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HOW LONG IS TOO LONG? WHEN PRETRIAL DETENTION VIOLATES DUE PROCESS

FLORALYNN EINESMAN*

From the passage of the Judiciary Act of 1789 to the present . . . federal law has unequivocally provided that a person arrested for a non-capital 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 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.¹

In 1984, Congress passed the Bail Reform Act (the Act)² which revolutionized the way in which bail was determined in federal criminal cases. For the first time in the history of federal bail legislation, courts are authorized, in noncapital cases, to consider both the defendant's risk of flight, as well his possible danger to the community, when deciding whether and what amount of bail should be set in a federal criminal case.³ The Act permits the court to incarcerate, *without bail*, a presumptively innocent individual charged with a federal offense when no conditions of release would "reasonably assure" the defendant's appearance at trial or "the safety of any other person and the community."⁴

Seeking to address the serious issues of flight and criminal activity by those released on bail, Congress created new problems when it passed this Act. While authorizing the pretrial detention of a defendant, Congress included no provision in the Act that limits the length of time a defendant could spend in pretrial detention. Congress mistakenly relied on the Speedy Trial Act⁵ to restrict the period of confinement to ninety days.⁶ Because the Speedy Trial Act con-

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1. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citations omitted).

2. 18 U.S.C. §§ 3141-3156 (1988 & Supp. II 1990).

3. 18 U.S.C. § 3142(g).

4. 18 U.S.C. § 3142(e).

5. 18 U.S.C. §§ 3161-3174 (1988 & Supp. II 1990).

6. For a discussion of Congress' decision to rely on the Speedy Trial Act to limit the length of pretrial detention, see *infra* notes 95-108 and accompanying text.

tains eighteen exclusions from its time limits, it does not effectively restrict the period of pretrial detention. This error was aggravated when the Supreme Court, reviewing the constitutionality of the Act, failed to address the question of when pretrial confinement exceeds the limits of due process.⁷ Due to the failure of Congress and the Supreme Court to resolve this problem, defendants facing federal criminal charges have been incarcerated without bail for as long as thirty-two months.⁸

After setting forth the background and history of the Act, this Article will address the question of how long an accused may be confined pretrial, without bail, before a violation of substantive due process takes place. Since neither Congress nor the Supreme Court has restricted the length of pretrial detention, the lower courts have devised their own standards to determine when a period of such incarceration crosses the line from permissible regulation to impermissible punishment. After tracing the evolution of these tests, this Article will analyze how they lead to protracted periods of incarceration for presumptively innocent individuals.⁹ This Article will then propose changes to the legislation to ensure that the law comports with due process.

Part I will discuss the history and practice of the Bail Reform Act of 1984. Part II will analyze the case of *United States v. Salerno*,¹⁰ the first and, thus far, only case in which the United States Supreme Court has reviewed the constitutionality of the Act. Although the Supreme Court upheld the constitutionality of the Act against a facial challenge, the Court chose not to resolve the question that this article will address—when does pretrial detention become so protracted so as to violate due process.¹¹ Part III will examine the development of the due process tests used to determine whether the pretrial detention has become punitive. It will conclude that the tests are deficient because they fail to effectively protect the liberty interest of the accused. Part IV will propose changes to the Act in an effort to reconcile the issue of pretrial detention to the Due Process Clause of the United States Constitution.¹²

7. *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987) (“We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore, punitive, in relation to Congress’ regulatory goal.”).

8. *United States v. Ojeda Rios*, 846 F.2d 167 (2d Cir. 1988).

9. Even if a criminal defendant is ultimately convicted of the charged offense, he is still entitled to due process under the Fifth Amendment before this adjudication. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”); *United States v. Gallo*, 653 F. Supp. 320, 343 (E.D.N.Y. 1986) (“That a defendant is ultimately found guilty does not, of course, excuse the violation of his constitutional rights prior to conviction.”).

10. 481 U.S. 739 (1987).

11. *Salerno*, 481 U.S. at 747 n.4; see *supra* note 7.

12. This Article does not seek to critique the entire Bail Reform Act of 1984

I. THE FEDERAL BAIL REFORM ACT OF 1984

In 1984, through sweeping legislation, Congress dramatically altered the way in which the matter of bail was determined in federal criminal cases.¹³ Congress adopted these changes to reflect its determination that a new bail law should address the problem of criminal activity by those released on bail and to authorize courts to consider the issue of danger to others that a defendant may pose if released on bail.¹⁴ In passing this legislation, Congress noted that these changes marked a "significant departure from the basic philosophy of the Bail Reform Act [of 1966] which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings."¹⁵

A. *The Bail Reform Act of 1966*

The new legislation revised the Bail Reform Act of 1966,¹⁶ which had been the first major modification of the federal bail system since 1789.¹⁷ President Johnson signed the 1966 Act into law on June 22, 1966.¹⁸ It sought to address the inequities of the Federal Judiciary Act of 1789,¹⁹ which resulted in indigent defendants being held in pretrial custody due to their financial inability to post a

or the decision in *United States v. Salerno*. For a critique of the Bail Reform Act, see Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Kevin F. Arthur, Comment, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378 (1987); Scott D. Himsell, Comment, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439 (1986); Shari J. Cohen, Note, *Circumventing Due Process: A Judicial Response to Criminal Recidivism Under the Bail Reform Act*, 15 HASTINGS CONST. L.Q. 319 (1988); and John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U. L. REV. 271 (1988). For a discussion of the *Salerno* decision, see Michael J. Eason, Note, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?* 78 J. CRIM. L. & CRIMINOLOGY, 1048 (1988); John B. Howard, Note, *The Trial of Pretrial Dangerousness: Preventive Detention After United States v. Salerno*, 75 VA. L. REV. 639 (1989); and Marian E. Lupo, Comment, *United States v. Salerno: A Loaded Weapon Ready for the Hand*, 54 BROOK. L. REV. 171 (1988).

13. 18 U.S.C. §§ 3141-3156 (1988 & Supp. II 1990) (current version at 18 U.S.C. §§ 3141-3156 (1988 & Supp. II 1990)).

14. S. REP. NO. 225, 98th Cong., 1st Sess. 3 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3185.

15. *Id.* at 3185-86.

16. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) reprinted in 1966 U.S.C.C.A.N. 241 (codified at 18 U.S.C. §§ 3141-3151 (1982)).

17. Sam J. Ervin, Jr., *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429, 431 (1967) [hereinafter *Legislative Role*].

18. *Id.* at 429.

19. See Ervin, *Legislative Role*, *supra* note 17, at 444 n.38.

surety bond.²⁰ Before 1966, the federal courts generally set bail in the amount of a corporate surety bond. This procedure required the defendant to resort to a bail bondsman to gain his release from pretrial custody.²¹ In so doing, the defendant was obliged to pay the bondsman a nonrefundable fee, usually ten percent of the bail set.²² The defendant also was required to post collateral with the bail bondsman in an effort to secure his release.²³ Consequently, many poor defendants, without property and money to post, were unable to secure even a low surety bond. As a result, these defendants were incarcerated before trial on the basis of their indigence rather than their likelihood of flight.²⁴

The Bail Reform Act of 1966 sought to eliminate financial status from bail consideration.²⁵ The Act provided that each defendant was presumptively entitled to release on the preferred method of release—personal recognizance or the execution of an unsecured appearance bond in an amount specified by the court.²⁶ Such methods of release did not oblige the defendant to resort to a bail bondsman or post any property as collateral.²⁷ The Act also enumerated various alternatives that could be ordered in addition to, or instead of, personal recognizance. These included placing the defendant in the custody of a designated person, restricting travel and association, or requiring the execution of an appearance bond with a deposit of up to ten percent of that bond in the registry of the court.²⁸ In the case of a

20. Ervin, *Legislative Role*, *supra* note 17, at 435.

21. *Id.* at 436.

22. *Id.*

23. *Id.*

24. *Id.* at 430.

25. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) *reprinted in* 1966 U.S.C.C.A.N. 241 (codified at 18 U.S.C. §§ 1341-3151 (1982)) [hereinafter cited as codified]. Section 2 of Pub. L. No. 89-465 provided:

The purpose of this Act is to revise the practice relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained, pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

Id. See also H.R. REP. No. 1541, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2295.

26. *Id.*

27. See 18 U.S.C. § 3146(a) (1982) (current version at 18 U.S.C. § 3142 (1988 & Supp. II 1990)) Section 3146(a) states:

Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. . . .

Id.

28. 18 U.S.C. § 3146(a)(1)-(5) (1982).

substantial risk of flight, the court could still demand that the defendant execute a bail bond with sureties.²⁹

In addition, the 1966 Bail Reform Act listed numerous factors for the courts to consider in setting bail.³⁰ Congress specifically omitted "danger to the community" as a factor that could be considered by the courts in setting bail because Congress considered this factor as inconsistent with the traditional purpose of bail—assuring the defendant's appearance in court.³¹ As a result, Congress also rejected the notion of preventive detention—detaining an accused in order to prevent the accused from continuing criminal activity while awaiting trial.³²

Three years later, in 1969, a new presidential administration called on Congress to reform the federal bail system. In response to the increase in crime, President Nixon issued a directive urging Congress to modify the Bail Reform Act of 1966 to allow for the temporary detention of defendants who presented a clear danger to the community while out on bail.³³ Based on this presidential directive, the United States Department of Justice, headed by Attorney General John Mitchell, proposed an amendment to the Bail Reform Act of 1966.³⁴

This amendment would have authorized the federal courts to hold pretrial detention hearings to determine whether a defendant should be incarcerated for up to sixty days upon a finding that he was charged with a crime of violence and that his release presented a danger to society.³⁵ The Attorney General explained that the acute increase in crime necessitated these changes.³⁶ It was necessary to amend the statute because the Bail Reform Act of 1966 excluded danger to the community as a factor the courts could consider in

29. 18 U.S.C. § 3146(a)(4) (1982).

30. 18 U.S.C. § 3146(b) (1982). This section prescribed that, in determining conditions of release which would reasonably assure the defendant's appearance in court, the judicial officer is to consider: the nature and circumstances of the offense, the weight of the evidence, and the defendant's financial resources, family ties, record of employment, character and mental condition, length of residence in the community, criminal record and his record of appearance or flight in previous cases.

31. Ervin, *Legislative Role*, *supra* note 17, at 447.

32. *Id.* at 443.

33. 27 CONG. Q. WKLY. REP. 238 (Feb. 7, 1969) (cited in John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969)).

34. S. 2600, 91st Cong., 1st Sess. (1969) (cited in Mitchell, *supra* note 33, at 1223 n.2).

35. 115 CONG. REC. S2600 (daily ed. July 11, 1969) (cited in Mitchell, *supra* note 33, at 1223 n.2).

36. "[T]he crisis we face from crime in our streets . . . makes it imperative for action to be taken along those lines." Letter from John Mitchell to the Speaker of the House of Representatives (July 11, 1969), *microformed on* CIS No. 70-H301-40 (Congressional Info. Serv.).

setting bail.³⁷ In order to deal with those defendants who posed such a substantial threat to the community that their release was considered dangerous, the statute would have to be modified to allow for the detention of these individuals without bail.³⁸ Attorney General Mitchell proposed limiting the period of pretrial detention to sixty days in order to mitigate the "burden of confinement" and to ensure that such detention did not violate due process.³⁹ The bill to amend the Federal Bail Reform Act of 1966, however, died in committee.⁴⁰

B. *The District of Columbia Bail Reform Legislation*

Although Congress did not amend the 1966 Act at that time, it did adopt the proposal to reform the bail procedures employed in the District of Columbia.⁴¹ Despite significant opposition,⁴² Congress

37. See *supra* note 31 and accompanying text.

38. Mitchell, *supra* note 33, at 1223.

39. *Id.* at 1239.

40. A bill authorizing preventive detention for federal criminal defendants was introduced in the Senate on July 11, 1969 (S2600, 91st Cong., 1st Sess. (1969)); see also 115 CONG. REC. at 19,256 (1969) and in the House of Representatives (H.R. 12606, 91st Cong., 1st Sess. (1969)); see also 115 CONG. REC. 19,352 (1969). The Senate bill was referred to the Senate Judiciary Subcommittee on Constitutional Rights, which refused to report the bill for further consideration. The subcommittee of the House Judiciary Committee also refused to take any further action on the bill. See Sam J. Ervin, Jr., *Preventive Detention, A Species of Lydford Law*, 52 GEO. WASH. L. REV. 113 (1983) [hereinafter *Preventive Detention*].

41. For a thorough analysis of the District of Columbia bail reform legislation, see Frederick D. Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 BROOK. L. REV. 277 (1971).

42. Senator Sam Ervin described the proposed District of Columbia Bail Reform legislation as "[a] bill to repeal the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution." *Hearings Before Senate Judiciary Committee*, 91st Cong., 2d Sess. (1970) *microformed on* CIS No. S301-10.1 at 2079 (Congressional Info. Serv.). He also characterized the proposed detention hearing as a "sort of a kangaroo court hearing" and as "a merry-go-round," by which "you can keep a man in jail until Gabriel's Horn is silent." *Hearings before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. (1970), *microformed on* CIS No. S521-28 at 273-276 (Congressional Info. Serv.). Congressman Abner Mikva proclaimed, "Masquerading as a crime-stopper, preventive detention is really a justice-stopper. In allowing the detention of accused persons before being adjudged guilty, this procedure itself perpetrates a 'crime of punishment without trial.'" 115 CONG. REC. at 37,373 (Dec. 5, 1969). Senator Muskie declared that the proposal for pretrial detention:

reflects a concept which runs counter to the presumption of innocence until guilt is proven beyond a reasonable doubt . . . an individual is deprived of his liberty on the mere possibility that he will be dangerous if released on bail and the probability that he is guilty of the crime for which he has been charged. . . . This is too high a price to pay for an 'acceptable legislative compromise.' . . . The law we write for the District should be a model for all the 50 States. Instead, the provisions of this conference report make the people of the District subjects for an experiment in repression.

116 CONG. REC., at 25, 187-90 (daily ed. July 21, 1970).

did finally pass the District of Columbia bail reform legislation on July 29, 1970.⁴³ This bail reform statute served as a prototype for the federal Bail Reform Act of 1984, providing much of the language for the Act.⁴⁴ Although it appears that a provision of the District of Columbia statute limiting pretrial detention to a period of sixty days eased its passage,⁴⁵ when Congress relied on this legislation to revise the federal bail system, it omitted any provision limiting the length of pretrial confinement.⁴⁶

The District of Columbia Bail Reform legislation authorized the courts to consider both danger to the community and risk of flight when setting bail.⁴⁷ If the court found that a person was charged

43. District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

44. Compare 18 U.S.C. §§ 3141-51 (1982) with D.C. CODE ANN. §§ 23-1321 to 1332 (1981).

45. Local District of Columbia editorials written or broadcast in favor of the passage of the bill, stressed the importance of the section of the legislation which limited the duration of pretrial detention to just sixty days:

It is our belief that the 1966 [Bail Reform Act] law should be changed. As matters stand, a federal judge can consider only one thing in passing upon a request for bail in a non-capital case—whether an accused person is likely to show up for his trial or whether he can be expected to flee to avoid trial. This limited discretion, we think, should be enlarged to permit a judge to take into consideration the danger to the community that could be created if a particular suspect were to be released prior to his trial. This is what is known as preventive detention.

