the undesignated paragraph (*Arzberger*). Indeed, so tortured is the tale of the AWA Amendments that even a majority of those decisions *upholding* its constitutionality used extra-textual relief to do so.[467]

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revoke denied, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum); United States v. Torres, 566 F. Supp. 2d 591, 597–99 (W.D. Tex. 2008); United States v. Vujnovich, No. 07-20126-01-CM-DJW, 2007 WL 4125901, at *3 (D. Kan. Nov. 20, 2007), *motion to revoke order denied*, 2008 WL 687203 (D. Kan. Mar. 11, 2008); United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *8–10 (W.D.N.Y. Dec. 7, 2006); *see also supra* notes 18 and 337 and accompanying text.

[465] *See Stephens*, 594 F.3d at 1038–39; *Kennedy*, 327 F. App'x at 707 (unpublished memorandum).

[466] *See* United States v. Gardner, 523 F. Supp. 2d 1025, 1032–34 (N.D. Cal. 2007) (applying *Mathews* test but upholding constitutionality of the Amendments). The *Mathews* test was not applied by the Ninth Circuit in *Kennedy*, the Eighth Circuit in *Stephens*, the District of Montana in *Cossey*, the District of Rhode Island in *Rondeau*, or the District of Nebraska in *Crites*. *See* United States v. Rondeau, Cr. No. 10-147-S, 2010 WL 5253847 (D.R.I. Dec. 16, 2010); *Stephens*, 594 F.3d 1033; United States v. Crites, No. 8:09CR262, 2009 WL 2982782 (D. Neb. Sept. 11, 2009), *aff'd*, 406 F. App'x 88 (8th Cir. 2011); United States v. Cossey, 637 F. Supp. 2d 881 (D. Mont. 2009); *Kennedy*, 327 F. App'x 706. Furthermore, although *Frederick* applied the *Mathews* test, this Article distinguishes *Frederick* from this group on its facts—that is, as an extreme case not involving viewing-only charges, but rather, aggravated sexual abuse of a child. *See* United States v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *1 n.1 (D.S.D. May 27, 2010) ("[T]his is the first constitutional challenge to the Adam Walsh Act, under the Due Process Clause, made by a defendant charged with sexually abusing a child."); *see also id.* at *9 (holding that AWA Amendments "do not deprive defendants *charged with aggravated sexual abuse* 'of . . . an individualized determination [as to] whether detention or release is appropriate' " (alteration in original) (emphasis added) (quoting *Stephens*, 594 F.3d at 1039)).

[467] *See Stephens*, 594 F.3d at 1039 (same); *Frederick*, 2010 WL 2179102, at *9 ("Construing the Adam Walsh Act to require a court to exercise its *discretion*, when

Decisions such as *Torres* and *Smedley* serve as a warning to the government that recycling its strategy in Eighth Amendment challenges will not prevail in the context of the Fifth. The mere fact that a person is charged with a crime falling under the undesignated paragraph is not enough to require predetermined conditions of release. The Fifth Amendment requires more. The government cannot meet the *Mathews* test for facial challenges by making a *Salerno* "no set of circumstances" argument when such circumstances are entirely foreclosed by the AWA Amendments. Nor can it satisfy *Mathews* in as-applied challenges by simply pointing to a compelling government purpose or insisting that certain conditions of release are outweighed by Congress's interest regarding safety or future dangerousness. Instead, it must be prepared to explain how removing the judiciary's traditional discretion in determining individualized conditions of release furthers its stated interest, how the mandatory conditions protect against the obvious risks of erroneous deprivation, and how the return of basic due process protections would place an unacceptable burden on the government.

Similar to the Eighth Amendment solution provided above,[468] Congress can solve this problem by either repealing the undesignated paragraph of the AWA Amendments or by including within that paragraph a rebuttable presumption in favor of the mandatory conditions unless the defendant can meet the burden of establishing that application of the conditions to him would violate the *Mathews* balancing test. Alternatively,

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applying the *mandatory* release conditions . . . avoids the need to pass on the constitutionality of the Act and its amendments as applied here." (emphasis added)); *Cossey*, 637 F. Supp. 2d at 891 (similar, referencing Ninth Circuit's rationale in *Kennedy*); *Kennedy*, 327 F. App'x at 707 (holding that the pretrial conditions of the undesignated paragraph are *not* mandatory, but rather, that the AWA Amendments "require the district court to exercise its *discretion* . . . in applying the *mandatory* release conditions" (emphasis added)); *see also Rondeau*, 2010 WL 5253847, at *2 (same). *But see* 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II) (undesignated paragraph) (noting that "any release order *shall contain*, at a minimum a condition of electronic monitoring and [five others]" (emphasis added)). One of these decisions ultimately contradicted itself when faced with the actual terms of the undesignated paragraph. *See Cossey*, 637 F. Supp. 2d at 884 (explaining that AWA Amendments mandate pretrial release conditions "that must include, at a minimum, electronic monitoring and the five specific conditions. *The statutory mandate is unambiguous.*" (emphasis added)).

