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The Bail Reform Act of 1984 and Witness Coercion

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INTRODUCTION

The Bail Reform Act of 1984[1] was enacted by Congress to counter "the alarming problem of crimes committed by persons on release"[2] from custody prior to trial. The 1984 Act provided the courts with authority to detain those accused of certain crimes before trial regardless of their ability or inability to provide bail. This was based on the theory that "there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons."[3]

Under the 1984 Bail Reform Act, a defendant may be detained before trial in three distinct sets of circumstances. Pretrial detention may be ordered if the defendant presents a serious flight risk,[4] a serious risk concerning obstruction of justice,[5] or a danger to the safety of any person or the community.[6] In the past, courts have been empowered to employ pretrial detention for risk of flight or obstruction of justice through statutory authority or case law.[7] The 1984 Act's most important modification to the bail system concerns detention based on the defendant's dangerousness.[8]

To effect the pretrial detention of a defendant based on danger to other persons or the community, the prosecution must present the court with a motion for detention.[9] The defendant is then

1. Pub. L. No. 98-473, 98th Cong., 2d Sess. 4 (1984), (codified as amended at 18 U.S.C. § 3141-3150 (Supp. 1986)).

2. S. REP. No. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3185.

3. *Id.* at 3189.

4. 18 U.S.C. § 3142(f)(2)(A) (1984).

5. *Id.* § 3142(f)(2)(B) (1984).

6. *Id.* § 3142(e) provides the judicial officer with the power to detain defendants prior to trial on the basis of danger to any other person or the community after a detention hearing is held pursuant to 18 U.S.C. § 3142(f).

7. *See, e.g.*, Carbo v. U.S., Gilbert v. U.S. and the Judiciary Act of 1789. *See also infra* notes 23-44 and accompanying text.

8. As discussed *infra*, courts have long had the authority to detain defendants before trial based on risk of flight or obstruction of justice.

9. 18 U.S.C. § 3142(f)(1) states that only the government may make a motion for pretrial detention based on a defendant's dangerousness, while either the government or the judicial officer is allowed to make a motion for a defendant's pretrial detention based on risk of flight or obstruction of justice under 18 U.S.C. § 3142(f)(2).

given a hearing in which the judicial officer must make three separate findings of fact to order detention.[10] First, there must be probable cause that the person charged committed the offense.[11] Second, there must be evidence that the accused's crime falls under a specified category set forth in sections 3142(e) or (f) of the Act.[12] Third, there must be a finding that there is no condition or combination of conditions of release which will reasonably assure the safety of other persons or the community.[13] If probable cause is found that the defendant committed a crime listed in sections 3142(e) or (f), there is a rebuttable presumption that this defendant poses a flight and/or safety risk.[14] The burden then

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10. 18 U.S.C. § 3142(e) empowers the judicial officer to order pretrial detention *only* after a hearing pursuant to the provisions of 18 U.S.C. § 3142(f).

11. S. REP. No. 225, *supra* note 2, at 3201.

> For good reason the bill does not incorporate, as a pre-condition of pretrial detention, a finding that there is substantial probability that the defendant committed the offense for which he is charged . . . . While this "substantial probability" requirement might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted, the Committee is satisfied that the fact that judicial officer has to find probable cause will assure the validity of the charges against the defendant, and that any additional assurance provided by a 'substantial probability' test is outweighed by the practical problems in meeting this requirement at the stage at which the pretrial hearing is held.

12. 18 U.S.C. § 3142(f) details the crimes for which both the government or the judicial officer may demand a bail hearing; while 18 U.S.C. § 3142(e) provides "rebuttable presumptions" that apply to defendants whose crimes fit into three of the categories. The first category consists of those who have been convicted of a federal offense described at 18 U.S.C. § 3142(f)(1), or a state or local offense that would have been an offense described at subsection (f)(1) if circumstances giving rise to federal jurisdiction had existed. The second category consists of those who are accused of an offense listed at § 3142(e)(1) that was committed while on pretrial release for a federal, state, or local offense. The third consists of those accused of a crime listed at § 3142(e)(1) if it was committed not more than five years after being convicted or released from imprisonment for another offense listed at § 3142(e)(1), whichever is later.

13. 18 U.S.C. § 3142(e).

14. S. REP. No. 225, *supra* note 2, at 3202.

> The first of these arises when it is determined that a person charged with a seriously dangerous offense has in the past been convicted of committing another serious crime while on pretrial release. Such a history of pre-trial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to community safety and that he cannot be trusted to conform to the requirements of the law while on release. Section 3142(e) provides, therefore, that in a case in which a defendant is charged with one of the serious offenses described in § 3142(f)(1) (a crime of violence, a crime punishable by death, a crime for which the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Import and Export Act (21 U.S.C. § 951) or Sec. I of the Act of Sept. 15, 1980 (21 U.S.C. § 955a)), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community, if the judicial officer finds: (1) that the defendant had been convicted of another offense described in subsection (f)(1) (or a State or local offense that would have been such an offense if circumstances giving rise to federal jurisdiction had existed); (2) that this offense was committed while the person was on pretrial release; and (3) that no more than five

shifts to the defendant to prove that there are release conditions sufficient to assure he will not engage in criminal activity or flee prior to trial.[15]

The evidence presented by the prosecution may be in the form of a proffer, and need not conform to the rules pertaining to admissibility in a court of law.[16] What this means, realistically, is

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years have elapsed since the date of conviction, or the defendant's release from imprisonment, for the offense, whichever is later. The Committee believes that it is appropriate in such circumstances that the burden shift to the defendant to establish a basis for concluding that there are conditions of release sufficient to assure that he will not again engage in dangerous criminal activity pending his trial. The term "crime of violence" is defined in § 3156, as amended by this title.

. . .