Under a bill proposed by the Nixon administration, this additional discretion would be subject to tight restrictions. Preventive detention would apply only in the case of very serious felonies. The period of detention *could not exceed 60 days*

Editorial from THE EVENING STAR, Oct. 22, 1969, *microformed on* CIS No. H301-2.7 (emphasis added). Another editorial comment included the following: "The City Government is properly concerned with protecting the rights of the accused. But, we believe the Administration bill provides adequate safeguards. The suspect would *have to go to trial within 60 days after arrest*" Editorial Broadcast by WMAL/AM/FM/TV, July 13, 1969, *microformed on* CIS No. H301-2.7 (Congressional Info. Serv.) (emphasis added). Another commentary included:

Under the administration's proposal, carefully-designated suspects *may be detained up to 60 days*, but only on an order of the court and only after a full hearing. This is a drastic policy, for its net effect is to impose imprisonment in advance of conviction. But in this particular respect, the right of society to a reasonable degree of safety needs to be reinforced.

A WTOP Editorial, October 22 & 23, 1969, *microformed on* CIS No. H301-2.7 (Congressional Info. Serv.) (emphasis added).

46. For a discussion of Congress' decision to omit any provisions limiting the length of pretrial detention, see *infra* nn. 95-108 and accompanying text.

47. See D.C. CODE ANN. § 23-1321(b) (1989).

In determining which conditions of release, if any, will reasonably assure the appearance of a person as required or the safety of any other person or the community, the judicial officer shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense

with a dangerous crime,⁴⁸ or a crime of violence⁴⁹ or with the obstruction or attempt to obstruct justice,⁵⁰ the court was permitted to hold a detention hearing. At that hearing, the court could order the detention of the defendant if it found by clear and convincing evidence that no conditions of release would reasonably assure the safety of any other person or the community,⁵¹ and by a "substantial probability"⁵² that the defendant committed the offense charged. The legislation required that the trial of a detained defendant be placed on an expedited calendar.⁵³ It limited the pretrial detention to a period of just sixty days, unless the trial was in progress or the defendant had caused the delay in getting the case to trial.⁵⁴

The statute specifically stated that the filing of pretrial motions by the defendant could not be used to extend the sixty-day limitation on pretrial detention.⁵⁵ The language regarding the filing of motions by the defendant was added by the House of Representatives on July 14, 1970, just two weeks before Congress passed the legislation.⁵⁶ This addition was made "in order to make it perfectly clear"⁵⁷

charged, the weight of the evidence against such person, his family ties, employment, financial resources, character and mental conditions, past conduct, length of residence in the community, record of convictions, and any record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

Id.

48. D.C. CODE ANN. § 23-1322(a)(1) (1989).

49. D.C. CODE ANN. § 23-1322(a)(2) (1989).

50. D.C. CODE ANN. § 23-1322(a)(3) (1989).

51. D.C. CODE ANN. § 23-1322(b)(1)-(2) (1989).

52. D.C. CODE ANN. § 23-1322(b)(2)(C) (1989). In reporting on the proposed legislation that ultimately became the Bail Reform Act of 1984, the Senate Judiciary Committee referred to the "substantial probability" provision as an "overzealous exercise of legislative precaution," which constituted the "principal reason cited by prosecutors for the failure over the last ten years to request pretrial detention hearings" under the District of Columbia Bail Reform statute. Although the Senate committee concluded that the "substantial probability" requirement did provide some additional protection against the possibility of authorizing pretrial detention for defendants who are ultimately acquitted, it decided that "the validity of the charges against the defendant" would be assured because pursuant to Rules 4(a) and 5(a) of the Federal Rules of Criminal Procedure, the court must find by probable cause, that the defendant committed the offense with which he is charged, both at his initial appearance and then later at either a preliminary hearing or through the filing of a grand jury indictment. Thus the bill contained no "substantial probability" requirement. S. REP. NO. 98-147, 98th Cong., 1st Sess. 9, 45 (1983).

53. D.C. CODE ANN. § 23-1322(d)(1) (1989).

54. D.C. CODE ANN. § 23-1322(d)(2)(A) (1989).

55. D.C. CODE ANN. § 23-1322(d)(2)(A) (1989). A person shall be entitled to release "upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person *other than by the filing of timely motions* (excluding motions for continuances)". *Id.* (emphasis added).

56. H.R. CONF. REP. NO. 91-1303, 91st Cong., 2d Sess. 239-40 (1970) *microformed on*, CIS No. H303-22.

57. *Id.*

that any delay in the trial resulting from the defendant's filing of timely motions, such as a motion to suppress illegally obtained evidence or a motion for discovery, would not be considered a "delay at the request of the defendant."⁵⁸ Twelve years later, on July 21, 1982, the City Council of the District of Columbia amended the provisions of the District of Columbia Code⁵⁹ to permit an extension of pretrial detention from sixty to ninety days upon a showing of "good cause" by the prosecutor, but only for the "additional time required to prepare for the expedited trial" of a detained defendant.⁶⁰

C. *United States v. Edwards*

Eleven years after its passage, the District of Columbia Court of Appeals heard a constitutional challenge of the District of Columbia Bail Reform statute. In *United States v. Edwards*⁶¹ the defendant challenged the bail statute on a number of constitutional bases. He argued that pretrial detention constituted impermissible punishment before an adjudication of guilt in violation of the principle recognized in *Bell v. Wolfish*,⁶² denied him substantive and procedural due process,⁶³ and violated the "Excessive Bail Clause" of the Eighth Amendment.⁶⁴

The Court of Appeals rejected each of these arguments and upheld the constitutionality of the statute.⁶⁵ The defendant contended that pretrial detention violated the Fifth Amendment because it constituted impermissible punishment before an adjudication of guilt.⁶⁶ Addressing the defendant's argument that confinement before trial always constitutes punishment,⁶⁷ the court found it was necessary to determine whether pretrial detention was "penal" or "regulatory"

58. *Id.*

59. District of Columbia Bail Amendment Act of 1982, No. 4-223, 29 D.C. Reg. No. 33, 3479, 3480 (codified at D.C. CODE ANN. § 23-1321 (1989)).

60. D.C. CODE ANN. § 23-1322(d)(4) (1989).

61. 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

62. *Id.* at 1331. "Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with Due Process." *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 534-35 (1978)).

63. *Id.* at 1333, 1341.

64. *Id.* at 1325-30. Because this Article focuses on the issue of whether and when pretrial detention constitutes impermissible punishment in violation of substantive due process, the arguments regarding the Eighth Amendment as well as the procedural Due Process Clause of the Fifth Amendment will not be addressed here. For a thorough analysis of *United States v. Edwards*, see David J. Rabinowitz, Comment, *Preventive Detention and United States v. Edwards: Burdening The Innocent*, 32 AM. U. L. REV. 191 (1982).

65. See *Edwards*, 430 A.2d at 1324.

66. *Id.* at 1331.

67. *Id.*

in order to decide whether it constituted impermissible punishment or permissible regulation.⁶⁸ Although recognizing that it is sometimes difficult to determine whether a sanction is penal or regulatory,⁶⁹ the court relied on the test set out by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*⁷⁰ and reaffirmed in *Bell v. Wolfish*,⁷¹ to decide the question.⁷²

The District of Columbia Court of Appeals found the characterization of pretrial detention to be a "close question"⁷³ but concluded that pretrial detention was regulatory not penal.⁷⁴ The traditional reasons behind pretrial detention, the prevention of flight and the intimidation of witnesses, did not seek to punish the defendant for past behavior but, rather, sought to prevent any future behavior which would jeopardize the integrity of the judicial process.⁷⁵ The court also found that pretrial detention to prevent the commission of dangerous acts by the detainee was not intended to punish the defendant for prior acts but to "curtail reasonably predictable conduct" in the future.⁷⁶

The court examined the statutory history of the District of Columbia legislation, concluding that Congress intended pretrial detention to protect the safety of the community, not to punish the accused.⁷⁷ The court stated that pretrial detention permitted by the District of Columbia bail statute was not intended to promote any goal of punishment—retribution, deterrence or rehabilitation.⁷⁸ The statute was "closely circumscribed"⁷⁹ so as not to exceed its goal of incapacitating a potentially dangerous defendant before trial. In so concluding, the court of appeals specifically cited section 23-

68. *Id.*

69. *Id.* ("The distinction . . . is often elusive . . .").

70. 372 U.S. 144, 164-69 (1963).

71. 441 U.S. 520 (1979).

72. The District of Columbia Court of Appeals set forth the test as follows: Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on 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 rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned

United States v. Edwards, 430 A.2d 1321, 1332 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted), quoting *Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979)).

73. *Edwards*, 430 A.2d at 1331.

74. *Id.* at 1332.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1333.

79. *Id.*

1322(d)(2)(A) of the District of Columbia bail statute which required that pretrial detention be limited to sixty days, by which time the detainee's trial must have begun or bail must have been set.⁸⁰ The court viewed this as proof that Congress had carefully restricted pretrial detention to ensure that the defendant was merely incapacitated for a limited period before trial and not punished for an extended period before a finding of guilt.⁸¹

D. *The Operation of the Bail Reform Act of 1984*

Armed with the District of Columbia legislation authorizing pretrial detention on the ground of danger to the community and the decision in *United States v. Edwards*⁸² upholding the constitutionality of the District of Columbia bail statute, Congress set out to modify the Bail Reform Act of 1966. By this time Congress was determined to address what it perceived to be "the alarming problem of crimes committed by persons on release."⁸³ Congress intended to authorize courts "to make release decisions that give appropriate recognition to the danger a person may pose to others if released."⁸⁴ Consequently, in passing the Bail Reform Act of 1984,⁸⁵ Congress expanded the list of factors a judicial officer could consider in determining whether bail should be set in a particular case to include "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."⁸⁶ Further-

80. *Id.* See also D.C. CODE ANN. § 23-1322(d)(2)(A) (1989).

81. See *Edwards*, 430 A.2d at 1333.

82. *Id.* at 1324.

83. S. REP. No. 225, 98th Cong., 1st Sess. 3 (1983), reprinted in 1984 U.S.C.C.A.N. 3185.

84. *Id.*

85. 18 U.S.C. §§ 3141-3156 (1988).

86. 18 U.S.C. § 3142(g)(4) (1988). This section requires the judicial officer consider the available information concerning:

- (1) the nature and circumstances of the offense charged;
- (2) the weight of the evidence;
- (3) the history and characteristics of the person including:
 - (a) the defendant's character;
 - (b) his physical and mental condition;
 - (c) his family ties;
 - (d) his employment history;
 - (e) his financial resources;
 - (f) his length of residence in the community;
 - (g) his ties to the community;
 - (h) his past conduct;
 - (i) his history of drug or alcohol abuse;
 - (j) his criminal history;
 - (k) his previous record of appearances at court proceedings;
 - (l) whether at the time of the current offense or arrest, he was on

more, Congress authorized that either the Government⁸⁷ or the court⁸⁸ could move for the pretrial detention of the defendant.

In order to detain a defendant, the statute requires that the court hold a hearing where the judicial officer must determine "whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and/or the community. . . ." ⁸⁹ The Act provides the defendant with certain procedural rights at this detention hearing,⁹⁰ requiring the judicial officer to find by clear and convincing evidence "that no condition or combination of conditions will reasonably assure the safety of any other person and the community."⁹¹ Although the Act does not specifically state the Government's burden of proof regarding risk of flight, several courts have held that the Government need only show risk of flight by a preponderance of the evidence.⁹² Significantly, the Bail Reform Act of 1984 does not contain a major protection of the District of Columbia Bail Reform legislation—that the case of a pretrial detainee be placed on an

probation, parole or other release pending trial, sentencing, appeal or completion of a sentence; and

- (4) the seriousness of the danger the defendant's release would pose to any person or the community.

See id.

87. *See* 18 U.S.C. § 3142(f)(1)-(2) (1988). The Government may move for a detention hearing when the case involves:

- (1) a crime of violence;
- (2) an offense for which the maximum sentence is life imprisonment or death;
- (3) a drug offense carrying a maximum term of imprisonment of 10 years or more;
- (4) any felony committed after the person has been convicted of two or more of the above offenses (state or federal).

See id.

88. *See* 18 U.S.C. § 3142(f)(2) (1988). The Government or the court may request a detention hearing where it believes that a case involves:

- 1) a serious risk of flight; or
- 2) a serious risk that the defendant will or will attempt to obstruct justice or risk that the defendant will or will attempt to threaten, injure or intimidate a prospective witness or juror.

See id.

89. 18 U.S.C. § 3142(f) (1988).

90. *Id.* This section provides the defendant the right:

- (1) to be represented by counsel, either retained or appointed;
- (2) to testify;
- (3) to present witnesses on his own behalf;
- (4) to cross-examine witnesses who appear at the hearing; and
- (5) to present information by proffer or otherwise.

See id.

91. 18 U.S.C. § 3142(e) (1988).

92. *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Medina*, 775 F.2d 1398, 1402 (11th Cir. 1985).

expedited trial calendar,⁹³ with the duration of pretrial detention being limited to a specific period of time.⁹⁴

E. The Legislative History of the Federal Bail Reform Act

The Senate Judiciary Committee rejected the setting of a specific time period beyond which a defendant could not be detained. Rather, it looked to the provisions of the Speedy Trial Act,⁹⁵ to set the necessary time limits:

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93. See D.C. CODE ANN. § 23-1322(d) (1989):
The following shall be applicable to persons detained pursuant to this section:
- (1) The case of such person shall be placed on an expedited calendar and, consistent with the sound administration of justice, his trial shall be given priority.
 - (2) Such person shall be treated in accordance with section 23-1321 [allowing for pretrial release in other than first degree murder cases]—
 - (A) upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person other than by the filing of timely motions (excluding motions for continuances); or
 - (B) whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention.

Id.

94. See D.C. CODE ANN. § 23-1322(d)(4) (1989). This section states: Notwithstanding the sixty calendar day provision of paragraph (2)(A), any such person may be detained for an additional period not to exceed thirty days from the date of the expiration of such sixty calendar day period on the basis of a petition submitted by the United States attorney and approved by the judicial officer. Such additional period of detention may be granted only on the basis of good cause shown and shall be granted only for the additional time required to prepare for the expedited trial of such person. For the purposes of determining the maximum period of detention under this section, such a period not to exceed ninety days, the period begins on the date the defendant is first detained after arrest, and includes the days detained pending a detention hearing and the days in confinement on temporary detention under subsection (e) whether or not continuous with full pretrial detention.

Id.

95. See 18 U.S.C. § 3161(c)(1). This section states: In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

Id. See also 18 U.S.C. § 3164:

- (a) The trial or other disposition of cases involving—
 - (1) a detained person who is being held in detention solely because he is

18 U.S.C. 3161, (sic) [of the Speedy Trial Act] specifically requires that priority be given to a case in which a defendant is detained, and also requires that his trial must, in any event, occur within 90 days, subject to certain periods of excludable delay, These current limitations are sufficient to assure that a person is not detained pending trial for an extended period of time.⁹⁶

The Senate Judiciary Committee also rejected an amendment to the Speedy Trial Act⁹⁷ that would have reduced the period in which a pretrial detainee must be brought to trial from ninety to sixty days.⁹⁸

awaiting trial, and

- (2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk, shall be accorded priority.
- (b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. *The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.*
- (c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a) shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

Id. (emphasis added). For a thorough discussion of the interaction between the Bail Reform Act of 1984 and the Speedy Trial Act of 1974, see Allen Daniel Applbaum, Note, *As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO LAW REV. 1055 (1987).