[468] *See* discussion *supra* Part III.A.7.

Congress could leave that provision untouched and instead create a legislative record in support of the AWA Amendments, complete with empirical findings as to the necessity and efficacy of each mandatory condition for persons charged with various sex offenses against children, or perhaps with evidence showing that courts would refuse to require the conditions for such defendants if they were discretionary rather than mandatory. These detailed findings would in turn bolster Congress's careful crafting of the amended statute.

C. *The Separation of Powers Doctrine*

1. Overview

Our Constitution diffuses power to secure liberty.[469] No one branch has the authority to transfer its power to another branch or take another's for itself, particularly when reallocation would threaten individual rights.[470] The separation of powers doctrine was designed to prevent this risk by implementing the "fundamental insight" that "[c]oncentration of power in the hands of a single branch is a threat to liberty."[471] An

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[469] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also* Mistretta v. United States, 488 U.S. 361, 380 (1989) ("[W]ithin our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

[470] *See, e.g.*, *Mistretta*, 488 U.S. at 381–82.

[471] Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("The accumulation of all powers legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." (alteration in original) (quoting THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed., 1961)) (internal quotation marks omitted)); *see also* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (concluding that the purpose of separation of powers was "not to promote efficiency" or fast constitutionalism by the political branches, so much as it was "to preclude the exercise of arbitrary power"). It is generally accepted that the separation of powers is not an abstract principle. *See* Buckley v. Valeo, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."); E. Donald Elliot, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 511 (1989) (arguing that the separation of powers doctrine was considered by the Framers as "the foundation of constitutional law"). Indeed, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) (citing THE FEDERALIST NO. 84, at 513, 515 (Alexander Hamilton) (C. Rossiter ed., 1961); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 536–43 (1969)).

independent judiciary, tasked with interpreting a Constitution that is supreme over every branch,[472] safeguards these individual liberties by enforcing constitutional restrictions on its coequal branches.[473] The Constitution returns the favor by vesting the judicial power in Article III courts and no one else, thereby restricting Congress's ability to legislate away liberties that are not subject to a majority vote.[474]

The separation of powers doctrine also balances our tripartite system by prohibiting the political branches from encroaching upon the powers conferred to the unelected federal judiciary.[475] Explaining that Section 1 of Article III "serves both

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[472] *See* U.S. CONST. art. VI, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that the Constitution is "a superior, paramount law" and that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109–10 (1801); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1273 (1996) ("The power to interpret the laws is an incident to th[e] case- or controversy-deciding function; courts must interpret because they must decide.").

[473] *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 870 (1960) ("[T]he judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches."); *see also* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches[,] . . . placing both substantive and procedural limitations on each. The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515–16 (1991) (explaining how the separation of powers doctrine is designed to protect individual liberty, and arguing that "when government action is challenged on separation-of-powers grounds, [courts] should consider the potential effect of the arrangement on individual due-process interests").

[474] *See* U.S. CONST. amends. I–IX; *see also, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (noting that the "very purpose" of having constitutional rights is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"); *id.* (explaining that such rights "may not be submitted to vote; they depend on the outcome of no elections").

[475] *See* INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring) (citing THE FEDERALIST NO. 48, at 336 (James Madison) (Jacob E. Cooke ed., 1961) for the proposition that the Founders enshrined separation of powers principles in the Constitution because of past legislative interference with the judiciary); *id.* ("Jefferson observed that members of the General Assembly in his native Virginia had not been prevented from assuming judicial power, and '[t]hey have accordingly in many instances decided rights which should have been left to *judiciary controversy*.'" (alteration in original) (quoting THE FEDERALIST NO. 48, at 336) (internal quotation marks omitted)); *see also* THE FEDERALIST NO. 78, at 526–27

to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government,' "[476] the Supreme Court has explicitly vowed to condemn any enactment that "impermissibly threatens the institutional integrity of the Judicial Branch."[477] This threat is acted upon, and the separation of powers is violated, usually in one of two ways: One branch interferes with another's performance of its constitutionally assigned function,[478] or one branch usurps a function constitutionally entrusted to the other.[479] In the context of our hypothetical, both categories may very well apply: Congress, through the AWA Amendments, could be both interfering with and usurping Constitutional and common law authority long possessed by the federal judiciary in the bail setting.