The second rebuttable presumption arises in cases in which the defendant is charged with felonies punishable by ten years or more of imprisonment described in 21 U.S.C. § 841, § 952(a), § 953(a), § 955, and § 959 which cover opiate substances and offenses of the same gravity involving non-opiate controlled substances, or an offense under 18 U.S.C. § 924(c) which covers the use of a firearm to commit a felony. These are serious and dangerous Federal offenses. The drug offenses involve either trafficking in opiates or narcotic drugs, or trafficking in large amounts of other types of controlled substances. It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses. Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers. In view of these factors, the Committee has provided in § 3142(e) that in a case in which there is probable cause to believe that the person has committed a grave drug offense, a rebutable [sic] presumption arises that no condition or combination of conditions will reasonably assure the appearance of the person and the safety of the community. Similar obvious considerations based upon the inherent dangers in committing a felony using a firearm support a rebuttable presumption for detention. *Id.* at 3202-03.

15. *Id.* at 3202-03. "The Committee believes that it is appropriate in such circumstances that the burden shift to the defendant to establish a basis for concluding that there are conditions of release sufficient to assure that he will not again engage in dangerous criminal activity pending his trial." *Id.* at 3202.

16. *Id.* at 3205. The committee stated:

The procedural requirements for the pretrial detention hearing set forth in section 3142(f) are based on those of the District of Columbia statute which were held to meet constitutional due process requirements in United States v. Edwards, 430 A.2d 1321 (1981). The person has a right to counsel, and to the appointment of counsel if he is financially unable to secure adequate representation. He is to be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. As is currently provided with respect to information offered in bail determinations, the presentation and consideration of information at a detention hearing need not conform to the rules of evidence applicable in criminal trials.

that an investigator may testify as to what witnesses for the prosecution have told him. Because the defendant has no right to subpoena witnesses to the hearing, there is no way to force his accusers to be cross-examined prior to his detention.[17] This detention prior to trial may continue indefinitely due to the excludable time delay loophole within the Speedy Trial Act, which governs the maximum length of pretrial detention.[18]

Over a bitter dissent, the U.S. Supreme Court decided six to three that the Bail Reform Act was facially constitutional in the case of *United States v. Salerno.*[19] The *Salerno* decision divided the Court into two factions diametrically opposed in both philosophy and opinion.

The majority, led by Chief Justice Rehnquist, preferred to take a utilitarian view of individual rights, and adhered to the position that an entirely reasonable solution to pretrial crime is to sacrifice the individual's freedom for the greater safety of society. Writing for the majority, Rehnquist stated: "We do not minimize the importance and fundamental nature of this right [to pretrial bail]. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to

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Pending the completion of the hearing, the defendant may be detained.

Id.

17. United States v. Edwards, 430 A.2d 1321, 1334 (1981).

> The legislative history of the statute confirms Congress' intent that the information upon which the judicial officer makes his finding need not be sworn testimony, and that the hearing is not designed to afford defendants a discovery device. Thus, in providing that the finding of substantial probability is to be based on information presented "by proffer or otherwise," the House Report anticipates "that, as is the present practice under the Bail Reform Act, . . . the use of sworn testimony will be the exception and not the rule . . . . [B]ail hearings under the Bail Reform Act, which frequently result in detention of the accused, proceed primarily by way of proffers. They are not formal trials requiring strict adherence to technical rules of evidence. *If the court is dissatisfied with the nature of the proffer, it can always, within its discretion, insist on direct testimony.* But the discretion should be left to the court without imposing on it the burden of limiting admissibility to what it would permit a jury to hear. [H.R. REP. No. 91-907, 91st Cong., 2d Sess. 182, 184 (1970).]" Accordingly, hearsay evidence may be presented, although the court may require direct testimony if dissatisfied with a proffer. (emphasis added).

Id.

18. *See infra* notes 110-13 and accompanying text for a discussion of this loophole. The dissenting opinion in United States v. Accettura, 783 F.2d 382, 396 (3d Cir. 1986) recognized the problems caused by this loophole, stating:

> Its requirement of trial [The Speedy Trial Act of 1974] within 90 days for persons who have been detained . . . has turned out to be largely illusory, in large part because the provision covering detainees also incorporates the periods of excludable time enumerated in section 3161(h) in computing the 90 day time limitation. As a result, detention can continue while all 18 different circumstances enumerated in 3161(h) give rise to excludable delay.

Id. (Sloviter J., dissenting).

19. 107 S. Ct. 1095 (1986).

the greater needs of society."[20]

This was in stark contrast to the scathing dissent written by Justice Marshall, who stated:

> Throughout the world today, there are men, women and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous". . . . Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.[21]

The Bail Reform Act of 1984 marks the culmination of efforts throughout American history to achieve a proper balance between several conflicting doctrines which are ingrained in the Anglo-American system of justice. The presumption of innocence, and protection of individual rights from the tyranny of the majority are both strong arguments for the unrestricted provision of bail to persons accused in American courts. Competing with this view is the utilitarian argument of protection to the community at the expense of individual freedoms.

This Comment will demonstrate the method by which the Bail Reform Act of 1984 can be used to coerce testimony from those held under its provisions. Section One will explain the history of bail in the United States, from the Judiciary Act of 1789, to the current Bail Reform Act. Second, this Comment will analyze the *Salerno* decision which held that the 1984 Bail Reform Act is facially constitutional. Finally, this Comment will demonstrate how the 1984 Act can be abused to obtain testimony in violation of due process rights, and it will provide suggestions to make the 1984 Act a closer balance between the competing doctrines which encouraged the legislation's enactment into law.

I. HISTORY OF BAIL

Bail has traditionally (in the Anglo-American system of justice) been used for the primary purpose of assuring a defendant's presence at trial. The Judiciary Act of 1789 stated that:

> [U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidences and usages of law.[22]

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20. *Id.* at 2103.
21. *Id.* at 2112 (Marshall, J., dissenting).
22. Judiciary Act of 1789, 1 Stat. 91 § 33 (1789).