96. See S. REP. NO. 225, 98th Cong., 1st Sess. 22 n.63 (1983), reprinted in 1984 U.S.C.C.A.N. 3205.

97. 18 U.S.C. §§ 3161-3174 (1988).

98. 130 CONG. REC. S945 (daily ed. Feb. 3, 1984) (Senator Grassley stated, "No evidence has been presented that at any time in our hearings [on the Bail Reform Act] that the 90 day Speedy Trial Act limit has not worked perfectly well to protect against lengthy incarceration.")

In an April 19, 1983 letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice, to Senator Strom Thurmond, Chairman of the Senate Committee on the Judiciary, Mr. McConnell strongly opposed such an amendment, stating that, "We have no doubt that the proposed amendment is well intentioned and agree that a speedy trial is especially important where a defendant must, for the protection of the integrity of the judicial process or the safety of the community be held pending trial. But the problems posed by the proposed reduction to 60 days of the Speedy Trial Act's present limit on pretrial detention are simply too great to justify its enactment as a means [sic] of furthering this principle." S. REP. NO. 98-147, 98th Cong., 1st Sess. app. at 93 (1983), *microformed* on CIS No. 83-S523-8 (Congressional Info. Serv.).

The Senate debate concerning the Bail Reform Act indicates that several senators believed that the ninety-day time period for bringing a detained defendant's case to trial under the Speedy Trial Act was firm and not likely to expand.⁹⁹ The senators apparently were not interested in, or at least not aware of, the practical reality of the Speedy Trial Act,¹⁰⁰ which permits the exclusion of time from the ninety-day limit on eighteen separate grounds.¹⁰¹ These exclusions include delay resulting from the filing of any interlocutory appeal,¹⁰² the filing of pretrial motions by either side,¹⁰³ or the granting of a continuance based on the judge's findings that the ends of justice served by taking such action outweigh the interest of the public and the defendant in holding a speedy trial.¹⁰⁴ Once the court finds an exclusion of time under any one of these grounds, the Speedy Trial Act stops the clock from running, and the ninety-day period is tolled.¹⁰⁵ This tolling delays the case of a detained defendant from proceeding to trial within the ninety-day period required by the Speedy Trial Act.¹⁰⁶ It results in further, and often protracted, incarceration of a presumptively innocent individual.¹⁰⁷

The lower federal courts quickly recognized that the Speedy Trial Act would not serve to protect defendants against lengthy pretrial incarceration.

[E]xperience under the combined operation of these two statutes [the Speedy Trial Act and the Bail Reform Act] may demonstrate that the realities of preparing for the trial of complex cases having

99. Senator Thurmond told the Senate that "the 90 days is the worst case limit," 130 CONG. REC. S941 (daily ed. Feb. 3, 1984); Senator Laxalt referred to the 90 day limit as the "upper bound," *id.* at S943; and Senator Grassley stated that "no defendant will be detained indefinitely while the processes of justice grind to a halt," *id.* at 945.

100. 18 U.S.C. §§ 3161-3174 (1988).

101. 18 U.S.C. § 3161(h)(1)-(9) (1988). These exclusions caused the Third Circuit to refer to the law as "the rather porous provisions of the Speedy Trial Act." *United States v. Perry*, 788 F.2d 100, 118 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986).

102. 18 U.S.C. § 3161(h)(1)(E) (1988).

103. 18 U.S.C. § 3161(h)(1)(F) (1988).

104. 18 U.S.C. § 3161(h)(8)(A) (1988).

105. The preceding 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 . . ." 18 U.S.C. § 3161(h) (1988).

106. 18 U.S.C. § 3164(b) (1988).

107. *See e.g.*, *United States v. Infelise*, 934 F.2d 103, 104 (7th Cir. 1991) ("defendants will have spent two years in jail without having been proved guilty of a crime."); *United States v. Ojeda Rios*, 846 F.2d 167, 168 (2d Cir. 1988) (over thirty-two months); *United States v. Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986) (over eight months); *United States v. Noriega*, 746 F. Supp. 1548, 1558 (S.D. Fla. 1990) (over one year); and *United States v. Gatto*, 750 F. Supp. 664, 673 (D.N.J. 1990) (over eighteen months).

numerous defendants and multi-count indictments are such that this congressional expectation [of having detained defendants being tried within ninety days] and policy may occasionally be frustrated. . . . Exclusions authorized by 3161(h) for pretrial motions by both sides, scheduling difficulties as well as unforeseeable delays granted in the interests 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.¹⁰⁸

II. THE ACT'S FACIAL CONSTITUTIONALITY: *UNITED STATES V. SALERNO*

In 1987, for the first and, thus far, only time the United States Supreme Court considered a constitutional challenge to the Act.¹⁰⁹ Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986. Along with thirteen others, they were charged in a twenty-nine count indictment.¹¹⁰ At the arraignment of the defendants, the Government conceded that neither Salerno nor Cafaro posed a risk of flight.¹¹¹ The prosecution argued for pretrial detention, however, based on the defendants' indictment for crimes of violence stemming from their alleged involvement in organized crime.¹¹² The Government contended that no conditions of bail would assure the safety of the community or any other person if either Salerno or Cafaro were released.¹¹³

108. *United States v. Colombo*, 777 F.2d 96, 101 (2d Cir. 1985) (footnotes omitted). See also *Melendez-Carrion*, 790 F.2d at 996 ("it may well be that the Senate did not fully appreciate just how long pretrial detention might last under the exclusions of the Speedy Trial Act"); *United States v. Gallo*, 653 F. Supp. 320, 342 (E.D.N.Y. 1986) ("[E]xtended imprisonment has become the rule rather than the exception whenever pretrial detention is used in complex, multi-count, multi-defendant actions. . . . Excludable time provisions of the Speedy Trial Act often push back the trial for months, and even years, despite the possible detention of defendants. . .").

109. *United States v. Salerno*, 481 U.S. 739 (1987).

110. The charges were as follows:

one count of conspiracy to violate the Racketeer Influence and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d) (1982); one count of participating in a racketeering enterprise, in violation of 18 U.S.C. § 1962(c) (1982); 16 counts of mail fraud, in violation of 18 U.S.C. § 1341 (1982); one count of wire fraud, in violation of 18 U.S.C. § 1343 (1982); eight counts of extortion, in violation of 18 U.S.C. § 1951 (1982); and one count of operating an illegal bookmaking business and one count of operating an illegal numbers business, in violation of 18 U.S.C. § 1955 (1982).

United States v. Salerno, 794 F.2d 64, 66-67 (2d Cir. 1986), *rev'd* 481 U.S. 739 (1987).

111. *United States v. Salerno*, 631 F. Supp. 1364, 1366 (S.D.N.Y.), *vacated* 794 F.2d 64 (2d Cir. 1986), *rev'd* 481 U.S. 739 (1987).

112. *Id.*

113. *Id.*

At the detention hearing, the prosecution proffered the testimony of two Government witnesses who, in the past, had testified in the trials of other organized crime figures.¹¹⁴ It also presented evidence from the search of an apartment where Cafaro lived and Salerno visited, as well as excerpts from wiretaps placed at various locations.¹¹⁵ The evidence proffered by the Government related largely to the defendants' alleged involvement in murder conspiracies and violence connected to their labor, loansharking and gambling enterprises.¹¹⁶

Following the hearing, the district court granted the Government's motion for detention.¹¹⁷ The court found that there was clear and convincing evidence that, due to their alleged involvement in violent crime, the two defendants presented a danger to society.¹¹⁸ The court ordered the defendants detained because it found that no conditions of release could reasonably assure that the defendants would not endanger the safety of the community.¹¹⁹

On appeal, the defendants argued, among other things, that the provision of the Bail Reform Act codified at section 3142(e), Title 18 of the United States Code, violated their rights to due process.¹²⁰ The defendants contended that this provision was unconstitutional because it allowed the court to order them held without bail pending a trial, solely on the ground that if released, they posed a danger to the community.¹²¹ The United States Court of Appeals for the Second Circuit agreed, holding that the "Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention."¹²²

The Second Circuit first noted that the only basis for this detention order was the finding that, if released, the defendants would likely continue their criminal business which involved threats and crimes of violence, thus posing a danger to the community.¹²³ The court further found that the pretrial detention of these defendants on this basis was unconstitutional because the deprivation of liberty in order to prevent future crimes violated due process.¹²⁴ The

114. *Id.* at 1367.

115. *Id.*

116. *Id.* at 1367-70.

117. *Id.* at 1375.

118. *See id.* ("When business as usual involves threats, beatings, and murders, the present danger such people pose to the community is self-evident.").

119. *Id.* at 1371, 1375.

120. *United States v. Salerno*, 794 F.2d 64, 71 (2d Cir. 1986), *rev'd* 481 U.S. 739 (1987).

121. *Id.*

122. *Id.* at 71.

123. *Id.*

124. *Id.* at 71-72.

court rejected the Government's contention that 18 U.S.C. § 3142(e) was a rational means of achieving the regulatory goal of protecting the public safety.¹²⁵ Although the court appreciated the objective of protecting the public from harm, it found that this goal could not be accomplished by incarcerating those merely accused and not convicted of crimes.¹²⁶ Citing *United States v. Melendez-Carrion*,¹²⁷ the court rejected the regulatory test advanced by the Government:

The fallacy of using such a test can be readily seen from consideration of preventive detention as applied to persons not arrested for any offense. *It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.* Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulating to promote even a substantial government interest.¹²⁸

In finding that the incarceration of a presumptively innocent individual to prevent future crimes exceeds the limits of due process, the court concluded that the Fifth Amendment permits the incarceration of individuals only as a punitive measure after they have been convicted of a crime and not as a regulatory measure to control the activities of those merely accused of a crime.¹²⁹ The court rejected the Government's position that the mere filing of criminal charges against individuals for alleged past criminal activity permitted the regulation of their conduct through detention.¹³⁰ Finally, the court found that "[t]he proper remedy for charges of past crimes, assuming they are proven," is the imposition of a penalty after trial and not incarceration before trial.¹³¹

On certiorari, the United States Supreme Court reversed.¹³² For the first time in the history of this country, the Supreme Court upheld the constitutionality of a statute that permitted the pretrial incarceration of adult defendants merely charged with, but not convicted of, noncapital offenses.¹³³ In a six-to-three decision, delivered by Chief Justice Rehnquist, the Court found that the Act is

125. *Id.* at 72-73

126. *Id.* at 73.

127. 790 F.2d 984 (2d Cir. 1986).

128. *Salerno*, 794 F.2d at 72 (citing *Melendez-Carrion*, 790 F.2d at 1000-01).

129. *See id.* at 73-74.

130. *Id.* at 72-73.

131. *Id.* at 73.

132. *United States v. Salerno*, 481 U.S. 739, 741 (1987).

133. *Id.*

not facially unconstitutional under either the Due Process Clause of the Fifth Amendment¹³⁴ or the Excessive Bail Clause of the Eighth Amendment.¹³⁵

The Court first examined the issue of whether the Act violates substantive due process because it authorizes impermissible punishment before trial in violation of the principle set forth in *Bell v. Wolfish*.¹³⁶ In order to make this determination, the Court examined the legislative history of the Act to ascertain whether Congress intended to punish or merely regulate the conduct of those whose detention was sought by the Government or the court.¹³⁷ It reiterated Congress' position that the Act is a legislative response to "the alarming problem of crimes committed by persons on release."¹³⁸ The Court found that unless Congress expressly intended to punish the detained defendant, the "punitive/regulatory distinction"¹³⁹ turns on whether the restriction serves some valid regulatory purpose and is not excessive in effecting this goal.¹⁴⁰ In examining the legislative history, the Court concluded that Congress intended for pretrial detention of adult defendants to address the problem of continued criminal activity by those released on bail and not to punish dangerous individuals.¹⁴¹

The Court looked to its recent decision in *Schall v. Martin* to decide the issue.¹⁴² In that case the Court upheld the constitutionality of a section of the New York Family Court Act that authorized pretrial detention of an accused juvenile delinquent who posed a "serious risk"¹⁴³ of further criminal activity. The Court held that the detention authorized by the New York statute served a legitimate regulatory function and, therefore, did not violate substantive due process under the Fourteenth Amendment.¹⁴⁴ The Court reasoned that society has a legitimate and compelling interest in protecting

134. *Id.* at 755.

135. *Id.* at 752. Because the focus of this Article is the constitutionality of pretrial detention under the Due Process Clause of the Fifth Amendment, there will be no discussion of the Court's ruling with respect to the Eighth Amendment. For a thorough examination of the Court's decision in *United States v. Salerno* see Donald W. Price, Comment, *Crime and "Regulation": United States v. Salerno*, 48 LA. L. REV. 743 (1988); Howard, *supra* note 12; Eason, *supra* note 12; Lupo, *supra* note 12.

136. *United States v. Salerno*, 481 U.S. at 746 (citing *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)).

137. *Id.* at 747.

138. *Id.* at 742 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 3 (1983)).

139. *Id.* at 747.

140. *Id.* at 747 (citing *Kennedy v. Mendoza-Martinez*, 373 U.S. 144, 168-69 (1963)).

141. *Id.* at 747.

142. 467 U.S. 253 (1984).

143. *Id.* at 255 (citing N.Y. FAM. CT. ACT § 320.5 (McKinney 1983)).

144. *Id.* at 257.

itself from crime and protecting juveniles from their own criminal conduct.¹⁴⁵ Although the Court recognized that juveniles have a substantial interest in their own liberty, this interest is qualified because, unlike adults, juveniles are "always in some form of custody."¹⁴⁶ The Court also found that because the pretrial confinement in *Schall* was restricted to a period of just seventeen days,¹⁴⁷ and the place of incarceration was either an open facility in the community or a secure one which resembled a dormitory,¹⁴⁸ this limited detention was intended to regulate the juvenile's conduct not to punish him.¹⁴⁹

Applying the principles of *Schall* to *Salerno*¹⁵⁰ the Court also examined the features of the Act and decided that they too reflect the regulatory, rather than punitive, objectives of the statute.¹⁵¹ As in *Schall*,¹⁵² the Bail Reform Act of 1984 requires that individuals be detained in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal."¹⁵³ The Court also found, that because the Act strictly limits the type of cases in which pretrial detention may be imposed, its regulatory purpose was not violated.¹⁵⁴ Lastly, the Court found that because the defendant receives a prompt detention hearing¹⁵⁵ and "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act,"¹⁵⁶ the Act is regulatory.¹⁵⁷

Citing numerous examples, the Court found that under certain circumstances the government's regulatory interest in community safety can outweigh an individual's liberty interest in a particular case.¹⁵⁸ In determining whether the Act is excessive in effecting its

145. *Id.*

146. *Id.* at 265.

147. *Id.* at 270. In relying on *Schall v. Martin*, the Court in *Salerno* neglected to mention that the defendants in the latter case had already spent ten months in custody by the time their case was heard by the Supreme Court. *See id.*

148. *Id.* at 271.

149. *Id.* at 269.

150. 481 U.S. 739 (1987).

151. *Id.* at 747-48.

152. 467 U.S. 253 (1984).

153. *United States v. Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3142(i)(2)). In practice, however, this is not always the case. *See, e.g., United States v. Gallo*, 653 F. Supp. 320, 336, 340 (E.D.N.Y. 1986).