(Alexander Hamilton) (Jacob E. Cooke ed., 1961) (recognizing the importance of an independent judiciary to the proper maintenance of separated powers); David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 460 n.108 (1983) (explaining that Article III, Section 1 of the Constitution "was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision").

[476] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (citations omitted) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985); United States v. Will, 449 U.S. 200, 218 (1980)).

[477] *Id.* at 851; *see also* United States v. Mistretta, 488 U.S. 361, 383 (noting that in separation-of-powers challenges "specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed tasks that are more properly accomplished by [other] branches, and, second, that no provision of law impermissibly threatens the institutional integrity of the Judicial Branch" (citation omitted) (quoting Morrison v. Olson, 487 U.S. 654, 656 (1988) (internal quotation marks omitted); *Commodity Futures Trading Comm'n*, 478 U.S. at 851 (internal quotation marks omitted)). Furthermore, "[e]ven when a branch does not arrogate power to itself, . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." Loving v. United States, 517 U.S. 748, 757 (1996).

[478] *See generally* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974); *see also Loving*, 517 U.S. at 757.

[479] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952); United States v. Klein, 80 U.S. (13 Wall.) 128, 146–48 (1871). This may also include scenarios when a branch attempts to *give* its power to another. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, at 449 (declaring Line Item Veto Act of 1996 unconstitutional as a violation of the Presentment Clause).

Of the seventeen district court decisions that address the constitutionality of the AWA Amendments, only five analyze the separation of powers argument. *Crowell*, *Vujnovich* and *Kennedy* concluded that the doctrine was violated; *Gardner* and *Arzberger* held that it was not.[480] No court of appeals has addressed this issue.

The *Gardner* court concluded that the AWA Amendments constituted permissible regulation of a field "already immersed in legislative prescription [that] does not substantially alter the fundamental [constitutional] function of the court."[481] The court stressed that under the facts before it, Congress's imposition of the mandatory conditions did not divest courts of the "fundamental role of determining whether an arrestee is to be detained or released" pending trial.[482] *Arzberger* added little to this line of reasoning, other than to hold that the Amendments did not produce any of the three types of legislative encroachments on the judicial branch that usually violate the separation of powers: prescribing a rule of decision without amending applicable law, vesting review of prior Article III decisions in executive branch officials, or requiring federal courts to reopen final judgments.[483]

The court in *Crowell*, however, came to a different conclusion. Explaining that "the setting of bail in federal criminal cases, with minor exceptions, has been recognized as representing the quintessential exercise of judicial power," it found that Congress had unconstitutionally deprived courts of this fundamental role by mandating certain release conditions

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[480] *Compare* United States v. Kennedy, 593 F. Supp 2d 1221, 1231–32 (W.D. Wash. 2008) (holding that the AWA Amendments violate the separation of powers doctrine), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum) *and* United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736, at *10–11 (W.D.N.Y. Dec. 7, 2006) (same), *with* United States v. Arzberger, 592 F. Supp. 2d 590, 606–07 (S.D.N.Y. 2008) (finding no separation of powers violation), *and* United States v. Gardner, 523 F. Supp. 2d 1025, 1035–36 (N.D. Cal. 2007) (same). *Vujnovich* also held that the undesignated paragraph of the AWA Amendments violated the separation of powers doctrine, see United States v. Vujnovich, No. 07-20126-01-CM-DJW, 2007 WL 4125901, at *3 (D. Kan. Nov. 20, 2007), but because the court summarily adopted the *Crowell* analysis, the *Vujnovich* decision will not be discussed here.

[481] *Gardner*, 523 F. Supp. 2d at 1036.

[482] *Id.*

[483] *Arzberger*, 592 F. Supp. 2d at 607; *see infra* notes 487–500 and accompanying text.

for all defendants charged with crimes involving "minor victims."[484] The district court in *Kennedy* echoed this conclusion, explaining that the mandatory conditions of the AWA Amendments "go much further" than the traditional role Congress has played in shaping the bail process by requiring predetermined release conditions in *all* cases, substantially burdening fundamental liberty interests while also precluding courts from making individualized determinations to ensure such deprivations are warranted.[485]

2. AWA Analysis

The Supreme Court has generally recognized three types of legislative encroachments on the judicial branch that violate the separation of powers.[486] First, Congress cannot vest review of prior decisions by Article III courts in executive branch officials.[487] Second, Congress cannot interfere with the judicial power to decide cases or controversies by commanding federal courts to revise or reopen final judgments.[488] Third, under *United States v. Klein*,[489] Congress may not "prescribe rules of decision to the Judicial Department . . . in cases pending before it" without amending applicable law.[490]