The rationale that bail's purpose is to assure a defendant's presence at trial was upheld in the 1951 Supreme Court case of *Stack v. Boyle*.[23] In *Stack*, the Supreme Court declared that each defendant in a criminal case is entitled to an individualized bail hearing, in which bail must be "based upon standards relevant to the purpose of assuring the presence of the defendant."[24]

The *Stack* Court relied on *United States v. Motlow*,[25] where it was held that bail set at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the accused's presence at trial was "excessive under the eighth amendment."[26] Chief Justice Vinson of the Supreme Court wrote an eloquent opinion for the majority in *Stack*, which provided for the provision of bail in all noncapital offenses. He stated that:

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a noncapital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment before conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[27]

Justices Jackson and Frankfurter joined in a concurring opinion.[28] Justice Jackson, like Chief Justice Vinson, was vehemently opposed to the denial of reasonable bail in noncapital cases:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusations until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence, and preparing a defense.[29]

The rationale that bail should be set only in an amount neces-

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23. 342 U.S. 1 (1951).
24. *Id.* at 5.
25. 10 F.2d 657 (1926).
26. *Id.* at 659. Justice Butler of the Supreme Court, then sitting as Circuit Judge in the Seventh Circuit Court of Appeals, stated for the majority:
> The Eighth Amendment provides that "excessive bail shall not be required." This implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.

27. *Stack*, 342 U.S. at 4.
28. *Id.* at 7 (Jackson, J., concurring).
29. *Id.* at 7-8 (Jackson, J., concurring).

sary to assure a defendant's presence at trial was statutorily codified by Congress in the Bail Reform Act of 1966.[30] The Bail Reform Act of 1966 was drafted in response to the injustice of the requirement of a monetary bond before the release of indigent defendants.[31] The legislative history of the Bail Reform Act of 1966 referred to the report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice Procedure in supporting the need for the legislation, and concluded:

> The bail system administered in the Federal Courts, relying primarily on financial inducements to secure the presence of the accused at the trial, results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of non-appearance by accused persons.[32]

The Bail Reform Act of 1966 changed the federal bail code by providing for a rebuttable presumption that defendants should be released on their own recognizance.[33] Furthermore, section 3 of the Act provided alternate release conditions for those whose release on recognizance would "not reasonably assure the appearance of the person as required."[34] In applying alternate release conditions, judges were required to look at the nature and circumstances of the offense; the weight of the evidence against the accused; the accused's family ties, employment, and financial resources; the accused's character and mental condition; the length of his residence in the community; his record of convictions; and his record of court appearance or flight at court appearances.[35] After carefully weighing this evidence, the judge could impose on the defendant any combination of the following five conditions which were deemed necessary to assure the defendant's appearance at trial:

> 1. place the accused in the custody of a designated person or organization agreeing to supervise him;
> 2. place restrictions on travel, association or place of abode of the person during the period of release;
> 3. require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or

30. Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214 (1966).

31. H.R. REP. No. 1541, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2293, 2299. The present system of monetary bail would be adequate if all could afford it. The facts, however, are to the contrary. The rich person and the professional criminal readily raise bail regardless of the amount. But it is the poor person, lacking sufficient funds, who remains incarcerated prior to trial.

32. *Id.* at 2296.

33. Bail Reform Act of 1966, Pub. L. No. 89-465, § 3, 80 Stat. 241 (1966).

34. *Id.* Section 3 consisted of seven new sections to be added to title 18, United States Code. The language quoted here is from the amended § 3146.

35. *Id.*

other security as directed, of a sum not to exceed ten per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

4. require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

5. impose any other condition deemed reasonably necessary to assure appearance as required, including a condition that the person return to custody after specified hours.[36]

Congress' clear intent in writing the Bail Reform Act of 1966 was to provide for bail in all possible instances where the risk of flight could be outweighed by a combination of bail requirements. This intent was made clear in the legislative history of the Act, which reads in part: "Studies have shown that failure to release has other adverse effects upon the accused's preparation for trial, retention of employment, relations with his family, his attitude toward social justice, the outcome of the trial, and the severity of the sentence."[37]

The issue of pretrial release for dangerous individuals first became known in the context of individuals who threatened to usurp a court's internal processes through witness intimidation. In *United States v. Carbo*, Justice Douglas held that "the risk of the applicant using release on bail as the occasion to escape does not, in my view, exhaust the conditions that may warrant denial of bail."[38] Further, the *Carbo* court held that "keeping a defendant in custody during the trial" to render fruitless "any attempt to interfere with witnesses or jurors may, in the extreme or unusual case, justify denial of bail."[39]

This logic, that a court can revoke bail to protect its own internal processes, was again reiterated in the case of *United States v. Gilbert*.[40] The *Gilbert* court stated:

A trial court has the inherent power to revoke a defendant's bail

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36. *Id.*

37. H.R. REP. No. 1541, *supra* note 31 at 2299. One of the major studies which the legislators of the 1966 Bail Reform Act relied upon was The Manhattan Bail Project. The Manhattan Bail Project evaluated each defendant using these factors as indicators of bailability: defendant's employment, family ties, length of residence, references, current charge, previous record, previous releases on bail, and connections to the community via unemployment payments or hospitalization. Over the study's two-year period, it was found that the vast majority of defendants would return to trial if a proper form of bail was selected. For further information concerning The Manhattan Bail Project, *see* Ares, Rankin & Strutz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67 (1963).

38. United States v. Carbo, 369 U.S. 868 (1962).

39. *Id.* at 868. The *Carbo* Court quoted Estabrook v. Otis, 18 F.2d 689, 690 (8th Cir. 1927): "Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and there is danger that if he is given his freedom he will commit another of like character."