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

155. *Id.*

156. *Id.* at 757 (citing 18 U.S.C. §§ 3161-64).

157. In practice, the time limits of the Speedy Trial Act have not proven to be so stringent and have not effectively restricted the period of pretrial detention. *See supra* notes 95-108 and accompanying text.

158. For instance, during wartime the Supreme Court has held the government may detain individuals whom the government believes to be dangerous. *See, e.g.,*

regulatory goal, the Court first noted that the government has a legitimate and compelling interest in preventing further crime by an individual who has already been arrested and charged with a criminal offense.¹⁵⁹ The Court found that the Act is not excessive because it narrowly focuses on the critical problem of crime committed by one already charged with an offense in which the government has an overwhelming interest;¹⁶⁰ it implicates only a limited number of individuals who have been charged with very serious violations of the law;¹⁶¹ it requires the government to establish by probable cause that the defendant has committed the charged offense;¹⁶² and through a detention hearing, the prosecution must persuade the court by clear and convincing evidence that "no conditions of release can reasonably assure the safety of the community or any person."¹⁶³

The Court found that even though an individual does have a substantial interest in liberty, under these carefully drawn and limited circumstances, this interest is outweighed by those of the government.¹⁶⁴ The Court concluded that "under these circumstances we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'"¹⁶⁵ and, therefore, the Court found no violation of substantive due process.¹⁶⁶

With respect to the defendants' procedural due process challenge to the Act, the Court stated that it need only find the Act's procedures "adequate to authorize the pretrial detention of at least some [persons] charged with crimes."¹⁶⁷ The Court found that the procedural requirements of the Act pass that test as well.¹⁶⁸ Noting that "there is nothing inherently unattainable about a prediction of

Ludecke v. Watkins, 335 U.S. 160 (1948) (approved the "unreviewable executive power to detain enemy aliens in time of war"). This interest in protecting the community's interest in safety is not limited, however, to wartime. *See, e.g.*, Schall v. Martin, 467 U.S. 253 (1984) (approved a post-arrest regulatory detention of juveniles when they present a continuing danger to the community); Gerstein v. Pugh, 420 U.S. 103 (1975) (police may arrest and hold a suspect for a short period of time until a neutral magistrate determines whether probable cause exists); Carlson v. Landon, 342 U.S. 524, 537-42 (1952) (no absolute constitutional barrier to the detention of potentially dangerous resident aliens pending deportation proceedings).

159. United States v. Salerno, 481 U.S. 739, 749 (citing *DeVeau v. Brausted*, 363 U.S. 144, 155 (1960)).

160. *Salerno*, 481 U.S. at 750.

161. *Id.* (citing 18 U.S.C. § 3142(f)).

162. *Id.* at 750.

163. *Id.*

164. *Id.* at 750-51.

165. *Id.* at 711 (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

166. *Id.*

167. *Id.* at 751 (quoting *Schall*, 467 U.S. at 264).

168. *Id.* at 751.

future criminal conduct,"¹⁶⁹ the Court found that the procedural requirements of the Act, including the defendant's right to counsel,¹⁷⁰ the right to testify in one's own behalf,¹⁷¹ the right to present information by proffer and to cross-examine those witnesses who appear at the hearing,¹⁷² and the right to immediate appeal of the decision,¹⁷³ militate in favor of an accurate determination that the defendant presents a danger to the community. Furthermore, the Court decided that the Act did not violate procedural due process¹⁷⁴ because the Act demands that the Government must prove by clear and convincing evidence that the defendant poses a threat to the safety of the community.¹⁷⁵ In addition the court must consider specific statutory factors in determining whether to detain the defendant¹⁷⁶ and must prepare written findings of fact and a statement of reasons supporting its decision.¹⁷⁷

The Supreme Court concluded that in view of "the legitimate and compelling regulatory purpose of the Act and the procedural protection it offers,"¹⁷⁸ the Act was not facially invalid under either the substantive or procedural Due Process Clause of the Fifth Amendment. In a footnote, the Court did comment, however, that "we intimate no view as to the point at which detention in a particular case might become excessively prolonged, and, therefore, punitive in relation to Congress' regulatory goal."¹⁷⁹ The issue, therefore, remained: at what point in time does detention become punitive rather than regulatory?

III. WHEN DOES PRETRIAL DETENTION VIOLATE SUBSTANTIVE DUE PROCESS?

The Fifth Amendment protects against deprivation of liberty without due process of law¹⁸⁰ and prohibits the imposition of punishment before trial.¹⁸¹ Absent extraordinary circumstances, it would violate due process to imprison a person deemed to be a danger to society who was not accused of a crime.¹⁸² Yet the Bail Reform Act

169. *Id.* at 751 (quoting *Schall*, 467 U.S. at 278).

170. *Id.* (citing 18 U.S.C. § 3142(f)).

171. *Id.* (citing 18 U.S.C. § 3142(f)).

172. *Id.* (citing 18 U.S.C. § 3142(f)).

173. *Id.* (citing 18 U.S.C. § 3145(c)).

174. *Id.*

175. *Id.* (citing 18 U.S.C. § 3142(f)).

176. *Id.* at 751-52 (citing 18 U.S.C. § 3142(g)).

177. *Id.* at 752 (citing 18 U.S.C. § 3142(i)).

178. *Id.*

179. *Id.* at 748 n.4.

180. U.S. CONST. Amend. V.

181. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

182. *United States v. Melendez-Carrion*, 790 F.2d 984, 1001 (1986). For such extraordinary circumstances see *supra* note 158 and accompanying text.

of 1984 authorizes the pretrial detention of an accused, who is presumed innocent, based on the finding that the accused presents a danger to society or a risk of flight.¹⁸³ As discussed, the Supreme Court in *United States v. Salerno*¹⁸⁴ upheld this provision of the Act as being regulatory rather than punitive, but left open the question of when such pretrial confinement crosses the line from permissible regulation to impermissible punishment.¹⁸⁵ This section will explain how the factors the courts use to make such a determination are inappropriate and, often, inconsistently applied. It will analyze, for example, why it is unconstitutional to allow the courts to extend the pretrial detention of defendants simply because they file pretrial motions that contribute to the delay in getting their cases to trial. It will conclude that because these tests do not effectively protect the due process rights of detained defendants, there should be a bright-line point at which pretrial detention is determined to be unduly protracted, and therefore, punitive in all cases.

A. *The Impact of the Bail Reform Act of 1984*

In order to fully appreciate the profound impact of the Act, it is first necessary to examine the number of individuals being detained under the statute.¹⁸⁶ In passing the Bail Reform Act of 1984, Congress seriously underestimated the number of individuals who would be detained pending trial.¹⁸⁷ It is difficult to accurately ascertain the total number of federal defendants detained pretrial because the Administrative Office of the United States Courts does not maintain this statistic. The Office does, however, maintain figures regarding the total number of defendants against whom criminal cases are filed and upon whom the Pretrial Services Agency (PSA) of the

183. 18 U.S.C. § 3142(e).

184. 481 U.S. 739 (1987).

185. *Id.* at 747 n.4.

186. Since the Supreme Court upheld the constitutionality of pretrial detention in the *Salerno* case in May of 1987, only the statistics for the period from July 1, 1987 to June 30, 1988; July 1, 1988 to June 30, 1989; and July 1, 1989 to June 30, 1990 will be included herein.

187. In a May 24, 1983, letter from Alice M. Rivlin, Director of the Congressional Budget Office to Senator Strom Thurmond, Chairman of the Senate Committee on the Judiciary, the Congressional Budget Office (CBO) estimated the cost to the federal government of implementing this law. The CBO assumed that the number of federal defendants would continue at its recent average—about 44,000 per year and that approximately 19 percent of this population would be affected by this bill. REPORT OF THE COMMITTEE ON THE JUDICIARY ON S. 215, S. REP. No. 147, 98th Cong., 1st Sess. 65-66 (1983). Statistics derived from the annual reports of the Administrative Office of the United States Courts for the years 1987, 1988 and 1990 strongly contradict this estimate. See *infra* notes 205-215 and accompanying text.

federal courts activates a case.¹⁸⁸ The PSA gathers information used by the federal courts to make decisions regarding the detention or the release of defendants charged with federal offenses.¹⁸⁹ The number of criminal filings exceeds the number of PSA cases because the total number of filings may include the names of an individual who is named in more than one criminal filing¹⁹⁰ and because the PSA figure only encompasses those defendants with whom the PSA has had contact in an official capacity.¹⁹¹ Some defendants, for example, choose not to be interviewed by the PSA.¹⁹²

The following table sets forth the total number of criminal filings in federal court, the total number of PSA cases activated, the total number and percentage of PSA cases where detention was sought and ordered, as well as the total number, percentage and reasons for this detention. It demonstrates that the total percentage of the PSA-activated cases in which detention was sought rose approximately five percent in the three-year period between July 1, 1987 through June 30, 1990. It also shows that detention was ordered in three-fourths of the PSA-activated cases where detention was sought, and that the total number of defendants detained in PSA-activated cases increased by over four thousand in the three-year period.

PRETRIAL DETENTION 1987-1990

Dates	Total Crim. Defendants Filed ¹⁹³	Pretrial Services Agency (PSA) ¹⁹⁴ cases activated	Number of motions for detention filed by gov'n't and court in PSA cases	% of PSA activated cases where detention is sought	Total Number of defendants detained in PSA activated cases	% of PSA activated cases where detention ordered
July 1, 1987 to June 30, 1988 ¹⁹⁵	49,658	34,664	10,256	30	7,625	74
July 1, 1988 to June 30, 1989 ¹⁹⁶	51,307	41,562	13,815	33	10,249	74
July 1, 1989 to June 30, 1990 ¹⁹⁷	54,193	46,101	16,204	35	11,945	74

188. 1988-1990 ADMIN. OFFICE OF U.S. COURTS ANNUAL REPORT [hereinafter ANNUAL REPORT].

189. 1988 ANNUAL REPORT 45.

190. 1990 ANNUAL REPORT 29.

191. Interview with Glen Vaughn, Chief Pretrial Services Officer, Southern District of California (April 15, 1992).

192. *Id.*

193. This figure "includes persons proceeding by indictment, information or consent on complaint and persons in fugitive status. It excludes petty, traffic, escapes

REASONS FOR DETENTION

Dates	Flight		Danger to Witness		Danger to Community		Flight and Danger	
	Total PSA Cases	Percent of PSA Cases	Total PSA Cases	Percent of PSA Cases	Total PSA Cases	Percent of PSA Cases	Total PSA Cases	Percent of PSA Cases
July 1, 1987 to June 30, 1988	3,745	49	125	1	956	13	2,799	37
July 1, 1988 to June 30, 1989	4,647	45	139	1	1200	12	4,263	42
July 1, 1989 to June 30, 1990	5,268	44	150	1	1503	13	5,024	42

B. The Evolution of a Due Process Test

The Bail Reform Act of 1984 was passed on October 12, 1984.¹⁹⁸ Almost immediately after the passage of the Act, defendants detained under the new legislation began to argue that not only the fact, but the length, of their pretrial detention constituted punishment before an adjudication of guilt, thereby violating their rights to substantive due process.¹⁹⁹ To address this argument, courts first had to devise a test to determine whether a period of pretrial detention passed from permissible regulation to impermissible punishment.

From the time the courts first began to examine the question of an allowable length of pretrial detention, they have rejected the use

[sic] reopens, removals and complaints dismissed at initial appearance." 1988 ANNUAL REPORT 377 n.1; 1989 ANNUAL REPORT 375 n.1; 1990 ANNUAL REPORT 248 n.1.

194. A PSA case is activated on each criminal defendant who chooses to confer with a pretrial services agent. "This column may include persons counted once as a PSA case, but named in more than one criminal filing." 1988 ANNUAL REPORT 377 n.2; 1989 ANNUAL REPORT 375, n.2; 1990 ANNUAL REPORT 248 n.2.

195. 1988 ANNUAL REPORT at 374, 386 (all information for time period of 1987-1988).

196. 1989 ANNUAL REPORT at 372, 384 (all information for time period 1988-1989).

197. 1990 ANNUAL REPORT at 247, 253 (all information for time period of 1989-1990). The 1990 Annual Report of the Proceedings of the Judicial Conference called the state of pretrial detention a "crisis" and noted that "the average number of defendants in pretrial detention has more than doubled in the past four years." 1990 PROCEEDINGS OF THE JUDICIAL CONF. ANNUAL REPORT 16.

198. See Pub. L. No. 98-473, 98 Stat. 1985 (1984).

199. See, e.g., *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991); *United States v. Gatto*, 750 F. Supp. 664 (D.N.J. 1990); *United States v. Noriega*, 746 F. Supp. 1548 (S.D. Fla. 1990);

of any "per se" test.²⁰⁰ They have all agreed that because "due process is a flexible concept,"²⁰¹ the due process limit on the duration of pretrial detention should be evaluated on a case-by-case basis. The courts have avoided drawing any bright lines that determine "precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial."²⁰² No court has "expressed a definitive view as to when a period of pretrial detention is so excessive as to impinge on a defendant's due process rights."²⁰³ All courts that have examined this issue, however, have agreed that after the passage of some period of time, pretrial detention may pass from permissible regulation to impermissible punishment.²⁰⁴

The question arose as to what factors should be used to determine if the length of detention had become unduly protracted and, therefore, punitive rather than regulatory. A description of the evolution of the due process tests will demonstrate that, because the courts received no guidance from either Congress or the Supreme Court as to what factors should be considered in making this decision, the courts' approach to this question was inconsistent and arbitrary. This same flawed approach continues to be used today.

In one of the first cases to address the issue of a constitutionally permissible length of pretrial detention, the Chief Judge of the Eastern District of New York, Jack B. Weinstein, upheld the magistrate's decision to release defendant Anthony Colombo on bail after an initial detention order had resulted in Colombo's ninety-day pretrial incarceration.²⁰⁵ In deciding to uphold the magistrate's release order, Judge Weinstein first relied on the statutory factors.²⁰⁶ He

200. See, e.g., *United States v. Berrios-Berrios*, 791 F.2d 246 (2d Cir.) cert. dismissed, 479 U.S. 978 (1986); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985); *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985); *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), *app. dismissed* sub nom. *United States v. Cheesman*, 783 F.2d 38 (2d Cir. 1986); *United States v. Hall*, 651 F. Supp. 13 (N.D.N.Y. 1985); *United States v. Hazzard*, 598 F. Supp. 1442, 1451 n.5 (N.D. Ill. 1984).

201. See, e.g., *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986).

202. *Id.*

203. *United States v. Infelise*, 1990 WL 77795 at *2 (N.D. Ill. May 15, 1990) (memorandum opinion and order).

204. See, e.g., *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Noriega*, 746 F. Supp. 1548 (S.D. Fla. 1990); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991).

205. *United States v. Colombo*, 616 F. Supp. 780, 788 (E.D.N.Y.), *rev'd* 777 F.2d 96 (2d Cir. 1985).