The mandatory conditions of the AWA Amendments do not fit the first category, as they apply to prospective bail determinations, not prior judicial decisions, and cannot transfer to the executive branch what has already been decided by a court. Nor is the second category applicable, for the AWA Amendments do not revise or reopen final judgments by imposing interim conditions of release awaiting trial.[491]

There is room for argument in the third category. First and most devastating for defendants, however, is the fact that the *Klein* prohibition arises only when Congress has not amended

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[484] *Crowell*, 2006 WL 3541736, at *11.

[485] *Kennedy*, 593 F. Supp. 2d at 1232.

[486] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995).

[487] *Id.* (citing Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792)); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 118 (1948).

[488] Clinton v. Jones, 520 U.S. 681, 699–700 (1997); *Plaut*, 514 U.S. at 218.

[489] 80 U.S. (13 Wall.) 128 (1871).

[490] *Id.* at 146.

[491] *See, e.g.*, United States v. Gardner, 523 F. Supp. 2d 1025, 1035 (N.D. Cal. 2007) (noting that a final judgment is not revised or reopened simply by "altering the interim conditions of release pending trial").

the law that underlies the litigation.[492] Here, Congress amended the applicable release conditions of the Bail Reform Act through the AWA Amendments.[493] Thus any effect of the Amendments on pending cases, the argument goes, is solely a result of a change in the underlying law, not Congress's impermissible attempt to dictate a specific rule of decision in a particular category of bail cases.[494] This was a predicate holding in both *Gardner* and *Arzberger*.[495]

A second feather in the government's cap is the history of statutory efforts to regulate bail. As the *Gardner* court explained, "Congress has long had a substantial hand in shaping the bail process,"[496] from the Judiciary Act of 1789 to the present.[497] Setting and conditioning bail, like prescribing criminal sentences and sentencing factors,[498] is merely another example of permissible cooperation between coordinate branches.[499] That Congress, through the AWA Amendments,

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[492] *See, e.g.*, *Plaut*, 514 U.S. at 218 ("Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" (alteration in original) (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992))).

[493] United States v. Arzberger, 592 F. Supp. 2d 590, 607 (S.D.N.Y. 2008) ("[O]nce Congress has amended the underlying law, any separation of powers concern evaporates."); *Gardner*, 523 F. Supp. 2d at 1035 (similar).

[494] Furthermore, it cannot seriously be argued that Congress may not override a judicial interpretation of a statute. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 2–3, 105 Stat. 1071, 1071; Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 6, 102 Stat. 28, 31; *see also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 337, 424–41, 450–55 (1991) (noting over one hundred examples of Congress overriding the Supreme Court's interpretation of statutes between 1967 and 1990); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 730–31 (1991) ("Congressional overruling of a Supreme Court decision is not a particularly exceptional event.").

[495] *See Arzberger*, 592 F. Supp. 2d at 606–07; *Gardner*, 523 F. Supp. 2d at 1035–36.

[496] *Gardner*, 523 F. Supp. 2d at 1036.

[497] *See id.* (noting that Judiciary Act of 1789 authorized the denial of bail in capital cases, and that the Bail Reform Act limits the availability of bail); *see also* Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966), *repealed by* 18 U.S.C. § 3141 (1983); Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, §203(a), 98 Stat. 1976, *codified in* 18 U.S.C. § 3142 (2006 & Supp. II).

[498] *See Arzberger*, 592 F. Supp. 2d at 607.

[499] *Id.* (noting that while "the separation of governmental powers into three coordinate branches is essential to the preservation of liberty," the Founders "did not intend for the three branches to remain autonomous" (quoting United States v. Polizzi, 549 F. Supp. 2d 308, 399 (E.D.N.Y. 2008)) (internal quotation marks omitted)); *Gardner*, 523 F. Supp. 2d at 1035 (similar).

decided to mandate "judicially imposed" conditions of release for specific arrestees does not amount to a separation of powers violation. Indeed, were the opposite true, the Bail Reform Act itself might violate the separation of powers, as it directs what a court "shall" do in several circumstances.[500] Accordingly, the mere fact that an amended bail statute contains mandatory pretrial release conditions in certain cases is not enough to violate the separation of powers doctrine.