40. 425 F.2d 490 (D.C. Cir. 1969).

> during the trial if necessary to insure orderly trial processes . . . . This is so even though it is recognized that a "defendant has an absolute right to be enlarged on bail prior to conviction . . . ." The necessities of judicial administration prevail, and the right to bail is not literally absolute.[41]

The authors of the 1984 Bail Reform Act recognized the lack of guidance provided under the 1966 Act for judges faced with dangerous defendants who did not pose a flight risk. Judges faced with this situation were often put in a position of releasing a dangerous person who presented no flight risk, or to effectively deny bail by imposing extraordinary amounts of bail based on an illusory "risk of flight."[42] The Attorney General's Task Force on Violent Crime realized this practice of detention via high monetary bail was "widespread."[43]

Eager to correct the problem created by the pretrial detention of indigent defendants on monetary bail, Congress pushed ahead with the implementation of the Bail Reform Act of 1966. At the same time, Congress recognized the dilemma the judiciary confronted with dangerous individuals who did not pose a flight risk. Unable to remedy the fault immediately, Congress left the question of pretrial detention to a later date, stating that:

> This legislation does not deal with the problem of the preventative detention of the accused because of the possibility that his liberty might endanger the public . . . . It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of crimes by the accused . . . . A solution goes beyond the scope of the present proposal and involves many difficult and complex problems which require deep study and analysis.[44]

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41. *Id.* at 491.

42. S. REP. No. 225, *supra* note 2, at 3187-88. As the committee explained in its report:

> The constraints of the [1966] Bail Reform Act fail to grant the courts the authority to impose conditions of release geared toward assuring community safety, or the authority to deny release to those defendants who pose an especially grave risk to the safety of the community. If a court believes that a defendant poses such a danger, it faces a dilemma—either it can release the defendant prior to trial, or it can find a reason, such as a risk of flight, to detain the defendant (usually by imposing high money bond). In the Committee's view, it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.

Id. at 3188.

43. ATT'Y GEN. TASK FORCE ON VIOLENT CRIME, FINAL REPORT 51 (Aug. 17, 1981).

44. H.R. REP. No. 1541, *supra* note 31, at 2296.

II. BAIL REFORM ACT OF 1984

The Bail Reform Act of 1984 substantially revised the Bail Reform Act of 1966 in that it allowed the community's safety to be considered in pretrial conditions of release.[45] Further, the Act allowed the pretrial detention of adult criminal defendants as to whom no conditions of release would assure their appearance at trial or the safety of the community or other persons.[46] Congress recognized the significant departure it was making from the 1966 Act as shown by the legislative history of the 1984 Bail Reform Act. It stated in part that:

> Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released. The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.[47]

However, the 1984 Bail Reform Act did not repeal the 1966 Act's presumption of bailability, preferring the release of defendants over detention.[48] The congressional committee recognized that pretrial detention was intended for a minority of defendants when it stated:

> There is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.[49]

In the 1984 Act, Congress recognized that the 1966 Bail Reform Act had put judges in a terrible ethical dilemma in cases of defendants who were not flight risks but were a danger to the community. Under the Bail Reform Act of 1966, the judge could only consider pretrial flight, and was thus placed in the position of either retaining the defendant on high monetary bond as a risk of flight, or releasing the defendant onto the unwary community. The Department of Justice expressed a similar view in testimony:

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45. S. REP. No. 225, *supra* note 2, at 3185.
46. *Id.*
47. *Id.* at 3185-86.
48. *Id.* at 3195. "It is anticipated that they [unsecured appearance bonds, conditional release] will continue to be appropriate for the majority of Federal defendants." *Id.*
49. *Id.*

> Current law places our judges in a desperate dilemma when faced with a clearly dangerous defendant seeking release. On the one hand, courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance, but actually to protect the public. Clearly neither alternative is satisfactory.[50]

In addressing this dilemma via the 1984 Bail Reform Act, Congress sought to enable the courts to address the issue of pretrial criminality "honestly and effectively."[51] The Bail Reform Act of 1984 was intended to "promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well."[52]

The Bail Reform Act of 1984 allows for the pretrial detention of defendants in three distinct categories of cases. The first of these categories is where there is a risk of flight,[53] the second is to prevent obstruction of justice,[54] and the third is where there is a danger to the community or any other person.[55] The 1984 Act also delineates who may make a motion for the defendant's pretrial detention on each of these bases,[56] and what offense must be alleged to demand a hearing on the issue.[57]

If the defendant is accused of a crime listed in section 3142(f)(1), the government is entitled to demand a hearing to determine if there is any condition or set of conditions to reasonably assure the safety of any person or the community upon the accused's release. The crimes listed in section 3142(f)(1) include:

1. A crime of violence;[58]
2. An offense for which the maximum sentence is life imprisonment or death;[59]
3. An offense for which the maximum term of imprisonment of ten years or more is prescribed by the Controlled Substances Act, the Controlled Substances Import and Export Act, or section 1 of the Act of September 15, 1980;[60] or
4. Any felony committed after the person had been convicted of

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50. *Id.* at 3193 (quoting *Bail Reform Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97 Cong., 1st Sess 177 (testimony of Jeffrey Harris, Deputy Associate Attorney General)).
51. *Id.* at 3194.
52. *Id.*
53. 18 U.S.C. § 3142(f)(2)(A).
54. 18 U.S.C. § 3142(f)(2)(B).
55. 18 U.S.C. § 3142(e).
56. 18 U.S.C. § 3142(f)(1)-(f)(2).
57. 18 U.S.C. § 3142(f).
58. 18 U.S.C. § 3142(f)(1)(A).
59. 18 U.S.C. § 3142(f)(1)(B).
60. 18 U.S.C. § 3142(f)(1)(C).

two or more prior offenses described above, or two or more state or local offenses that would have been offenses described above if a circumstances giving rise to federal jurisdiction had existed.[61]