206. *Id.* at 784. The Court is to examine:

(1) nature and circumstances of the offense charged, including whether the

found that the Government had failed to establish by clear and convincing evidence that detention was necessary because, in this case, the court could devise bail conditions which would assure the safety of the public.²⁰⁷

Another significant reason for Judge Weinstein's decision was that the defendant's trial was not likely to begin for another thirteen to twenty-four months.²⁰⁸ The judge reached this conclusion because the indictment contained seventy-one counts, the charges were complex, there were twenty-four other defendants in the case, and many pretrial motions had been filed to which the Government had not yet responded.²⁰⁹ The judge recognized that Congress had excluded the length of pretrial detention in the statutory list of factors the court should use in determining whether to order the pretrial detention of a defendant.²¹⁰ He found, however, that it was necessary to consider this factor because otherwise a defendant, in effect, would "be sentenced to a long term of imprisonment on the theory that he is guilty as charged, without affording him the due process of law available at trial."²¹¹ Consequently, he considered the likely length of pretrial detention in determining whether the defendant should be released or detained.²¹² He found that the anticipated delay in bringing Colombo to trial justified his release on bail.²¹³

Three months later, while the defendant was still being detained, the United States Court of Appeals for the Second Circuit reversed Judge Weinstein's decision.²¹⁴ The court held that the conditions set by the lower court were insufficient to assure that the defendant would not pose a danger to the community.²¹⁵ More importantly, the court concluded that the release of the defendant based on the anticipated length of his pretrial incarceration was premature at that time.²¹⁶ It thereby rejected the predominant factor used by the Chief

offense is a crime of violence or involves a narcotic drug;

(2) weight of the evidence against the person;

(3) the history and characteristics of the person . . . ;

(4) the nature and seriousness of the danger to any person or the community that would be posed by release.

18 U.S.C. § 3142(g) (1988).

207. *Colombo*, 616 F. Supp. at 785.

208. *Id.*

209. *Id.* at 786-87.

210. *Id.* at 784.

211. *Id.* at 786.

212. *Id.*

213. *Id.*

214. *United States v. Colombo*, 777 F.2d 96, 101 (2d Cir. 1985).

215. *Id.* at 99. "The particular danger that Colombo . . . was found to pose—that of an alleged supervisor and director of the 'Colombo Crew'—is hardly alleviated by the type of conditions established by the district court." *Id.* at 100.

216. *Id.*

Judge to determine the issue. Even though the defendant had already been detained for seven months when the appellate court reviewed the matter, the court found that, at this stage, the case did not present the issue of whether the length of the defendant's pretrial detention violated due process.²¹⁷ Because the trial date was not yet set and the court did not know who would cause any further delays or what the reasons for the delays would be, it held it was premature to determine that the defendant must be released to protect his due process rights. The court conceded that the combined operation of the Bail Reform Act and the Speedy Trial Act "might not work perfectly well to protect against lengthy incarceration,"²¹⁸ and in "such a case, the length of a defendant's pretrial detention might not survive a proper due process challenge."²¹⁹ Nonetheless it held that this was not the case because the anticipated delay in trial was merely speculative and Colombo had not moved to expedite his trial or sever his case from that of his codefendants.²²⁰ Consequently, the Court would not find that the defendant's rights to due process had been violated.²²¹

Soon after Judge Weinstein rendered his decision in *Colombo*,²²² the Chief Judge of the United States District Court for the Northern District of New York, Howard Munson, examined the issue of whether a defendant's six-month pretrial detention constituted a violation of his due process rights.²²³ In deciding that this period of detention did violate the defendant's rights to due process, the court used a balancing test, "[w]eighing the defendant's interest in liberty against society's interest in his continued detention."²²⁴ Although the court found that the defendant did pose a risk of flight and potential danger to the community, Judge Munson ruled that the defendant's six-month pretrial incarceration up to that point and the likelihood of future incarceration for at least three additional months before trial outweighed those concerns.²²⁵ Because the court had declared

217. *Id.* at 101.

218. *Id.* at 101. The court of appeals noted that Congress had relied on the Speedy Trial Act, 18 U.S.C. §§ 3161-64 (1988), to limit the period of pretrial incarceration but that in a complex case such as this, excludable time under 18 U.S.C. § 3161(h) such issues as: the filing and consideration of pretrial motions by both sides, the scheduling difficulties of all parties and the delays in the interest of justice, would substantially delay trial and would likely extend trial for detained defendants well beyond the ninety days set forth in section 3164. *Id.*

219. *Id.* at 101.

220. *Id.*

221. *Id.*

222. 616 F. Supp. 780 (E.D.N.Y. 1985).

223. *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), *appeal dismissed sub nom. United States v. Cheesman*, 783 F.2d 38 (2d Cir. 1986).

224. *LoFranco*, 620 F. Supp. at 1326.

225. *Id.*

the case complex under the Speedy Trial Act,²²⁶ this case was exempt from the time requirements under that statute. Consequently, there were no limitations on the amount of time this defendant could spend in custody awaiting his trial. The court, therefore, found that the defendant's rights to due process under the Fifth Amendment had been violated.

Soon after, in January of 1986, defendants in the case of *United States v. Accetturo*²²⁷ argued that the Bail Reform Act of 1984 violated due process because it failed to include any provision directing the courts to consider the probable length of pretrial detention when initially determining whether a defendant should be ordered detained or released.²²⁸ The United States Court of Appeals for the Third Circuit rejected this argument.²²⁹ It ruled that in relying on the Speedy Trial Act²³⁰ to govern the length of pretrial delay, Congress had provided for a "rational scheme for limiting the duration of federal pretrial detention."²³¹ The court found that because, at the time of the initial detention hearing, the probable length of pretrial detention and the responsibility for that delay was speculative, the consideration of probable length of pretrial detention at that time would be inappropriate.²³² It thereby rejected the concern that Judge Weinstein had thought to be so critical.

The court did recognize, however, that pretrial detention could not last indefinitely without resulting in a violation of due process.²³³ Accordingly, the court fashioned a test enumerating the factors that should be used at a hearing to determine whether the length of the defendant's pretrial detention violated due process.²³⁴ Citing no authority and relying on no statutory language or enunciated judicial principles, the Third Circuit ruled that a court should consider the factors relevant in the initial detention hearing "such as the seriousness of the charges, the strength of the government's proof that defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits."²³⁵ In addition, the court ruled that such additional factors as "the length of the detention that has in fact occurred, the complexity of the case, and

226. *Id.* at 1325. If a case is "unusual" or "complex" the time limit provisions of the Speedy Trial Act do not apply. See 18 U.S.C. § 3161(h)(8)(B)(ii) (1988).

227. 783 F.2d 382 (3d Cir. 1986).

228. *Id.* at 387.

229. *Id.*

230. 18 U.S.C. §§ 3161-3164 (1988).

231. *Accetturo*, 783 F.2d at 388.

232. *Id.*

233. *Id.* ("[A]t some point due process may require a release from pretrial detention or, at a minimum, a fresh proceeding at which more is required of the government than is mandated by section 3142 [of the Bail Reform Act].").

234. *Id.*

235. *Id.*

whether the strategy of one side or the other has added needlessly to that complexity" should be considered.²³⁶ The Third Circuit did not include in its formulation Judge Weinstein's major concern, the likely length of future detention. Although the defendants in *Accetturo* had already been detained for three months and were not scheduled for trial for an additional two months,²³⁷ the court failed to decide whether their due process rights had been violated by this term of pretrial detention.²³⁸

Several months later, in November of 1986, the United States Court of Appeals for the Second Circuit addressed the constitutional challenge of appellants who argued that their fourteen-month pretrial detention on the grounds of risk of flight violated their rights to due process.²³⁹ The Second Circuit, like the Third Circuit in *Accetturo*,²⁴⁰ recognized that at some point the length of pretrial detention raises a constitutional issue and that each such challenge must be decided on its own facts.²⁴¹ The court devised its own test to decide whether the duration of pretrial detention violated due process. This test considered the length of detention that the defendants had already endured, the nonspeculative length of future detention, the extent of the Government's responsibility for the pretrial delay, and the strength of the evidence of the defendant's risk of flight, or danger to the community when relevant.²⁴² The Second Circuit, unlike the Third Circuit, emphasized that the duration of the detention was a "central focus of our inquiry."²⁴³ At some point in time, irrespective of other circumstances, the sheer length of pretrial detention would violate due process.²⁴⁴

Also unlike the Third Circuit, the Second Circuit Court did not find it necessary to revisit such issues as the seriousness of the charges or the strength of the Government's case on the merits to determine whether the length of the defendant's pretrial incarceration violated

236. *Id.*

237. *Id.* at 387.

238. *Accetturo* is particularly noteworthy on the issue of pretrial detention. Some of the defendants in this case were held in pretrial detention for an extended period of time and after a twenty-one month jury trial, all twenty defendants were acquitted of all charges. See Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 719 (1990).

239. *United States v. Gonzales-Claudio*, 806 F.2d 334, 335 (2d Cir. 1986).

240. 783 F.2d 382 (3d Cir. 1986).

241. *Gonzales-Claudio*, 806 F.2d at 340.

242. *Id.* at 340-41.

243. *Id.* at 340. The court also noted the importance of considering the prosecution's role in the trial delay and the strength of the evidence indicating risk of flight.

Id.

244. *Id.* However, the court stated that "in most cases likely to be encountered it is more consonant with due process jurisprudence to consider factors in addition to passage of time." *Id.*

due process. Instead, the court was much more concerned with the status of the case at the time of the due process challenge. It considered how long the pretrial detention of the defendant had already lasted, how much longer it was scheduled to last, to what extent the Government bore responsibility for the pretrial delay, and whether the facts that supported initial pretrial detention on the basis of risk of flight (or danger to the community, when relevant) were constitutionally sufficient to extend the detention.²⁴⁵

The Second Circuit found that the fourteen-month pretrial confinement, with the certainty of at least another twelve months to the end of trial, militated in favor of a violation of due process.²⁴⁶ Added to that was the Government's responsibility for a significant portion of the delay due to its dilatory tactics in providing the defense with discovery such as certified translations of audiotapes and videotapes.²⁴⁷ The court concluded that although the district court was not clearly erroneous in its finding that the defendants posed a risk of flight, in view of the protracted length of the pretrial detention, the facts regarding flight were insufficient to permit continued detention of the defendants.²⁴⁸

At almost exactly the same time, in *United States v. Gallo*,²⁴⁹ Chief Judge Weinstein was again examining the constitutionality of prolonged pretrial detention in a case where defendants had been incarcerated for almost five months on the grounds that they posed a danger to a Government witness.²⁵⁰ The Chief Judge opined that assessing whether or not a defendant's rights to due process had been denied was a "delicate and complex" matter.²⁵¹ He concluded that a decision regarding the release of a defendant should be left to the discretion of the trial court because as the factfinder on the issues of risk of flight and danger to the community, it was in the best position to determine whether release or detention was appropriate.²⁵²

Judge Weinstein found that the statutory factors set forth in the Bail Reform Act of 1984 for an initial determination regarding release or detention of the defendant would have to be reconsidered at the time of a due process challenge by the defendant.²⁵³ In addition, he

245. *Id.*

246. *Id.* at 343. "[T]he Due Process Clause endeavors to set outer limits at which risks to society must be accepted to avoid unconscionable deprivations of the liberty of individuals." *Id.*

247. *Id.* at 342.

248. *Id.* at 343.

249. *United States v. Gallo*, 653 F. Supp 320 (E.D.N.Y. 1986).

250. *Id.*

251. *Id.* at 338.

252. *Id.* at 339-40.

253. *Id.* at 344. Section 3142(g) of the Bail Reform Act requires that the court

agreed with the Third Circuit²⁵⁴ that the court must consider who is responsible for the delay in proceeding to trial and whether the delay is reasonable under the circumstances.²⁵⁵ Maintaining the position he set out in *United States v. Columbo*,²⁵⁶ the Chief Judge reiterated that the length of both pretrial detention to the point of the due process challenge as well as the nonspeculative future detention should be considered in assessing whether a violation of due process had occurred.²⁵⁷

Judge Weinstein went further, however, and stated that the court should consider not only the length but also the hardships caused by the detention.²⁵⁸ The Chief Judge stated that the court must take into account the detrimental effects of lengthy detention on the defendant.²⁵⁹ He noted that protracted incarceration causes financial difficulties for the defendant who is forced into unemployment,²⁶⁰ deterioration of the defendant's morale and demeanor due to isolation from family and friends, interaction with those already convicted of crimes,²⁶¹ and the devolution of the defendant's legal defense due to an inability to assist the attorney full-time in the investigation and preparation of his case.²⁶² The court recognized that the harsh effects of custody must also be considered when deciding whether the detention has passed from regulation to punishment.²⁶³ Up until that time, no court had ever addressed these concerns when deciding this issue. In resolving whether the period of pretrial detention constituted punishment, the courts had considered the amount of time the defendant spent in pretrial custody, but no court had weighed the effects that this incarceration had on the defendant.

The Chief Judge also stated that once the defendant has been detained for a substantial period of time, the court must carefully

consider the following in determining whether to detain or release the defendant: 1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence; 2) the weight of the evidence against the defendants, 3) the history and characteristics of the defendants, and 4) the nature and seriousness of the danger to the witness that would be posed by the person's release. 18 U.S.C. § 3142(g) (1988).

254. See *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986).

255. *Gallo*, 653 F. Supp. at 343.

256. 616 F. Supp. 780 (E.D.N.Y. 1985).

257. *Id.* at 344.

258. *Id.* at 336-38.

259. *Id.* at 338.

260. *Id.* at 337.

261. *Id.* at 336. The Bail Reform Act requires that those ordered detained be housed in a place of commitment "separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U.S.C.

§ 3142(i)(2)(1988). Many detainees, however, are held in the very same facility as individuals who have already been convicted of crimes and are awaiting or serving their sentences. *Gallo*, 653 F. Supp. at 336, 344.

262. *Id.* at 337.

263. *Id.* at 338.

re-evaluate any alternatives to pretrial incarceration to determine whether any such conditions may be imposed on the defendant that would effectively, but not so restrictively, deal with the threat he poses.²⁶⁴ Even though the statute required courts to impose detention only when no conditions of release would reasonably assure against the risk of flight or danger to the community, no other court included this concern in the calculus that was to be used to determine if pretrial detention had crossed the line from constitutional to unconstitutional.

In this case, the Chief Judge weighed the length of detention, the effects of such detention on the defendants, the nonspeculative length of future detention, the responsibility for the delay, the reasonableness of the delay, the nature of the offense, the weight of the evidence against the defendants, the history and characteristics of the defendants, the nature and seriousness of the danger the defendants presented if released, and options other than incarceration. Judge Weinstein decided that the release of the *Gallo* defendants was constitutionally required.²⁶⁵

The cases that followed failed to adopt the test set forth by Judge Weinstein. Specifically they did not consider the effects of pretrial incarceration on the accused. Instead they relied on the tests set forth in *United States v. Accetturo*²⁶⁶ or *United States v. Gonzales-Claudio*.²⁶⁷

264. *Id.*

265. *Id.* at 345.

266. 783 F.2d 382 (3d Cir. 1986). The test set forth in *Accetturo*, considers the seriousness of the charges, the strength of the Government's proof that the defendant poses a risk of flight or danger to the community, the strength of the Government's case on the merits, the length of the detention which has in fact occurred, the complexity of the case and whether the strategy of one side or the other has added needlessly to that complexity. *Id.* at 388. See, e.g., *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991); *United States v. Noriega*, 746 F. Supp. 1548 (S.D. Fla. 1990); *United States v. Gatto*, 750 F. Supp. 664 (D.N.J. 1990); *United States v. Renzulli*, No. 87-258-7, 1987 U.S. Dist. LEXIS 8750, (E.D. Penn. Sept. 28, 1987) (memorandum and order).