Unless, of course, the result is to rob the bail court's fundamental role in *determining* detention or individualized conditions of release.[501] Although a court is generally without authority to decide new cases based on expired law, when judicial non-reviewability is the result of the questioned amendment, the bargain between branches may become unconstitutional.[502] In such an instance, Congress has, in effect, concentrated the bail power in its own hands by assuming the (judicial) role of conclusively determining the conditions of pretrial release. Our hypothetical demonstrates that defendants should focus on this opening to attack the timing of and degree to which the AWA Amendments encroach upon quintessential judicial powers conferred by the Constitution.

As noted above, the Constitution vests federal judicial power in Article III courts and no one else, thereby restricting Congress's ability to legislate away liberties that, by their very nature, are not subject to a majority vote.[503] Naturally then, the

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[500] *See, e.g.*, 18 U.S.C. § 3142(b) (noting that the judicial officer "*shall order* the pretrial release . . . unless the judicial officer determines that such release will not reasonably assure . . . [re]appearance . . . or will endanger the safety of any other person or the community.") (emphasis added); *id.* § 3142(f)(2)(B) ("During a continuance [of the detention hearing] such person *shall be detained* . . . ." (emphasis added)); *id.* § 3143(b) ("The judicial officer *shall order* that a person who has been found guilty of an [enumerated offense] . . . *be detained* [pending appeal] . . . ." (emphases added)). Furthermore, it is important to note that the Supreme Court did not consider the separation of powers doctrine in *Salerno*.

[501] The *Gardner* court recognized this fact. *See Gardner*, 523 F. Supp. 2d at 1036.

[502] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive . . . , it most assuredly envisions a role for all three branches when individual liberties are at stake." (citing United States v. Mistretta, 488 U.S. 361, 380 (1989))).

[503] *See* U.S. CONST. amends. I–IX; *supra* note 474. This includes not only the physical liberty deprived by incarceration, but also privacy rights, the freedom of movement, and the right to remain in a public place, among other liberties. *See supra* Part III.B.

best way to jeopardize these liberties is to cripple their constitutional guarantor—the independent judiciary. In our first hypothetical, the AWA requirement that the defendant be placed on electronic monitoring, coupled with, for example, the inability to coordinate traditional or GPS monitoring or some other obstacle to such monitoring,[504] creates a scenario of automatic detention upon charging. In other words, a supposed mandatory condition of pretrial *release* has the effect of barring pretrial release on *any* conditions, producing detention by default. What results is the predicament even *Gardner* concluded would violate the separation of powers: a situation in which "Congress has . . . deprived the courts of the fundamental role of determining whether an arrestee is to be detained or released on conditions."[505] This is more than the setting and conditioning of bail, or even the application of a presumption of detention. Analogies to *Gardner* and *Arzberger* would therefore be

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[504] *See* United States v. Kennedy, 593 F. Supp. 2d 1233, 1235 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum); United States v. Kennedy, 593 F. Supp 2d 1221, 1229 (W.D. Wash. 2008), *motion to revoke denied*, 593 F. Supp. 2d 1233 (W.D. Wash. 2009), *vacated and remanded*, 327 F. App'x 706 (9th Cir. 2009) (unpublished memorandum); *see also, e.g.*, STATE OF TENN. BD. OF PROB. & PAROLE, MONITORING TENNESSEE'S SEX OFFENDERS USING GLOBAL POSITIONING SYSTEMS: A FOLLOW-UP EVALUATION 3–8 (2008), *available at* http://www.tn.gov/bopp/Docs/2008-GPS%20follow-up%20 report.pdf (noting several problems and costs associated with GPS monitoring, including technological complications and the lack of monitoring capability in rural areas or for indigent defendants); Jonathan Martin, *GPS Tracking Beset by Problems of Terrain, Technology and Time*, SEATTLE TIMES, Sept. 28, 2005, at A16 (similar; noting that Washington's passive GPS monitoring pilot program encountered severe geographical limitations, with most of "nearly 4,000 'notices of violation' " recorded by the devices coming from technical glitches, not actual violations by the sex offenders); Jesse Jannetta, *GPS Monitoring of High-Risk Sex Offenders* 6–7 (Univ. Cal. Irvine Ctr. for Evidence-Based Corr., Working Paper, 2006), *available at* http://ucicorrections.seweb.uci.edu/pdf/WorkingPaper5106_B.pdf (noting that GPS systems implemented by California Department of Corrections pilot program were subject to a real time "lag" of up to twenty minutes between offense and transmission of notice).