If the government exercises its right to a hearing on the defendant's dangerousness utilizing section 3142(f)(1), it has the burden of proving by "clear and convincing evidence" that no condition or set of conditions will reasonably assure the community's safety.[62]

If, however, the government *or* the court believes that the defendant poses a serious flight risk,[63] or a serious threat via any obstruction of justice,[64] either may motion for the defendant's pretrial detention.[65] In either of these circumstances, there is no requirement that the offense the defendant is charged with be of any certain type. This motion also requires that the defendant be given his right to a hearing under section 3142(f), where the government must prove the defendant is a flight risk or a threat to the judicial process.[66]

Under section 3142(f), the defendant's hearing "shall be held immediately upon the person's first appearance before the judicial officer, unless that person, or the Government, seeks a continuance."[67] During this continuance, which may be no longer than five days without good cause, the defendant remains detained.[68] After the hearing, the defendant has the right to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear, and to offer evidence by proffer or otherwise.[69] Should the judicial officer find that no condition or set of conditions can reasonably assure the safety of any person or of the community, he may order the defendant's pretrial detention.[70]

In making such a determination, the judicial officer is guided by the factors in section 3142(g). Included in these factors are:

1. The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic or a drug;[71]

2. The weight of the evidence against the arrested person;[72]

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61. 18 U.S.C. § 3142(f)(1)(D).
62. 18 U.S.C. § 3142(f).
63. 18 U.S.C. § 3142(f)(2)(A).
64. 18 U.S.C. § 3142(f)(2)(B).
65. 18 U.S.C. § 3142(f)(2).
66. 18 U.S.C. § 3142(f).
67. *Id.*
68. *Id.*
69. *Id.*
70. 18 U.S.C. § 3142(e).
71. 18 U.S.C. § 3142(g)(1).
72. 18 U.S.C. § 3142(g)(2).

3. The history and characteristics of the arrested person;[73] and

4. The nature and seriousness of the danger posed by the arrested person's release.[74]

The 1984 Act also provides "rebuttable presumptions" as to the defendants risk to community safety or probability of flight if the crime he is charged with falls into certain categories.[75] The first category includes persons accused of a federal offense described in section 3142(f)(1), or a state or local offense that would have been an offense described in section 3142(f)(1) if circumstances giving rise to federal jurisdiction had existed, who commit the offense described above while on release pending trial. The offense must have been committed not more than five years since the date of conviction or release from imprisonment for another such offense, whichever is later.[76] In these cases the law provides a rebuttable presumption that no condition or set of conditions will reasonably assure the safety of any person or the community.[77]

In the second category of offenses, a rebuttable presumption arises that no condition or set of conditions will reasonably assure the appearance of the defendant as required or the safety of the community.[78] This second set of cases includes serious drug offenses, as well as felonies committed while in possession of a firearm.[79]

Should the judicial officer determine that there is sufficient evidence of a defendant's danger to the community, risk of flight or likelihood of tampering with the court's internal processes via witness or juror intimidation, and orders detention pursuant to U.S.C. section 3142(e), he must reduce his findings to a written statement of the facts and reasons for pretrial detention.[80] Upon rendering this written opinion, the judicial officer may order the defendant detained in the custody of the Attorney General; segregated from persons awaiting or serving sentences, or being held in custody pending appeal.[81]

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73. 18 U.S.C. § 3142(g)(3).
74. 18 U.S.C. § 3142(g)(4).
75. 18 U.S.C. § 3142(e).
76. 18 U.S.C. § 3142(e)(2).
77. 18 U.S.C. § 3142(e).
78. *Id.*
79. *Id.*
80. 18 U.S.C. § 3142(h).
81. 18 U.S.C. § 3142(i).

III. *United States v. Salerno*: THE SUPREME COURT ANALYZES THE FACIAL CONSTITUTIONALITY OF THE BAIL REFORM ACT OF 1984

The facial constitutionality of the Bail Reform Act of 1984 was first addressed by the United States Supreme Court in the 1987 case of *United States v. Salerno*.[82] The *Salerno* majority, led by Chief Justice Rehnquist, held that the 1984 Act was not susceptible to a facial constitutional challenge.[83]

The attack that Salerno attempted to mount against the 1984 Bail Reform Act was based on the premises that: (1) the Act violates the eighth amendment's proscription against excessive bail, and (2) the Act violates the due process clause of the fifth amendment. As the *Salerno* Court noted, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act is valid."[84] The Court went on to say that, "[t]he fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[85]

Chief Justice Rehnquist, writing for the majority, held that the 1984 Act did not violate the due process clause of the fifth amendment by imposing impermissible punishment before trial. Relying on the Court's decision in *Bell v. Wolfish*,[86] Chief Justice Rehnquist reasoned that pretrial detention under the Bail Reform Act of 1984 constitutes a legitimate regulatory measure, and is therefore not "penal" in nature. As the Court held in *Bell*, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.[87]

Reaching the conclusion that pretrial detention is not *per se*

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82. 107 S. Ct. 2095 (1987).

83. *Id.* This reversed the Second Circuit Court of Appeals decision in United States v. Salerno, 794 F.2d 64 (1986) in which the circuit court found "[s]ection 3142(e)'s authorization of pretrial detention [on the grounds of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing crimes." *Id.* at 71-72.

84. 107 S. Ct. at 2100. The Supreme Court stated, "we think respondents have failed to shoulder their heavy burden to demonstrate that the Act is 'facially' unconstitutional." *Id.*

85. *Id.* at 201.

86. Bell v. Walfish, 441 U.S. 520 (1978). The Court stated: "Not every disability imposed during pretrial detention amounts to punishment in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate that detention." *Id.* at 537.