267. 806 F.2d 334 (2d Cir. 1986). The test set forth in *Gonzales-Claudio* considers the length of the detention that the defendants have thus far endured, the nonspeculative length of future detention, the extent of the Government's responsibility for the pretrial delay and the strength of the evidence of the defendant's risk of flight or danger to the community. *Id.* at 340. See, e.g., *United States v. Quatermaine*, 913 F.2d 910 (11th Cir. 1990); *United States v. Gelfuso*, 838 F.2d 359 (9th Cir. 1988) (streamlining the *Gonzales-Claudio* test to include only the length of the detention and the extent to which the Government was responsible for the delay); *United States v. Ojeda Rios*, 846 F.2d 167 (2d Cir. 1988); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Jackson*, 823 F.2d 4 (2d Cir. 1987); *United States v. Whitehorn*, No. 88-0145, 1989 U.S. Dist. LEXIS 6460 (D.C. Cir. June 8, 1989) (memorandum and order); *United States v. Martinez*, 678 F. Supp. 267 (S.D. Fla. 1988).

C. Problems with the Due Process Test

There are serious flaws with the flexible test currently used by the courts to determine whether pretrial detention has crossed the line from permissible regulation to impermissible punishment. These flaws include placing the onus on the defendant to bring the issue of a due process violation to the attention of the court and finding the defendant responsible for extending his detention when he exercises his right to litigate constitutional issues by filing pretrial motions.

The current tests place the onus on the defendant to continuously raise the issue of the denial of due process rights. This burden remains on the defendant until the court either recognizes that the defendant's rights to due process have been violated and releases him from custody or resolves the case. With no guidance from the Bail Reform Act and no indication from the Supreme Court as to when pretrial detention becomes unduly protracted, the defendant must speculate as to when the court will be prepared to grant his motion for release based on a denial of due process rights.²⁶⁸ If such speculation is wrong and the court does not believe that the defendant's term of pretrial incarceration has been long enough, the defendant must continue to file motions seeking release. This process continues until the court orders the defendant released or the case ends.²⁶⁹ The process involves a substantial investment of resources by the defense attorney, who must continuously prepare and file such motions, by the prosecutor, who must continuously respond to these motions, and by the court, which must continuously review, hear, and decide these motions.²⁷⁰

It also extends the length of time of pretrial detention. Every time a defendant files a motion, the period of time from the filing of the motion until its resolution by the court is excluded from the

268. Alschuler, *supra* note 12, at 517 n.30.

269. *Id.* "[T]he effective representation of a detained defendant apparently would require his lawyer to appear before a judge at periodic intervals to ask, 'Now?' After an unspecified number of months during which the judge would reply, 'Not yet,' he would answer, 'Yes, now.'" *Id.* See, e.g., *United States v. Portes*, 786 F.2d 758, 768, n.14 (7th Cir. 1986) (The Seventh Circuit found defendant's four and one-half month detention did not rise to the level of a due process violation, but invited the defendant to "at any time request that the district court reconsider the detention order." The court would "express no opinion as to the length of detention which would be constitutionally impermissible"); *United States v. Infelise*, No. 90-CR-87, 1990 WL 77795 (N.D.Ill. May 15, 1990) (memorandum opinion and order) (the court found the defendants' three month detention did not constitute a violation of due process but recommended "that if at a later date defendants can more definitively show that their pretrial detention is no longer regulatory but instead has become punitive, they should bring a motion for reconsideration.")

270. Eason, *supra* note 12 at 1076.

time requirements of the Speedy Trial Act.²⁷¹ The trial date can, therefore, be scheduled for a date further in the future.²⁷² Although Congress chose to rely on the Speedy Trial Act to guarantee a defendant's limited pretrial incarceration, in practice under that very statute, each time a defendant asks the court to consider whether the length of pretrial detention has become unduly protracted, the detention may grow longer and the trial date may become even more distant.

The current system also creates problems for the defendant who waits a significant period of time before filing such a motion for pretrial release because he believes that he must endure a substantial period of time in pretrial detention before approaching the court for release. When his motion is heard, he learns that the court will grant his request for release, and based on the court's assessment of the factors involved, would likely have granted the request several months earlier.²⁷³ The denial of the defendant's due process rights is irreversible, however, and the only remedy at that point is release from custody on conditions. There is no compensation for the period of time the defendant has spent in pretrial custody past the point of a due process violation.²⁷⁴

271. See 18 U.S.C. § 3161(h)(1)(F) (1988). This section states:

(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—

...

(F) delay resulting from an pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

Id.

272. See, e.g., *United States v. Mendoza*, 663 F. Supp. 1043, 1047-48 (D.N.J. 1987). In *Mendoza* the court noted "[i]f the accused exercises his constitutional rights by filing pre-trial motions, he thus extends his period of pre-trial incarceration. This is so even if he is successful on said motions." *Id.*

273. Alschuler, *supra* note 12, at 516-17 n.30. "Just when the preventive tadpole would become a punitive bullfrog seems to be anyone's guess." *Id.*

274. Interestingly, when a subcommittee of the House Committee on the District of Columbia, held hearings on the bill authorizing pretrial detention in the District of Columbia, Subcommittee Chairman John Dowdy proposed a provision that would compensate a defendant wrongfully detained at the rate of twenty dollars per day. *Bail Reforms, Stop and Search, Pretrial Detention, Crimes of Violence, and Juvenile Code: Hearings on H.R. 14334 Before the Subcomm. of the Comm. on the District of Columbia House of Representatives 91st Cong., 1st Sess. (1969) microformed on CIS No. H301.2 at 73 (Congressional Info. Serv.) (statement of John Dowdy, Chairman, Subcomm. No. 3). "My Bail Reform Bill [H.R. 12855] has one unique feature that none of the others has, and that is it would provide a \$20 per day allowance to a defendant wrongfully detained. One who is eventually exonerated would be compensated for the time that his liberty was denied him." *Id.* Neither the final version of the*

The courts also have expressed different views on the element of length of the detention of the defendant. Although the amount of time the defendant has spent in pretrial custody would seem to be an objective factor, it is often evaluated in a subjective light. While some courts consider a relatively short period of custody before an adjudication of guilt to be onerous,²⁷⁵ other courts view a substantially longer period of detention to be an acceptable consequence of being accused of a serious crime and being found to be a flight risk or danger to the community.²⁷⁶ It is true that when courts make these due process judgements, they view a number of factors in conjunction with each other. If one court begins, however, with the position that pretrial detention of eight or ten months is not particularly onerous, while another court views detention of four months as unduly burdensome, then the final answer to the question of whether the period of pretrial detention has passed from permissible regulation to impermissible punishment will differ significantly from court to court.²⁷⁷

Furthermore, not all courts allocate the same weight to the factor of length of detention. While some courts believe that the length of pretrial detention is the determinative factor in the calculus used to decide whether the defendant's due process rights have been violated,²⁷⁸ other courts see it as only one of several elements they must consider.²⁷⁹ This lack of uniformity results in disparate treatment for individuals charged with federal offenses.²⁸⁰ While defendants are asserting their right to due process under the Fifth Amendment, the

District of Columbia bail reform legislation nor the federal Bail Reform Act of 1984 includes such a provision. Commentators have suggested that such a provision would compel the Government to be accountable for unwarranted detention. See Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 411 (1990).

275. See, e.g., *United States v. Vastola*, 652 F. Supp. 1446, 1448 (D.N.J. 1987) (the defendants' three and one-half month detention plus the likelihood of extended future detention required immediate release); *United States v. Gallo*, 653 F. Supp. 320 (E.D.N.Y. 1986) (the four and one-half months the defendants spent in pretrial custody along with the probability of much longer incarceration warranted the defendants' immediate release with stringent conditions).

276. See, e.g., *United States v. Quatermaine*, 913 F.2d 910, 918 (11th Cir. 1990) ("the prospect of eight to ten months of pretrial detention, without more, does not mandate the release of a defendant for whom pretrial detention is otherwise appropriate"); *United States v. Tortora*, 922 F.2d 880, 889 (1st Cir. 1990) (defendant's more than six month pretrial detention "has not been so protracted as to support a due process claim"); *United States v. Melendez-Carrion*, 820 F.2d 56, 59-60 (2d Cir. 1987) (defendants' nineteen-month detention was not a per se violation of due process).

277. See *supra* notes 275-76.

278. See, e.g., *United States v. Gallo*, 653 F. Supp. 320 (E.D.N.Y. 1986); *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), *appeal dismissed sub nom. United States v. Cheesman*, 783 F.2d 38 (2d Cir. 1986)

279. See, e.g., *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Zannino*, 798 F.2d 544, 547-48 (1st Cir. 1986).

280. Eason, *supra* note 12, at 1075.

resolution of their claims seems to depend upon the district or even the judge hearing their motions.²⁸¹ The courts have enormous discretion in making these judgments. Often this discretion results in disparate treatment for those accused of federal offenses in federal courts.²⁸²

Another problem is the way in which courts assess responsibility for the delay in getting the case to trial. Generally, the courts examine the record of the case proceedings and try to ascertain if either the prosecution or the defense has acted in any way to complicate or delay the case. In some cases, courts have found that defendants who file extensive pretrial motions are responsible for prolonging their own detention.²⁸³

Charging a defendant with the responsibility for delaying the trial and extending his detention due to his filing of pretrial motions creates an intolerable dilemma for the defendant. For example, if he files a pretrial motion to suppress evidence or obtain discovery, his pretrial detention is extended, and he may be held responsible for this extension.²⁸⁴ The alternative is to abandon all claims to exclude or obtain evidence in an effort to limit pretrial incarceration. This result forces the defendant to choose between the exercise of two constitutional rights—the litigation of constitutional claims under the Fourth, Fifth and Sixth Amendments versus the Fifth Amendment right not to be punished before an adjudication of guilt by a prolonged period of pretrial incarceration.²⁸⁵ The Supreme Court has

281. *See id.* at 1076.

282. *Id.* at 1075.

283. *See, e.g.,* *United States v. Infelise*, 934 F.2d 103, 105 (7th Cir. 1991) (sixteen-month pretrial incarceration did not violate due process because “the length and depth of their [the defendants’] preparation” can not be used to gain their release from pretrial detention); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (thirty-two month pretrial detention could no longer withstand a due process challenge, but that this substantial delay was largely due to the “zealous, perhaps overly zealous, pretrial demands of the defendants”); *United States v. Berrios-Berrios*, 791 F.2d 246, 253 (2d Cir. 1986) (the complexity of the case, “exacerbated by the defendants’ many motions,” did not render eight-month pretrial detention unconstitutional); *United States v. Gonzales-Claudio*, 806 F.2d 334, 341 (2d Cir. 1986) (court found fourteen-month pretrial detention did violate due process but commented that “defendants cannot litigate pretrial matters to the ultimate degree and then rely on the extra time attributable to their motion practice to claim that the duration of pretrial detention violates due process”).

284. *See* 18 U.S.C. § 3161(h)(1)(F) (1988). Under the Speedy Trial Act, any delay resulting from the filing of a pretrial motion through the conclusion of the hearing on, or other prompt disposition of, such motion is excluded in the computation of time within which the defendant’s trial must take place. *Id.* Furthermore, after a hearing on the motions, the court may take the matter under advisement for a period of up to thirty days. *See* 18 U.S.C. § 3161(h)(1)(J) (1988).

285. *See, e.g.,* *United States v. Mendoza*, 663 F. Supp. 1043, 1047-48 (D.N.J. 1987). The Court stated:

held that it will not tolerate a government action which compels a defendant to choose between the exercise of two constitutional rights.²⁸⁶

If the accused exercises his constitutional rights by filing pre-trial motions, he thus extends his period of pre-trial incarceration. This is so even if he is successful on said motions. On the other hand, if he forgoes those motions, he accelerates his trial date, but thereby relinquishes valuable rights and defenses. The chilling effect is obvious.

Id.

286. See *Simmons v. United States*, 390 U.S. 377, 394 (1968). In *Simmons*, pursuant to the Fourth Amendment, one of the defendants moved to suppress a suitcase that contained incriminating evidence. *Id.* at 381. In support of this motion, the defendant testified on the issue of standing at the pretrial hearing. The motion was ultimately denied and the Government used the defendant's pretrial testimony as evidence against him during its case-in-chief. *Id.* The Supreme Court recognized that this created a "dilemma" for the defendant, because by pursuing a Fourth Amendment motion to suppress evidence and providing the necessary information regarding standing through his own testimony, the defendant was required to incriminate himself in violation of his Fifth Amendment privilege against self-incrimination. *Id.* at 391. The Court acknowledged that by allowing the defendant's pretrial testimony to be used against him on the issue of guilt at trial, the court was forcing the defendant to make a choice between either litigating his Fourth Amendment claims and incriminating himself in violation of his Fifth Amendment privilege, or remaining silent and abandoning his rights under the Fourth Amendment. *Id.* at 393. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 399. The Supreme Court held that when a defendant testifies in support of his motion to suppress evidence pursuant to the Fourth Amendment, his pretrial testimony can not later be used against him as evidence of guilt during the Government's case-in-chief, in violation of his Fifth Amendment right to remain silent. *Id.*

The principle set forth in *Simmons* was reaffirmed in *United States v. Salvucci*. See *United States v. Salvucci*, 448 U.S. 83 (1980). Other courts have addressed the problem of compelling a defendant to choose between the exercise of two constitutional rights and have found this compulsion to be unacceptable. See, e.g., *United States v. Inmon*, 568 F.2d 326 (3d Cir. 1977) (testimony at pretrial hearing as to whether second indictment charged same offense for which he had already been placed in jeopardy could not be used at trial because doing so would force defendant to choose between the Fifth Amendment privilege against self-incrimination and the Fifth Amendment double jeopardy claim); *United States v. Branker*, 418 F.2d 378 (2d Cir. 1969) (Government was not permitted to use defendant's testimony during a hearing to determine indigence for the purpose of seeking appointed counsel, against him at trial because doing so would compel the defendant to choose between his Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination). *But see*, *McGautha v. California*, 402 U.S. 212, 213 (1971), *vacated on other grounds*, 408 U.S. 941 (1972). In *McGautha* the Supreme Court distinguished *Simmons* and stated:

The criminal process, like the rest of the legal system is replete with situations requiring the 'making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow which ever course he chooses, the Constitution does not by that token *always* forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Id. at 183 (emphasis added) (citation omitted). See also Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66

Significantly, two weeks before the passage of the District of Columbia Bail Reform legislation that served as a prototype for the Bail Reform Act of 1984, Congress specifically added language to that statute to make it clear that the defendant's filing of motions, other than a motion for continuance, would not be used to extend pretrial detention.²⁸⁷ Fourteen years later when Congress passed the federal bail legislation, it included no such language in the Act.²⁸⁸

An additional difficulty emerges when one detained defendant files few or no motions while a codefendant files extensive and complicated motions. Under the Speedy Trial Act, 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" is excludable.²⁸⁹ Consequently, the delay attributable to one defendant for the filing of pretrial motions is attributable to all defendants in the case, even if they have not joined in those motions.²⁹⁰ The only requirement is that the delay be "reasonable."²⁹¹ As a result, a defendant who has not acted in any way to delay trial, who has repeatedly requested a severance from the other codefendants, who has filed few, if any, motions, and who has at all times requested an immediate trial, may still be detained for a substantial period of time.²⁹²

Finally, the courts find no constitutional violation when they conclude that defendants are responsible for prolonging their own

IOWA L. REV. 741 (1981); William R. Stein, Note, *Resolving Tensions Between Constitutional Rights: Use Immunity In Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674 (1976).