[505] *Gardner*, 523 F. Supp. 2d at 1036; *cf.* United States v. Scott, 450 F.3d 863, 874 (9th Cir. 2006) ("Neither *Salerno* nor any other case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime."). In such a case, the AWA Amendments have clearly removed a defendant's "right to have claims decided before judges who are free from potential domination by other branches of government" thereby "impermissibly threaten[ing] the institutional integrity of the Judicial Branch" and violating the separation of powers doctrine. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848, 851 (1986) (internal quotation marks omitted).

misplaced, as those decisions extend only to the condition-setting function of the judiciary and explicitly presume the existence of proper procedural protections, including the individualized judicial determinations that narrowly saved the Bail Reform Act from demise in *Salerno*.[506] Due process performed the work of the separation of powers doctrine in those cases.[507]

However, neither *Gardner* nor *Arzberger* contemplated detention by default. In such a case, the AWA Amendments have clearly removed a defendant's "right to have claims decided before judges who are free from potential domination by other branches of government."[508] It would certainly place our tripartite system of separated powers on its head to prevent an arrestee from challenging the mode of his detention or

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[506] *See* United States v. Salerno, 481 U.S. 739, 747–55 (1987); *Gardner*, 523 F. Supp. 2d at 1036 (noting that AWA Amendments, by incrementally "mandat[ing] certain conditions of release . . . [have] not deprived the courts of the fundamental role of determining whether an arrestee is to be detained or released on conditions"). To make its point that the bail-setting function is not the exclusive province of the judiciary, the *Arzberger* court invoked *Salerno* to explain that "Congress may impinge on the traditionally judicial function of bail setting by declaring that defendants who meet certain criteria will not be entitled to bail at all." United States v. Arzberger, 592 F. Supp. 2d 590, 607 (2008) (citing *Salerno*, 481 U.S. at 755). As discussed above, however, the result in *Salerno* was held together by the Supreme Court's finding that the Bail Reform Act "narrowly focuse[d] on a particularly acute problem [(i.e., crime committed by arrestees)] in which the Government interests are overwhelming," *Salerno*, 481 U.S. at 750; "carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes," *id.* at 747; and most importantly, mandated a multitude of procedures "specifically designed to further the accuracy of the [bail court's] determination[s]" on a case-by-case basis, *id.* at 751. To this end, the *Salerno* Court reemphasized that "[t]he arrestee is entitled to a prompt" and "full-blown adversary hearing," at which "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." *Id.* at 747, 750 (citing 18 U.S.C. § 3142(f)). *Arzberger* fails to recognize this crucial distinction and conflates judicial role with judicial responsibility in the bail setting. This failure is surprising in light of *Arzberger*'s scathing due process ruling. *See Arzberger*, 592 F. Supp. 2d at 600–01.

[507] *See* M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 19–20 (1967) ("The belief that 'due process' is an essential part of constitutional government is of great antiquity, and it runs parallel with ideas of mixed government and the separation of powers . . . ."); *see also* Brown, *supra* note 473, at 1557–65 (concluding that judiciary's primary role in separation of powers cases should be to protect the due process rights of individuals from the dangers of arbitrary government, not the institutional interests of the branches of government).

[508] *Schor*, 478 U.S. at 848 (quoting United States v. Will, 449 U.S. 200, 218 (1980)) (internal quotation marks omitted).

supervision merely because Congress has already decided for the Judiciary that he is subject to the same restrictions regardless of his individual circumstances.

The question ultimately becomes one of degree. If the AWA Amendments have the effect of mandating detention without any role for a court in the calculus, the result is reallocation—not cooperation—at the price of individual rights.[509] In such a scenario, it is easier to argue that Congress has usurped a quintessential function constitutionally entrusted to the Judiciary, and has therefore violated the separation of powers doctrine.

CONCLUSION

Eighty years ago, Justice Brandeis warned us to "be most on our guard to protect liberty when the government's purposes are beneficent," as great dangers to liberty often lurk in the "insidious encroachment by men of zeal, well-meaning but without understanding."[510] Five years ago, Congress meant well in crafting the Adam Walsh Act Amendments to the Bail Reform Act of 1984,[511] but failed to understand the consequences of its actions. The Amendments were passed without a stated purpose, a single substantive debate, or a shred of congressional findings. In drafting the undesignated paragraph of the Amendments, Congress inserted the term "involves a minor victim" as a prerequisite to application of the mandatory pretrial release conditions which, ironically, makes them less mandatory than Congress may have wished.[512] Furthermore, while Congress did not intend to overrule *Salerno* by adding the mandatory conditions, it inexplicably removed precisely what had saved the Bail Reform Act from an Eighth Amendment violation in that

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[509] *Cf.* Brown, *supra* note 473, at 1565–66 ("[The federal judiciary's] role in cases involving separated powers, no less than in those involving the Bill of Rights, ought to be as vigilant arbiter of process for the purpose of protecting individuals from the dangers of arbitrary government. When exercises of power by one branch of government, or by coalitions of two or more acting together, threaten the integrity of government process, then the Court should consider interfering to restore a balance of power, a balance of process.").