87. *Id.*

punishment, the Court sought to find authority that the actions taken were legitimate regulatory actions on the part of the government. The Court utilized the 1983 Supreme Court decision of *Schall v. Martin*[88] for the proposition that "to determine whether a restriction in liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent."[89] In looking at legislative intent, the Court used the guidance given in *Kennedy v. Mendoza-Martinez*,[90] which states in part that "[u]nless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may be rationally connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it.]' "[91] The *Kennedy* opinion, however, contained many more tests to be considered, stating that:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only for a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may be rationally connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.[92]

Examining these alternative factors, it is clear that pretrial detention could easily become penal in nature if allowed to become excessive in relation to the legitimate regulatory goal it must demonstrate.

The Court in *Salerno* found that the legislative intent of Congress was clearly not to impose punishment before trial in violation of the fifth amendment due process clause,[93] but rather to offer "a possible solution to a pressing societal problem."[94] As such, the Act must merely pass the test enumerated in *Kennedy v. Mendoza-Martinez*, as to its rational connection to an alternative purpose, and its excessiveness or lack of excessiveness in compari-

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88. 467 U.S. 253, 269 (1984). (The Court upheld the post-arrest pretrial detention of juveniles because it found juveniles to have a lesser interest in liberty than adults. *Id.* at 265.)

89. 107 S. Ct. at 201.

90. 372 U.S. 144 (1963).

91. 107 S. Ct. at 2101 (citing *Schall*, 467 U.S. at 269 (quoting *Kennedy*, 372 U.S. at 168-69)).

92. *Kennedy*, 372 U.S. at 168-69.

93. *Salerno*, 107 S. Ct. at 2101. The Court referred to S. REP. No. 225, *supra* note 2.

94. *Salerno*, 107 S. Ct. at 2101. The Court referred to S. REP. No. 225, *supra* note 2.

son to this goal.[95]

Examining the alternative purpose to punishment that the Bail Reform Act ostensibly was created to fulfill, and the purpose for which it was enacted, the Court held that (1) the pretrial detention contemplated by the Bail Reform Act of 1984 is regulatory in nature, and (2) this pretrial detention does not constitute punishment before trial in violation of the fifth amendment's due process clause.[96]

Citing the 1984 Act's "extensive procedural safeguards," the Supreme Court declared that the Act was not excessive in relation to its regulatory goal.[97] Among the factors cited which constitute these safeguards are as follows:

> 1. The Act only operates on individuals who have been arrested for a specific category of serious crimes,[98]
> 2. The defendant is entitled to a prompt "full blown adversarial hearing,"[99]
> 3. The maximum length is limited by the stringent time limitations of the Speedy Trial Act,[100] and
> 4. Detainees are housed in a separate facility to the extent practicable, away from persons awaiting sentencing, serving sentences, or being held in custody pending appeal.[101]

After examining the procedural safeguards incorporated into the 1984 Act, the Supreme Court reasoned that it was not susceptible to a facial attack on fifth amendment due process grounds.[102] In reaching this conclusion, the Court stated, "[w]e think these extensive safeguards suffice to repel a facial challenge . . . . Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment."[103]

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95. *Salerno*, 107 S. Ct. at 2101.

96. *Id.*

97. *Id.* However, the Court went on to state that "[w]e intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at n.4.

98. *Id.* at 2101.

99. *Id.* at 2101, 2103. However, as noted previously, evidence at this adversarial hearing may be based on hearsay which is clearly not cross-examinable.

100. *Id.*

101. *Id.*

102. *Id.* at 2100. The Court stated, "[w]e think respondents have failed to shoulder their heavy burden to demonstrate that the Act is 'facially' unconstitutional." However, this statement was footnoted as follows: "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." *Id.* at n.3.

103. *Id.* at 2104.

IV. PREVIOUS DUE PROCESS ARGUMENTS MADE AGAINST THE BAIL REFORM ACT OF 1984

Previous attacks on pretrial detention statutes have focused on the amount of time spent between actual pretrial incarceration and trial. In *Schall v. Martin*,[104] the U.S. Supreme Court upheld a New York juvenile detention statute, citing its maximum length provision of seventeen days for felony offenses and six days for misdemeanors.[105] As Justice Rehnquist stated in *Schall*, "[t]hese time frames seem suited to the limited purpose of providing the youth with a controlled environment . . . pending the speedy disposition of the case."[106]

In drafting the Bail Reform Act of 1984, Congress refused to include a mandatory time limit for pretrial detention. Recognizing this, the *Salerno* Court imputed to Congress the desire to allow the Speedy Trial Act[107] to be an effective limitation to pretrial detention.[108] The Speedy Trial Act, however, was written long before the 1984 Bail Reform Act, and did not address current issues. Rather, the Speedy Trial Act was designed mainly to "assist in reducing crime and the danger of recidivism by requiring speedy trials and strengthening of supervision over persons released pending trial."[109] Recognizing the problem of pretrial recidivism, the Speedy Trial Act was designed as an alternative solution to incarceration prior to trial, rather than a device guaranteeing the constitutional rights of defendants incarcerated prior to trial. Thus, the Speedy Trial Act was not intended to address the unique constitutional issues presented by the 1984 Bail Reform Act.[110] Several courts have recognized that the Speedy Trial Act may allow a detention to become so long as to be a violation of substantive due process.[111]

The dissenting opinion in *United States v. Accetturo*[112] recognized the problem of lengthy delay under the Speedy Trial Act, stating:

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104. 467 U.S. 253 (1984).
105. *Id.* at 270.
106. *Id.*
107. Pub. L. No. 93-619 (1974), 18 U.S.C. § 3161 (as amended 1979).
108. *Salerno*, 107 S. Ct. at 2101.
109. H.R. REP. 1503, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S CODE CONG. & ADMIN. NEWS 7401, 7402.
110. The Speedy Trial Act was designed to interact with the then applicable law, the 1966 Bail Reform Act. The 1966 Bail Reform Act did not contemplate the pretrial detention provisions of the 1984 Bail Reform Act, but left them to a later legislation. *See supra* note 42 and accompanying text.
111. *See* United States v. Accetturo, 783 F.2d 382, 396 (3d Cir. 1986); United States v. Columbo, 777 F.2d 96, 101 (2d Cir. 1985).
112. *Accetturo*, 783 F.2d 382 (3d Cir. 1986).