287. D.C. CODE ANN. § 23-1322(d)(1) (1989). See also *supra* note 80 and accompanying text.

288. For a discussion regarding the reasons why Congress did not include any such time limitations, see *supra* notes 95-108 and accompanying text.

289. 18 U.S.C. § 3161(h)(7) (1988).

290. *United States v. Piteo*, 726 F.2d 53 (2d Cir. 1984); *United States v. Campbell*, 706 F.2d 1138, 1141 (11th Cir. 1983); *United States v. Novak*, 715 F.2d 810, 815 (3d Cir. 1983) *cert. denied* 465 U.S. 1030 (1983); *United States v. Noriega*, 746 F. Supp. 1548, 1559 (S.D. Fla. 1990).

291. *Noriega*, 746 F. Supp. at 1559.

292. See, e.g., *Noriega*, 746 F. Supp. at 1548. The court found that despite defendant Saldarriaga's twelve-month pretrial detention, the four additional months until the scheduled trial date, his lack of responsibility for the delay, his repeated efforts to sever his case from that of codefendant Noriega, his one-year pretrial incarceration did not violate due process. The court reasoned that the defendant posed a significant flight risk while facing very serious charges, and the Government was not responsible for the delay, even though it repeatedly opposed the defendant's motion for severance. *Id.* at 1561-62. But see *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986). In *Theron* the court held that after four and one-half months pretrial incarceration, due process demanded that the defendant either be released on bond or be tried within thirty days because he had repeatedly sought an immediate trial, and the delays were attributable to the filing of motions by his codefendants. *Id.* at 1516-17.

pretrial detention by requesting additional time to prepare for trial, irrespective of whether the case encompasses a lengthy pre-indictment investigation, multiple charges or numerous defendants. For example, in *United States v. Infelise*,²⁹³ the United States Court of Appeals for the Seventh Circuit held that defendants' pretrial detention of approximately fifteen months did not violate due process because the defense, not the Government, was responsible for the delay in bringing the case to trial.²⁹⁴

The Seventh Circuit reached this decision despite the fact that this was a complex case in which the Government filed an indictment charging twenty defendants with forty-two separate counts. During the course of its investigation, the Government had amassed approximately 1000 hours of electronic surveillance of the defendants and voluminous betting and loan records. In addition, the Government had applied for and obtained authorization for Title III wiretaps and several search warrants. In preparing their defense, the defendants sought to review all this discovery.²⁹⁵

By holding the defendants entirely responsible for the pretrial delay, the court ignores the role of the Government in any criminal case. The Government controls the investigation. It decides how many charges to file and what those charges should be. It decides how many defendants to charge and whether those charges should be contained in one or several separate indictments. It decides whether and what discovery should be released without the filing of pretrial motions. Moreover, the prosecution can oppose continuances and move for severance of counts or defendants. The Government must, therefore, bear at least some of the responsibility when a complex case does not get to trial expeditiously.²⁹⁶

293. 934 F.2d 103 (7th Cir. 1991).

294. *Id.* at 1104-05. The *Infelise* court stated:

[T]he extent of delay is to some extent within the control of the defendants themselves, and they cannot be allowed to manufacture the grounds for their constitutional argument. . . . The delay appears to be due to the time that the defendants' counsel are taking to prepare their clients' defense. Of course, we do not criticize them for preparing as carefully as possible, but neither do we think that the length or depth of their preparation can obtain the release of defendants whose dangerousness has been amply demonstrated.

Id. See also *United States v. Gelfuso*, 738 F.2d 358, 359 (9th Cir. 1988); *United States v. Jackson*, 823 F.2d 4, 7 (2d Cir. 1987); *United States v. Melendez-Carrion*, 820 F.2d 56, 60 (2d Cir. 1987); *United States v. Gotti*, 776 F. Supp. 666, 671 (E.D.N.Y. 1991).

295. *United States v. Infelise*, No. 90-CR-87, 1990 WL 77795 (N.D. Ill. May 15, 1990) (memorandum opinion and order). On March 4, 1991, defendants filed thirty-three separate pretrial motions. *United States v. Infelise*, No. 90-CR-87, 1991 LEXIS 10220 at *1 (N.D.Ill. July 12, 1991) (memorandum opinion and order). On July 12, 1991, the court rendered its decision on these motions. *Id.* The time period from the filing of the pretrial motions until the rendering of the decision by the district court was all excludable under the Speedy Trial Act. See 18 U.S.C. § 3161(h)(1)(F)(1988).

296. See *United States v. Salerno*, 794 F.2d 64, 79 n.2 (2d Cir. 1986), *reversed*

By finding that even in complex cases the defendants are entirely responsible for the pretrial delay, the courts compel these defendants to choose between either preparing for trial and extending their pretrial detention or foregoing the preparation and reducing their pretrial detention. Again this forces the defendant to choose between constitutional rights—the right to a fair trial and the right not to be punished before trial, both under the Fifth Amendment. If the defendant chooses the right to a fair trial through a thorough preparation that requires some time, then the courts will not find that the extended pretrial detention constitutes a denial of due process. The courts thus force the defendant to endure an extended period of pretrial incarceration because the defendant has sought to thoroughly prepare a defense to obtain a fair trial.²⁹⁷

481 U.S. 739 (1987). As Chief Judge Feinberg noted in his dissent:

Pretrial detention under any circumstances is an extraordinary remedy with serious due process implications. If the Government seeks the benefit of that remedy it must exert itself to accelerate the date for a trial. Quite often, reliance on the usual processes of trial administration will not be enough. If this is so, the Government must take whatever special steps are needed to move the trial date forward. In complex, multi-defendant cases, that may require that the Government seek a severance. In cases involving many hours of taped intercepted material, the Government may have to arrange for swift and reliable transcription, by extraordinary means if necessary, before moving for detention or immediately after obtaining it. *Should the Government be unwilling or unable to shoulder the cost of these procedures, pretrial detention may not be available.*

Id. (emphasis added). See also *United States v. Vastola*, 652 F. Supp. 1446, 1448 (D.N.J. 1987). In *Vastola* the district court ordered the defendants released from pretrial detention because upon initial detention of the defendants, the Government first estimated its evidence to contain approximately 1000 hours of audio tape which defense counsel would need to review before trial, but later agreed that there were actually 3000 to 3800 hours of tape recordings. *Id.* The Government did not facilitate the review of the tapes by providing an index of the contents of those tapes. *Id.* In *United States v. Gatto*, the district court ordered the release of the detained defendants because, after successfully moving for the pretrial detention of the defendants on the ground of dangerousness, fourteen months later the Government first disclosed to defense counsel that it had amassed fifteen years worth of surveillance logs on the detained defendants which the defense would have to review. *United States v. Gatto*, 750 F. Supp. 664, 671 (D.N.J. 1990).

297. See *United States v. Infelise*, No. 90-CR-87, 1990 WL 77795 (N.D.Ill. May 15, 1990) (memorandum opinion and order). In *Infelise*, the defense argued that the pretrial incarceration of the defendants would serve to prolong the period needed to review discovery and prepare for trial because access to those detained was restricted. *Id.* at *2. The court rejected this contention as well. *Id.* at *4. On October 15, 1991, after a period of twenty months of pretrial custody, the court again denied defendants' motion for limited release. See also *United States v. Infelise*, No 90-CR-87, 1991 LEXIS 17111 (N.D.Ill. October 15, 1991) (memorandum opinion and order). The defendants had sought release for the period of their trial in order to have more time to meet with counsel. *Id.* at *1. They had proposed that they be fitted with electronic ankle bracelets which would monitor their whereabouts twenty-four hours per day.

IV. PROPOSALS FOR CHANGE

The statistics and cases on pretrial detention clearly show that pretrial detention has become a common phenomenon in federal criminal cases²⁹⁸ and that congressional reliance on the Speedy Trial Act²⁹⁹ to limit the length of pretrial detention was misplaced.³⁰⁰ It appears that having a case of a detained defendant proceed to trial within ninety days is the exception rather than the rule. Many defendants have spent protracted periods of time in custody awaiting their trials.³⁰¹ Furthermore, there are significant problems with the way in which the courts now determine whether the period of pretrial detention has become punitive rather than regulatory. To address these problems, the federal Bail Reform Act must be amended.

The most dramatic and uniform solution to the problems set forth in this Article would be to amend the Bail Reform Act to strictly limit the period of pretrial detention.³⁰² Congress should follow the lead of the District of Columbia bail statute and amend the Act to limit pretrial detention to a maximum period of ninety days.³⁰³ This amendment would read as follows:

Although the court was sensitive to the difficulties the defendants faced in trying to confer privately and extensively with their attorneys while incarcerated, the court found that these difficulties did not constitute a violation of the defendants' Sixth Amendment right to effective assistance of counsel. *Id.* As of February 13, 1992, two years after the defendants had been ordered detained, the trial of this case was in progress and the defendants were still detained. *United States v. Infelise*, No. 90-CR-87, 1992 LEXIS 2746 (N.D.Ill. February 13, 1992) (memorandum opinion and order).

See also United States v. DiGiacomo, 746 F. Supp. 1176, 1182 (D. Mass. 1990) (regarding defendant's Sixth Amendment right to effective assistance of counsel). In *DiGiacomo* the court noted that the defendants were being incarcerated before trial approximately four hours away from the courthouse and the offices of their attorneys. The court recognized that "[a]t some point a serious question concerning whether the defendants are being denied their right to effective counsel might be generated by problems relating to the place or manner of their pretrial detention." *Id.* However, the court stated that it was "not now presented with this constitutional question." *Id.*

298. *See supra* notes 95-108 and accompanying text.

299. 18 U.S.C. §§ 3161, 3164 (1988).

300. *See supra* notes 95-108 and accompanying text (discussing Congress' decision to rely on the Speedy Trial Act to limit the length of pretrial detention).

301. *See, e.g., United States v. Infelise*, 934 F.2d 103, 104 (7th Cir. 1991); *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988); *United States v. Ojeda Rios*, 846 F.2d 167, 168 (2d Cir. 1988); *United States v. Gotti*, 776 F. Supp. 666, 670 (E.D.N.Y. 1991); *United States v. Noriega*, 746 F. Supp. 1548, 1561 (S.D. Fla. 1990).

302. *See, e.g., D.C. CODE ANN. § 23-1322(d)(4)* (1989). Others have also advocated a bright-line test to determine whether a period of pretrial detention violates due process. *See, e.g., Alschuler, supra* note 12, at 510; *Applbaum, supra* note 95, at 1090; *Eason, supra* note 12, at 1077; *Miller & Guggenheim, supra* note 274, at 412; *Price, supra* note 135.

303. *See, e.g., D.C. CODE ANN. §§ 23-1322(d)(1)-(4)* (1989); *see also WIS. STAT. ANN. § 969.035(8)* (1985). The defendant "shall be released from custody with or without conditions" if the period of detention exceeds sixty days from the date of the pretrial hearing. *Id.*

A defendant shall be entitled to release on conditions pursuant to 18 U.S.C. § 3142 upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the defendant, other than by the filing of timely motions. This period of pretrial detention may be extended for a period of up to thirty days, upon a showing of good cause by the prosecutor, but only for the additional time required to prepare for the expedited trial of a detained defendant.³⁰⁴

This amendment would limit pretrial detention to a period of sixty days, with one thirty-day continuance permitted upon the showing of "good cause" by the prosecutor.³⁰⁵ After the expiration of ninety days, the defendant would have to be tried or released on bond, with appropriate conditions.³⁰⁶

This change would permit the Government to seek and obtain the pretrial detention of a defendant who was deemed dangerous and likely to flee. It would, however, strictly curtail the length of time the defendant could be incarcerated pending his trial. It would place the onus on the Government to ensure that the case moved to trial expeditiously.³⁰⁷ It would eliminate the disparate treatment of defendants who are charged with federal crimes and whose pretrial status depends not only on which test the courts use to determine if there was a denial of the defendants' due process rights but the interpretation of that test as well.³⁰⁸ It would eliminate the need for the defendants to speculate as to the appropriate time to move for release from pretrial custody and would obviate the need for the defendants to bring this issue to the courts' attention regularly.³⁰⁹ It would force the Government to have its case well organized before it filed an indictment.³¹⁰ Because in passing the Bail Reform Act Congress envisioned that, in most cases, pretrial detention would not last longer than ninety days,³¹¹ such a provision would serve to ensure that this expectation was realized.

It is true that such an amendment would eliminate the flexibility the courts prefer to exercise in this matter. It would establish a rigid timetable for the trial of detained defendants. It would not permit the courts to decide the issue of due process in each case on its own facts. It would place a significant burden on the Government to

304. See, e.g., D.C. CODE ANN. §§ 23-1322(d)(1)-(4) (1989).

305. See, e.g., D.C. CODE ANN. § 23-1322(d)(4) (1989).

306. *Id.*

307. See *supra* note 296 and accompanying text. See also Eason, *supra* note 12, at 1077.

308. See *supra* notes 275-82 and accompanying text.

309. See *supra* notes 268-69 and accompanying text. See also Eason, *supra* note 12, at 1078.

310. See *supra* note 296 and accompanying text.

311. See *supra* notes 95-108 and accompanying text.

proceed to trial quickly if it sought to maintain the defendant in custody pending trial. When one balances these concerns against the due process rights of the presumptively innocent defendant who has spent ninety days in custody and the fact that Congress envisioned that pretrial detention would not last longer than ninety days,³¹² such an amendment to the Act prevails. It would effectively resolve the problem of protracted periods of detention which defendants currently endure, yet it would still permit pretrial detention for up to ninety days in those cases where it was warranted. It would eliminate, however, both the arbitrary approach that the courts use to decide this issue and the substantial expenditure of resources the current system demands.

If Congress is serious about limiting pretrial detention to ninety days in most cases and if it finds that an amendment as described above is too far-reaching, then, at a minimum, it should adopt a compromise solution. The alternative amendment would read as follows:

A detained defendant shall be entitled to a review hearing upon the expiration of ninety calendar days, unless the trial is in progress or the trial has been delayed at the request of the defendant, other than by the filing of timely motions. At that review hearing the court shall determine whether the pretrial detention of the defendant shall continue for a maximum period of sixty additional calendar days. At this hearing, the presumption shall be in favor of release on conditions pursuant to 18 U.S.C. 3142. The Government shall bear the burden of proving that continued pretrial detention is regulatory and not punitive. In determining whether the extended detention would be regulatory and not punitive, the court shall consider the following factors:

- (1) the stage of the proceedings of this case;
- (2) the date of the trial if one has been set;
- (3) if a trial date has not been set, the reasons why no trial date has been set;
- (4) in view of defendant's pretrial detention of ninety days, any alternatives to pretrial detention that would reasonably assure against the possibility of the defendant's flight or danger to the community which his release on conditions may present.

If after the review hearing, the court determines that pretrial detention is still regulatory and necessary, the court may extend the period of pretrial detention for up to sixty additional calendar days. Upon the expiration of one hundred and fifty calendar days, unless the trial is in progress or the trial has been delayed at the request of the defendant, other than by the filing of timely motions, the court shall hold a hearing to set conditions and to order the defendant released pursuant to 18 U.S.C. § 3142(c).