[510] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967) *and* Berger v. New York, 388 U.S. 41 (1967).

[511] *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

[512] *See id.* § 216, 120 Stat. at 617.

very case—the requirement that the applicable conditions be proven case-by-case, and in every such case, that the *Judiciary* would determine what was "excessive" in its calculation of appropriate bail.[513] As a result of this congressional failure, liberty-infringing pretrial release conditions are triggered by a mere charge, rather than the arrestee's particularized risk of danger, re-offense, or flight. Order is exalted at the cost of liberty.

Congress's drafting problem also violates the Fifth Amendment due process rights of every person charged with one of the enumerated "minor victim" crimes,[514] or at least makes an as-applied attack easy for defendants charged with viewing-only offenses who are not provided a meaningful, individualized judicial determination of the propriety of the mandatory conditions of release. Eleven of the thirteen district courts that have applied the *Mathews* balancing test in this situation have ruled in favor of the defendant.[515] All eleven that have struck down the AWA Amendments have resolved Fifth Amendment tensions by simply applying § 3142 of the Bail Reform Act as it existed prior to the AWA's addition of the undesignated paragraph of subsection (c)(1)(B), complete with an individualized hearing and rebuttable presumption that no set of conditions will reasonably assure the safety of children and the community from those charged with an AWA-enumerated offense.[516] Indeed, even the two courts that have *upheld* the Amendments under *Mathews* tried to do the same by ignoring the terms of the undesignated paragraph and applying a similar

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[513] *See* 18 U.S.C. § 3142(c)(1)(B) (2006 & Supp. II) (undesignated paragraph); United States v. Salerno, 481 U.S. 739, 751–55 (1987).

[514] 18 U.S.C. § 3142(c)(1)(B) (undesignated paragraph).

[515] *See* cases cited *supra* note 18; *see also* discussion *supra* Part III.B.1–6 and note 466; United States v. Karper, ___ F. Supp. 2d ___, 2011 WL 7451512, at *5-6 (N.D.N.Y. Aug. 10, 2011). As mentioned above, *Karper* was decided just as this Article was sent to press.

[516] *Compare* 18 U.S.C. § 3142(e)(1)–(2) (providing rebuttable presumption in favor of detention to assure reappearance and safety of community of defendants previously convicted of certain violent crimes), *with* § 3142(c)(1)(B) (providing *irrebuttable* presumption that all listed conditions are required to assure reappearance of sex offense arrestee and safety of community); *see also* 18 U.S.C. § 3142(c)(1)(A)–(B) (2005 version).

version of the unamended Bail Reform Act.[517] The latter approach fails to answer the question of how a case-by-case determination of the applicable conditions is even possible when the Amendments explicitly state that the bail court *must* impose each condition, even if the court finds those conditions are not warranted.

Judicial discretion is either the missing piece or Trojan horse in these cases. While rulings alternate between saving and striking down the Amendments, judges on both sides of the issue emphasize the bail court's discretion as the remedial key. This again raises the issue of whether the AWA Amendments as written provide for such discretion. Clearly they do not. Nevertheless, a few appellate courts—insulated from the bail world—have answered this question in the affirmative in order to save the statute from constitutional attack. But by reading into the Amendments a discretion that does not exist, these courts are doing more to harm the statute than save it. By leaning too heavily on the magistrate judge's "discretion" in applying each "mandatory" condition to fit each defendant's needs,[518] these appellate courts have increased the risk that the criminal defense bar will use the Amendments as a sword, threatening an as-applied challenge whenever an individualized assessment for each and every possible circumstance is lacking. This will require bail courts to constantly tinker with the conditions of release in every AWA case involving a minor victim—ironically, an exercise the Amendments were designed to eliminate.

Congress meant well but failed miserably. Consequently, our criminal justice system now provides fewer procedural protections to first-time arrestees of sex offenses than it does to arrestees previously *convicted* of crimes warranting life imprisonment or death sentences.[519] Congress can fix this mess by repealing the undesignated paragraph of the AWA Amendments or by including within that paragraph a rebuttable presumption of mandatory application of the pretrial release

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[517] *See* United States v. Frederick, No. 10-30021-RAL, 2010 WL 2179102, at *9 (D.S.D. May 27, 2010); United States v. Gardner, 523 F. Supp. 2d. 1025, 1032–34 (N.D. Cal. 2007).