> Its requirement of trial within [ninety] days for persons who have been detained . . . has turned out to be illusory, in large part because the provision covering detainees also incorporates the periods of excludable time enumerated in section 3161(h) in computing the [ninety] day time limitation. As a result, detention can continue while all [eighteen] different circumstances enumerated in 3161(h) give rise to excludable delay.[113]

These eighteen different circumstances literally make pretrial detention an unlimited proposition. Included in such periods of excludable delay are: time for examination of the defendant's mental and physical capacity, delay due to the absence or unavailability of an essential witness, and time for complications of the pretrial process, such as joinder of defendants and continuances.[114]

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113. *Id.* at 394 (Sloviter, J. dissenting).

114. Section 3161(h) of The Speedy Trial Act of 1974, provides the following:
(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 or title 28, United States Code [28 U.S.C.S. 2902];
(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code [28 U.S.C.S. § 2902];
(D) delay resulting from trial with respect to other charges against the defendant;
(E) delay resulting from any interlocutory appeal;
(F) delay resulting from pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion;
(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure [U.S.C.S. Rules of Criminal Procedure];
(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;
(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and
(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.
(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.
(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.
(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his

These factors are often completely out of the defendant's hands, resulting in the government's ability to manipulate the length of pretrial detention at will.

The Court in *United States v. Columbo*[115] reiterated this proposition, stating in part that:

> [E]xperience under the combined operation of these two statutes [Bail Reform Act of 1984 and the Speedy Trial Act] may demonstrate that the realities of complex cases having numerous defendants and multi-count indictments are such that this congressional expectation and policy may sometimes be frustrated . . . . Exclusions authorized by section 3161(h) for pretrial motions by both sides, scheduling difficulties as well as unforeseeable delays granted in the interest of justice, may combine to so delay a trial that the Speedy Trial Act might not work perfectly well to protect against lengthy incarceration. In such a case, the length of a defendant's pretrial detention might not survive a proper due process challenge.[116]

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whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing and/or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h) (Supp. 1987).

115. 777 F.2d 96 (2d Cir. 1985).

116. *Id.* at 101.

V. Due Process and the Coercive Impact of the 1984 Bail Reform Act

The government's ability to manipulate the length of pretrial detention raises the concern of prosecutorial abuse of the Bail Reform Act in obtaining testimony. Granted the power to hold a defendant indefinitely through the loophole created by the excludable delay provisions enumerated in section 3161(h), the government is clearly in a coercive position when dealing with the defendant. A valid concern is whether the 1984 Act will become a bargaining chip, much like the plea bargain, in obtaining testimony.

This coercive impact in obtaining testimony is brought clearly to light by the facts underlying the *Salerno* case. The two defendants in *Salerno* were Anthony "Fat Tony" Salerno, the reputed "boss" of the Genovese crime family of La Cosa Nostra, and Vincent "Fish" Cafaro, a reputed "captain" in the same organization. These defendants were arrested on March 21, 1986, pursuant to a twenty-nine-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations.[117] The RICO counts alleged thirty-five acts of racketeering including fraud, extortion, gambling, and conspiracy to commit murder.[118] The evidence against the defendants included court-ordered wiretaps demonstrating that Salerno and Cafaro had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means,[119] and two witnesses who would testify that Salerno had personally participated in two murder conspiracies. [120] On paper, the evidence was overwhelming, and a perfect test case for the 1984 Bail Reform Act.

At the time the *Salerno* case was decided by the Supreme Court, however, the case was arguably moot. Anthony Salerno had already been sentenced to 100 years imprisonment for charges unrelated to these before the Supreme Court.[121] Vincent Cafaro,

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117. *Salerno*, 107 S. Ct. at 2099.
118. *Id.*
119. *Id.*
120. *Id.*
121. Upon Salerno's conviction of these unrelated charges, the pretrial detention order in issue before the Supreme Court became unnecessary. The District Judge ordered Salerno released on bail pending appeal for the conviction, while he was still being held under the pretrial detention order in question before the Supreme Court. This led Justice Marshall to comment:

> Had this judgement and commitment order been executed immediately, as is the ordinary course, the present case would certainly have been moot with respect to Salerno. On January 16, 1987, however, the District Judge who had sentenced Salerno in the unrelated proceedings issued the following order, apparently with

who was held as a danger to the community pursuant to the Bail Reform Act's provisions, had begun working covertly with the government as a cooperating witness, and was immediately released on a $1,000,000 personal recognizance bond.[122] The Solicitor General's brief to the district court, however, stated, "[o]n October 8, 1986, Cafaro was temporarily released for medical treatment. Because he is still subject to the pretrial detention order, Cafaro's case also continues to present a live controversy."[123] The Solicitor General failed to inform the Supreme Court of Cafaro's execution of a release bond, or of his covert capacity.[124]

Thus, the danger to the community which Vincent "Fish" Cafaro was proven to represent by "clear and convincing" evidence, suddenly disappeared at the same time he decided to work for the prosecution as a covert witness. Further, the prosecution in effect covered up the coerced testimony by characterizing the release as "medical" in nature. Justice Marshall, Commenting on the situation, stated, "[a]s to Cafaro, this case was no longer justiciable even before *certiorari* was granted, but the information bearing on the essential issue was not made available to us."[125]

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the Government's consent:

> "Inasmuch as defendant Anthony Salerno was not ordered detained in this case, but is presently being detained pretrial in the case of *United States v. Anthony Salerno et. al,* SS 86 Cr. 245 (MJL),
>
> "IT IS HEREBY ORDERED that the bail status of defendant Anthony Salerno in the above-captioned case shall remain the same as it was prior to the January 13, 1987 sentencing, pending further order of the Court." Order in SS 85 Cr. 139 (RO)(S.D.N.Y.)(Owen, J.).
>
> This order is curious. To release on bail pending appeal "a person who has been found guilty of an offense and sentenced to a term of imprisonment," the District Judge was required to find "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ." 18 U.S.C. § 3143(b)(1)(1982 ed., Supp. III). In short, the District Court that had sentenced Salerno to 100 years imprisonment then found, with the Government's consent, that he was not dangerous, in a vain attempt to keep alive the controversy as to Salerno's dangerousness before this court.