312. See *supra* notes 95-108 and accompanying text.

Because Congress anticipated that pretrial detention would not last longer than ninety days, it should amend the Act to require that, at a minimum, after ninety calendar days of pretrial detention, the court must hold a hearing to determine whether the detention has become punitive rather than regulatory.³¹³ Where the defendant has already spent ninety days in custody, the presumption at the review hearing should be that detention was punitive. The burden should be on the prosecution to establish that pretrial detention is still regulatory and must continue, rather than on the defendant to prove that it is punitive in violation of due process.³¹⁴

In order to promote consistency, Congress must delineate the factors that the courts are to use at this hearing to determine whether detention should continue. Because at the initial detention hearing the court has already assessed the nature of the charges, the weight of the evidence, the history and characteristics of the defendant, the risk of flight, and the danger to the community that this defendant poses, it would be redundant to re-evaluate all of these factors at the review hearing. At this hearing the court should focus on the major concern in this due process issue: the length of the detention that has already occurred and the likely length of any future detention.³¹⁵ It should also consider the fact that the defendant has already spent ninety days in custody and whether at this point there are any available alternatives³¹⁶ that would "reasonably assure"³¹⁷ against the

313. See, e.g., *United States v. Accetturo*, 783 F.2d 382, 396 (3d Cir. 1986) (Sloviter, J., dissenting).

314. See, e.g., *United States v. Mendoza*, 663 F. Supp. 1043, 1047 (D.N.J. 1987). See also *Miller & Guggenheim*, *supra* note 274, at 412-13.

315. See *United States v. Colombo*, 616 F. Supp. 780, 785-6 (E.D.N.Y.) *rev'd* 777 F.2d 96 (2d Cir. 1985). See also *Applbaum*, *supra* note 95, at 1089; *Himsell*, *supra* note 12, at 464.

316. A number of courts have begun to devise creative alternatives to pretrial detention. See, e.g., *United States v. Patriarca*, 948 F.2d 789, 793 (1st Cir. 1991). In *Patriarca* the First Circuit upheld the lower court's order to release the defendant with the standard conditions set forth in the statute, as well as the following more innovative conditions: that the defendant remain in his home, twenty-four hours per day (save for medical appointments or meetings with his attorney while wearing an electronic monitoring device; that he meet or communicate only with his attorneys and individuals approved by the court; that he keep a record of any such communications; that at his own expense, he install and maintain 24-hour video camera surveillance of each entry to his home; that he maintain only one telephone and telephone line at his home; that he execute an agreement to forfeit four million dollars, collateralized by property, if the court determines that he has violated a condition of his release; and that he be subjected to unannounced searches by law enforcement officers.

In *United States v. DiGiacomo*, the district court ordered release of the defendants subject to the following conditions: house arrest subject to electronic monitoring; a limitation on meetings or communications with only their attorneys, certain relatives and a small number of close friends, all of which would be monitored by the installation of a pen-register on the defendants' telephones to record the destination of outgoing

defendant's flight or danger to the community if released on conditions pursuant to 18 U.S.C. § 3142.

In order not to penalize the defendant for exercising his right to file motions to litigate legal issues, either proposed amendment must also contain a provision, like the District of Columbia Bail Reform legislation, which specifically prohibits the court from extending the period of pretrial detention due to the filing of motions by the defendant.³¹⁸ The second amendment should also contain a provision

calls, and the possible tracing of incoming calls, in addition to the maintenance of a log by the defendants to record their communications which would be available to the Government for review; a restriction on communication with codefendants, except in the presence of their attorneys; and the posting of their assets which would be subject to forfeiture if they failed to appear as required. *United States v. DiGiacomo*, 746 F. Supp. 1176, 1189-90 (D. Mass. 1990). See also *United States v. O'Brien*, 895 F.2d 810, 811 (1st Cir. 1990); *United States v. Traitz*, 807 F.2d 322, 323-24 (3d Cir. 1986). But for a rejection of such conditions see *United States v. Tortora*, 922 F.2d 880, 882 (1st Cir. 1990); *United States v. Gotti*, 776 F. Supp. 666, 672-73 (E.D.N.Y. 1991); and *United States v. Infelise*, 765 F. Supp. 960, 964 (N.D. Ill. 1991), where the courts refused to permit the use of electronic surveillance equipment and other stringent conditions as an alternative to pretrial detention.

317. See 18 U.S.C. § 3142(f) (1988). Under section 3142(f) of the Bail Reform Act, the Government must prove that no combination of conditions will *reasonably* assure the appearance of the defendant, the safety of any person, or the safety of the community. *Id.* (emphasis added). As one court recently observed: "Congress did, however, choose to use the term 'danger,' which by its nature is a risk concept. By using this term, Congress did not declare that the community is entitled to assurances of freedom from all harm, and a court cannot detain arrestees on the mere apprehension of danger of harm. Rather, the court's inquiry must focus on whether by conditions of release the community can *reasonably* be assured of its safety." *United States v. Phillips*, 732 F. Supp. 255, 266 (D. Mass. 1990) (citations omitted). The need for the *reasonableness* of this assurance is even more acute after the defendant has already spent ninety days in custody awaiting his trial.

318. D.C. CODE ANN. § 23-1322(d)(2)(A) (1989). See also *supra* notes 283-88 and accompanying text. If such a provision is contained in the amendment, there may be a concern that a defendant may file frivolous pretrial motions merely to delay the trial. Once the 90 or 150 days had passed, the defendant would be entitled to release on conditions. Arguably, the defendant would then be able to flee from the jurisdiction or endanger the community. It would, however, constitute unethical behavior for a lawyer to file frivolous motions merely to delay the proceedings. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1983). The *Model Code of Professional Responsibility* states that a lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law." *Id.* Under the *Model Rules of Professional Conduct*, a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . ." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.1 (1990). In addition, an attorney who files motions merely for dilatory purposes may be monetarily sanctioned by the court for his actions. Pursuant to 28 U.S.C. § 1927, an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy *personally* the excess costs, expenses and attorneys' fees reasonably incurred

that if, at the ninety-day mark, the court found that pretrial detention was still regulatory and must continue, then another hearing should be held in sixty days, unless the trial had already begun by that point or the defendant had requested the delay. At the second hearing, if the trial had not yet begun after one hundred and fifty days of pretrial custody, then the court would set appropriate conditions and order the release of the defendant.

Such an amendment of the Bail Reform Act would serve many of the same functions as the first recommended amendment. It would not, however, strictly limit pretrial detention to a period of ninety days, and would permit longer detention in those extraordinary cases where it was warranted. Ultimately, however, it would restrict the length of pretrial detention to a period of 150 days,³¹⁹ with a presumption that after ninety days the detention has become punitive rather than regulatory.

By establishing this presumption and shifting the burden to the Government to prove at a review hearing that detention was still regulatory and necessary, Congress would prescribe that periods of pretrial detention of longer than ninety days are to be considered exceptional. It would legislate that such pretrial detention could only be extended when the Government could show that it is not responsible for the delay, the trial is imminent, and there are still no alternatives that could reasonably assure against the risk of flight or possible danger to the community. By statutorily scheduling review hearings, it would also eliminate the need for the defendant to speculate as to whether his pretrial detention was ripe for consideration of a due process violation and would eliminate the need to regularly bring the issue to the court's attention.³²⁰ This amendment would also compel the prosecution to prepare its case promptly and adopt every possible

because of such conduct." 28 U.S.C. § 1927 (1992) (emphasis added).

For example, in *United States v. Blodgett*, the Ninth Circuit held that the lower court had the power to impose a monetary sanction on a criminal defense attorney who filed a frivolous appeal in bad faith, solely for the purposes of delay. *United States v. Blodgett*, 709 F.2d 608, 609 (9th Cir. 1983). The Court remanded the case for a hearing to determine if the appeal in question was, in fact, filed solely to delay the proceedings. *Id.* at 610. The court of appeals also noted that a district court has the "inherent power to impose sanctions on counsel who 'willfully abuse[s] judicial processes'" by taking actions in bad faith, i.e. solely for the purposes of delay. *Id.* at 609 (quoting *Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980)). Of course, 28 U.S.C. § 1927 must be strictly construed "so that the legitimate zeal of an attorney in representing her client is not dampened." *Browning v. Kramer*, 933 F.2d 340 (5th Cir. 1991) (citing *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980)).

319. See *supra* notes 95-108 and accompanying text. This period is sixty days longer than Congress envisioned pretrial detention would last when passing the Bail Reform Act. *Id.*

320. See *supra* notes 268-69 and accompanying text. See also Eason, *supra* note 12, at 1078.

measure to ensure that a trial takes place expeditiously if it wishes to have the defendant detained before trial.³²¹ Furthermore, it would promote consistency by requiring that all courts use the same factors to decide whether the period of pretrial detention had become punitive rather than regulatory. The factors enumerated would focus on the element of time—the amount of time that the defendant had already spent in custody and the amount of time the defendant would likely continue to be so held.³²² In addition, the court would examine the role the prosecution played in the delay of trial, and in view of the period of detention which had already taken place, whether any other alternatives to pretrial detention were reasonable and available at that time.³²³ These factors also reflect Congress' position that pretrial custody of longer than ninety days is to be considered exceptional. Consequently, the defendant should be released unless the Government can establish that the trial will be held in the near future, that it was not responsible for the delay, and that after the defendant had already spent ninety days in custody, there were still no alternatives that could reasonably assure that this defendant would not flee or would not pose a danger to the community.³²⁴

These proposed changes also take into consideration the fact that prisons are overcrowded and likely to remain so for the future.³²⁵ With the advent of minimum mandatory sentences for numerous federal offenses³²⁶ and life sentences for career offenders,³²⁷ the abolition of parole,³²⁸ and the increased use of pretrial detention,³²⁹ the prison population in this country is exploding. The federal prison population is expected to increase 119 percent from 1987 to 1997.³³⁰ The expense

321. See note 296 and accompanying text. See also, Eason, *supra* note 12 at 1077.

322. See *supra* note 315 and accompanying text.

323. See *supra* notes 316-17 and accompanying text.

324. See Miller & Guggenheim, *supra* note 274, at 412-13. Some commentators have suggested an even stricter time limit—the right to trial for a detained defendant within fourteen to thirty days—and a strong set of escalating protections if the Government seeks to extend the period of pretrial detention. *Id.*

325. MARC MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 3 (1991). According to one study, the "United States has the world's highest known rate of incarceration, with 426 prisoners per 100,000 population. South Africa is second in the world with a rate of 333 per 100,000 and the Soviet Union third with 268 per 100,000 population." *Id.*

326. See, e.g., 21 U.S.C. § 848(a) (1988).

327. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4B1.1 (Nov. 1990) (Career Offender provisions).

328. 18 U.S.C. § 3141 (1988).

329. See *supra* notes 193-97 and accompanying text.

330. UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT IN THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, 71 (June 18, 1987) (cited in MAUER, *supra* note 325, at 8).

of incarcerating these individuals is exorbitant.³³¹ As the following chart indicates,³³² the cost of incarcerating defendants from the time of their arrest to the adjudication³³³ of their cases has risen dramatically. In just a two-year period, the cost has soared approximately one hundred and fifty-seven percent.³³⁴ Over two-thirds of the total expenditure goes to pay for the detention of defendants from the time of their initial hearing to the adjudication of their case.³³⁵

COST OF FEDERAL DETENTION

Date	Pretrial Services Agency (PSA) Cases Closed ³³⁶	Total From Pre-initial Hearing To Post Adjudication		Cost Pre Initial Hearing	Post Initial Hearing to Adjudication	
		Cost	% Increase From Previous Year		Cost	% of Tot.
July 1, 1987 to June 30, 1988 ³³⁷	21,952	\$27,729,277	N/A	\$940,480	\$19,343,704	70%
July 1, 1988 to June 30, 1989 ³³⁸	30,139	\$54,678,322	97%	\$1,939,115	\$37,175,616	68%
July 1, 1989 to June 30, 1990 ³³⁹	38,797	\$90,994,844	60%	\$3,246,812	\$57,642,710	63%

In order to alleviate this substantial economic cost, as well as address the significant social cost of incarcerating presumptively

331. "The total cost of incarcerating the more than one million Americans in prisons and jails is now \$16 billion a year." MAUER, *supra* note 325, at 3 (citing *Justice Expenditure and Employment*, 1988 Bureau of Justice Statistics (July 1990)).

332. These figures are not complete because the Administrative Office of the United States Courts does not maintain statistics on the total cost of incarcerating all defendants in federal facilities. These figures only reflect the cost of incarceration for those cases that the Pretrial Services Agency has maintained files.

333. In this context, adjudication is defined as the determination of guilt or innocence.

334. It appears that Congress also severely underestimated the increased cost of detaining defendants pretrial. In a letter dated May 24, 1983 from Alice M. Rivlin, the Director of the Congressional Budget Office (CBO) to Senator Strom Thurmond, the Chairman of the Senate Committee on the Judiciary, Ms. Rivlin estimated that the increased cost to the federal government for detaining defendants pretrial would be about \$1.1 million in fiscal year 1983, \$4.6 million by fiscal year 1984 and \$5.6 million by fiscal year 1988. Letter from Alice M. Rivlin, Director of the Congressional Budget Office, to Strom Thurmond, Chairman of the Senate Committee on the Judiciary, in *Report of the Committee on the Judiciary, United States Senate on S. 215*, S. REP. NO. 147, 98th Cong., 1st Sess. 66 (1983).

335. This amount includes the cost of incarcerating those who are either ordered detained by the court or who can not meet the release conditions set by the court.

336. All figures on this table pertain only to Pretrial Services Agency (PSA) cases closed during the time indicated.

337. 1988 ANNUAL REPORT at 47, 398 (all information for time period of 7-1-87 to 6-30-88).

338. 1989 ANNUAL REPORT at 40, 396 (all information for time period of 7-1-88

innocent individuals for protracted periods of time the Bail Reform Act must be modified to include one of the proposed amendments set forth above. These proposed changes would still provide the Government with the option of detaining potentially dangerous or fleeing defendants, but would restrict the length of that detention and would more effectively address the due process rights of those defendants who find themselves detained for protracted periods of time.

CONCLUSION

When Congress passed the Bail Reform Act of 1984, it mistakenly relied on the Speedy Trial Act to limit the duration of pretrial detention. Pursuant to the Bail Reform Act of 1984, large numbers of individuals are being incarcerated pending their trials. Periods of pretrial confinement often exceed the ninety days contemplated by Congress. In some cases, the duration of such detention is even three, four or five times as long as Congress intended when it passed this law. There is no uniformity in the factors the courts use to determine whether the period of pretrial detention exceeds constitutional limits and no consistency in the manner in which the courts apply these factors. In order to eliminate this arbitrariness and conform to Congress' original intent regarding the length of pretrial detention, the Bail Reform Act of 1984 must be revised to include provisions strictly limiting the duration of pretrial confinement to a period of ninety days and requiring that if this limit must be extended for a period of sixty days, then the Government will bear a heavy burden to establish that this extension should be granted. Only in this way will the due process rights of the presumptively innocent defendant be protected while still permitting the use of pretrial detention to safeguard against the potential risk of flight or danger to the community the released defendant may present.

338. 1989 ANNUAL REPORT at 40, 396 (all information for time period of 7-1-88 to 6-30-89).

339. 1990 ANNUAL REPORT at 259 (all information for time period of 7-1-89 to 6-30-90) (The percentages for this time period were computed by this author.).