[518] *See* United States v. Peeples, 630 F.3d 1136, 1139 (9th Cir. 2010); United States v. Stephens, 594 F.3d 1033, 1039 (8th Cir. 2010); United States v. Kennedy, 327 F. App'x 706, 707 (9th Cir. May 6, 2009).

[519] *See supra* note 516 and accompanying text.

conditions unless the defendant can meet the burden of establishing, during a full-blown individualized hearing, that application of one (or all) of the conditions would violate the *Salerno* test under the Eighth Amendment or the *Mathews* test under the Fifth Amendment. The mere fact that a person is charged with a crime falling under the undesignated paragraph is simply not enough. The Constitution requires more.

In the alternative, Congress should consider creating a detailed legislative record in support of the AWA Amendments, complete with findings that establish the necessity of each mandatory condition for persons charged with an AWA-enumerated offense.[520] Questions posed throughout this Article will need to be answered. How, for example, would home confinement or curfew for those charged with child pornography possession offenses further the AWA goal of preventing child pornography and promoting internet safety? Does statistical evidence support the conclusion that the risks of danger to children are too high to make the conditions discretionary? Are there more appropriate pretrial release tools to protect children in these scenarios? By its very nature, this process might result in much-needed refinements to the mandatory conditions themselves. Congress could then attempt to bolster the legislative record with evidence that courts would not require the conditions for defendants accused of sex crimes against children if they were discretionary rather than mandatory, a finding which would make additional procedural safeguards too costly under both *Salerno* and *Mathews*. Any combination of these steps would more effectively speak to the strength of the government's interest and provide the prosecution with more than a fighting chance in court.

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A lack of individual assessment and discretion pervades the Adam Walsh Act. Nevertheless, despite the steady rise of legal challenges to its various provisions,[521] purposeful noncompliance

[520] This will likely require evidence of the risk of future danger against children by particular arrestees, rather than the mere assumption that all persons charged with an AWA-enumerated offense must have their constitutional liberty interests restrained in order to protect children from sexual attacks.

[521] *See supra* notes 17–20 and accompanying text.

with its mandates by several states,[522] and mounting evidence of the social and financial costs associated with expanding the war on sex crimes,[523] it is unlikely that any meaningful policy reform will take place at the national level.[524] One of the purposes of this Article, however, is to point out that not every problem created by the AWA needs a grand solution. While zeal can sometimes cloud the judgment of beneficent lawmakers, it can also be employed to make a well-intentioned law more reasonable, functional, and fair. By making the aforementioned changes to the AWA Amendments, Congress can safeguard the pretrial rights of arrestees, prevent future judicial decisions casting doubt on the constitutionality of the Amendments, and stave off the argument that it has violated the separation of powers by depriving courts of their fundamental role in determining whether an arrestee should be detained or released on conditions.

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[522] *See* Yung, *supra* note 17, at 479 ("[Several states have decided] not to comply with some AWA requirements," which comes with a penalty of "10% of funds authorized under the Omnibus Crime Control and Safe Streets Act of 1968. . . . Interestingly, every state that has studied the costs of compliance has determined that noncompliance is substantially cheaper." (citing Amy Borror, *Sex Offender Registration*, CQ CONGRESSIONAL TESTIMONY, Mar. 10, 2009)); Richard G. Wright, *From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy*, 21 FED. SENT'G. REP. 124, 130 (2008) (examining Justice Policy Institute research which concludes that AWA-implementation "may cost states ten times more than they would lose in federal crime funds").

[523] *See* Yung, *supra* note 17 at 447–78; Wright, *supra* note 522, at 131 ("Despite the lack of empirically demonstrated efficacy, untold financial costs, and faulty promises of sexual assault prevention, the politics of sex offender laws continue to dominate the policy debate.").

[524] *See* Logan, *supra* note 20, at 1012 ("Contemporary politicians, as is well known, do their utmost to out-tough one another with respect to sex offenders. As a result, any members of Congress who might have successfully pushed for mitigation of the AWA's onerous regime were absent from the scene."); Yung, *supra* note 17, at 476 ("The fact that most sex offender statutes are passed with neither dissent nor debate makes any evidence-based policy reform unlikely to take hold."); *cf.* Wright, *supra* note 522, at 127 ("[R]eason and research are secondary factors in the passage of sex offender laws."). This problem is neither new nor unique to sex crimes. *See, e.g.*, Yung, *supra* note 17, at 473 ("[E]xisting criminal laws are not given much attention by legislatures on a regular basis. Laws last for decades or centuries without reform. Very few interest groups focus on criminal law reform so there are not substantial political incentives for politicians to tinker with existing policy." (citing Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 220 (2003))).