Id. at 2106 n.1. (Marshall, J., dissenting).

122. *Id.* at 2106 (Marshall, J., dissenting). Justice Marshall stated in his dissenting opinion:

> In early October 1986, before the Solicitor General's petition for *certiorari* was granted, respondent Cafaro became a cooperating witness, assisting the government's investigation 'by working in a covert capacity.' The fact that Cafaro was cooperating with the government was not revealed to his co-defendants, including Salerno. On October 9, 1986, respondent Cafaro was released, ostensibly 'temporarily for medical care and treatment' with the Government's consent.

Id.

123. *Id.* (Marshall, J., dissenting). "This information was all that was released to the court. Further particulars of the Government's agreement with Cafaro, including the precise terms of the agreement to release him on bail, are not included in the record, and the Court has declined to order that the relevant documents be placed before us." *Id.*

124. *Id.* at 2107 (Marshall, J., dissenting).

125. *Id.*

Justice Marshall characterized this situation as "disturbing."[126]

CONCLUSION

The ability of the government to abuse its discretion in using the Bail Reform Act of 1984's pretrial detention provisions to manipulate the judicial process is illuminated by the disturbing manner in which the Solicitor General withheld key evidence of Vincent Cafaro's decision to become a covert government witness, and his subsequent release from custody. It seems that his pretrial detention was not based on the legitimate government interest in community safety, but rather to force him to testify or remain imprisoned indefinitely.[127] Because this information was not made available to the Supreme Court justices, or Salerno's own attorneys, the issue of the use of the Bail Reform Act of 1984 to coerce testimony from witnesses was never addressed in the *Salerno* decision.[128]

Clearly, such coercion strikes at the defendant's, as well as the witnesses', due process rights. Witness coercion also opens the issue of the reliability of testimony received by the government. Someone who can be held under the 1984 Act is likely to be a hardened criminal, with little concern for the morality behind sworn testimony. Given the choice between perjury and indefinite detention, such a person could easily be coerced into testifying, with or without the government's actual knowledge of the facts to which he is testifying.

This Comment suggests that Congress should modify the Bail Reform Act of 1984 to reflect a more realistic view of how the 1984 Act interacts with the Speedy Trial Act, and its potential for prosecutorial abuse. This legislation should create a less arbitrary standard governing the maximum excludable time delay for those detained on motion by the prosecution. To accomplish this goal, a provision should be added to the Bail Reform Act which creates a rebuttable presumption of bailability for those detained on government motion after the passage of a fixed time limit. At the same time, motions by the defense for additional time to prepare a defense could be granted under excludable time delay. This would allow defense attorneys flexibility in the amount of time allotted to prepare a defense, while encouraging their efforts for a speedy trial due to the defendant's incarceration during the delays. Such

126. *Id.* at 2106 (Marshall, J., dissenting).

127. The author reaches this conclusion based on the coincidence of the time between Cafaro's cooperation with the government and release, and the suspicious circumstances which were not revealed in the Solicitor General's brief to the Court.

128. *See supra* notes 122-23.

a modification would retain all the legitimate benefits to community safety for which the Act was intended, while minimizing the coercive power the prosecution now holds in obtaining testimony.

This suggestion of a fixed time limit is neither novel nor new, but has never been proposed in light of the issue of witness coercion. Courts dealing solely with the length of pretrial delay had earlier made the call for such a statutorily defined limit to the maximum length of pretrial detention.[129] Justice Sloviter, in his dissent in *United States v. Accetturo*, eloquently supported this proposition, stating:

> I suggest that it is incumbent upon us to use our supervisory power to fix a timetable beyond which no person can be held in pretrial detention on the ground of dangerousness without being accorded a full due process hearing. The timetable should not be extended for reasons attributable to any other factor other than that detainee's own waiver. Failure to comply would not result in dismissal of the charges, but merely in the defendant's release pending trial under appropriate conditions. The suggestion is hardly radical since it was the procedure in use for 200 years. I agree with Judge Weinstein that "a long period of preventive detention without a finding of guilt, based solely on possible danger to the public, is 'anathema to American ideals of due process.'" [citations omitted]
>
> I respectfully dissent from the judgment of the majority because it has failed to accept the challenge, seize the opportunity, and take the bold step needed to insure effectuation of the defendants' due process rights.[130]

*Tim J. Vanden Heuvel**

129. *See* United States v. Columbo, 777 F.2d 96 (2d Cir. 1985); United States v. Accetturo, 783 F.2d 382 (3d Cir. 1986).

130. *Accetturo*, 783 F.2d at 382, 396 (Sloviter, J., dissenting) (quoting U.S. v. Columbo, 616 F. Supp. 780, 785 (S.D.N.Y 1985), (quoting R.B. McNAMARA, CONSTITUTIONAL LIMITS ON CRIMINAL PROCEDURE 135 (1982) *rev'd* 777 F.2d 96 (2d Cir. 1985))).

* Thanks to the devil's advocates, who kept law school humorous and the tedious process of writing this Comment bearable.