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NOTES AND COMMENTS

UNITED STATES v. SALERNO: DETAINING DANGEROUS DEFENDANTS

I. INTRODUCTION

American law has traditionally recognized the strong liberty interest of the individual by granting a defendant charged with a noncapital crime the right to be free from incarceration while awaiting trial.¹ This freedom, however, may be conditioned on the posting of bail to deter the flight of the accused.² Denial of bail has been justified primarily by the need to assure the defendant's appearance at trial.³ The bail system reconciles the pretrial liberty interest of the individual with the government's interest in insuring the operation of the criminal justice system.

The Bail Reform Act of 1984⁴ significantly altered the traditional purpose of bail by allowing a judicial officer to consider dangerousness as a factor when determining whether to grant bail.⁵ The Act authorizes a court to order detention prior to trial to protect the community from crimes which the defendant might commit if released.⁶ These provisions apply to "arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of . . . the community which no condition of release can dispel."⁷ This legislation permits preventive detention by restricting the liberty of defendants who endanger society.

In a constitutional challenge to the Bail Reform Act of 1984, the Supreme Court confirmed the validity of preventive detention in *United*

1. Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 GEO. L.J. 287, 287 (1969).

2. *Id.*

3. *Id.*

4. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. §§ 3141-3150 (Supp. III 1985)).

5. *Id.* at § 3142(g). "The judicial officer shall . . . take into account . . . the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *Id.*

6. *Id.* at § 3142(f).

7. *United States v. Salerno*, 107 S. Ct. 2095, 2105 (1987) [hereinafter *Salerno III*].

States v. Salerno.⁸ In the opinion of the Court, the Act does not inflict punishment prior to an adjudication of guilt and, therefore, does not violate the due process clause of the fifth amendment.⁹ Moreover, the Court rejected the argument that denial of bail constitutes infinite bail in violation of the excessive bail clause of the eighth amendment.¹⁰ The Court found the pretrial detention provisions of the Act to be a carefully limited exception to individual liberty required by the government's concern for the safety and lives of its citizens.¹¹

The *Salerno* decision invites continued challenge to the Act because it did not address the limitations to the length of pretrial detention. The Court relied in part on the provisions of the Act which restrict the period of detention to determine that preventive detention was not punitive.¹² The opinion, however, did not address the failure of these provisions to protect a defendant from an unconstitutionally long period of pretrial detention. By declining to establish parameters for determining when due process requires release from detention, the decision leaves in place a variety of practices and criteria developed by the federal courts to determine when the Act has been applied unconstitutionally.

II. STATEMENT OF THE CASE

A. Facts

On March 20, 1986, Anthony Salerno was indicted for racketeering activity.¹³ The indictment charged that Salerno was the current "Boss" of the Genovese Organized Crime Family and controlled the use of the family's violence.¹⁴ The thrust of the twenty-nine count indictments was

8. 107 S. Ct. 2095 (1987). The defendant's initial detention hearing was reported at *United States v. Salerno*, 631 F. Supp. 1364 (S.D.N.Y. 1986) [hereinafter *Salerno I*]. The appeal from that order to detain was reported at *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986) [hereinafter *Salerno II*].

9. *Salerno III*, 107 S. Ct. at 2102-04.

10. *Id.* at 2104.

11. *Id.* at 2105.

12. *Id.* at 2101.

13. *Salerno I*, 631 F. Supp. 1364, 1366 (S.D.N.Y. 1986). The indictment was filed on March 20, 1986 and unsealed on March 21, 1986. *Id.* The indictment came over a year after Salerno had been indicted on similar charges in the "Commission" case. In that case, Salerno and twenty-four others were named in a seventy-one count indictment on charges of committing "state and federal crimes, including murder, robbery, narcotics violations, arson, extortion, threats, assaults, illegal gambling, bribery, interstate theft and transportation of stolen goods, extortion and mail/wire fraud." *United States v. Colombo*, 777 F.2d 96, 97 (2d Cir. 1985). Salerno was released, but Colombo was detained pursuant to the Bail Reform Act. *Id.* at 101.

14. *Salerno I*, 631 F. Supp. at 1366. The purposes of the Family included the unlawful infiltration of the concrete construction, food manufacturing, and food distribution industries; murder and conspiracies to murder those who threatened the Family or its activities; creating fear of the Family

that the power and effectiveness of the Genovese Family to carry out its criminal activities depended on “its ability and willingness to use violence.”¹⁵

At Salerno’s arraignment, the government urged that he be denied bail,¹⁶ as required by the Bail Reform Act of 1984, on the grounds that no condition of bail or combination of release conditions would assure the safety of the community.¹⁷ The government charged that Salerno was dangerous and would continue to engage in racketeering activities if released.¹⁸ Evidence, including statements concerning prospective testimony,¹⁹ a weapon found in Salerno’s home,²⁰ and excerpts from electronic surveillance, supported the government’s charges.²¹

Salerno was unable to rebut the government’s evidence that he presented a danger to the community.²² He argued that the proposed

through violence; and concealment of the Family from law enforcement officials. *Id.* Details were given of each Family member’s role in the racketeering activities of “bid rigging in the concrete construction industry, extortion, loansharking, labor racketeering, gambling and the use of violence.” *Id.*

15. *Id.* at 1367. The charges included two conspiracies to commit murder; violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (1982); mail fraud, 18 U.S.C. § 1341 (1982); wire fraud, 18 U.S.C. 1343 (1982); extortion, 18 U.S.C. § 1951 (1982); and operating illegal bookmaking and numbers businesses, 18 U.S.C. § 1955 (1982). *Id.* at 1366-67.

The prosecution supported its charges with prospective testimony from two “former high-ranking members of organized crime.” *Salerno II*, 794 F.2d 64, 66-67 (2d Cir. 1986). The witnesses had testified previously in other organized crime trials. *Salerno I*, 631 F. Supp. at 1367. The anticipated testimony was the primary support for the conspiracy to murder charges. The witnesses allegedly participated in conversations with Salerno which resulted in hit orders. *Id.* at 1367-68.

Electronic surveillance was used in two Manhattan social clubs, from which the Genovese Family conducted its business, and one location in a construction trailer in Edgewater, New Jersey. *Id.* at 1367. The evidence supported labor violence charges, including the beatings of members of a local carpenter’s union who opposed Family control, and loansharking violence, including the beatings of slow payers. *Id.* at 1368-69. This form of evidence also supported charges of gambling violence, including threats of beatings for those who violated the “two block” rule by operating a numbers business within two blocks of a Genovese Family numbers store. *Id.* at 1369. A lawful search of Salerno’s home netted a .25 caliber automatic weapon and ammunition. *Id.* at 1368.

16. *Salerno II*, 794 F.2d at 66.

17. Bail Reform Act of 1984, 18 U.S.C. § 3142(e).

18. *Salerno I*, 631 F. Supp. at 1371. “[T]he government has established that Salerno is the head, or “Boss,” of an organization engaged in extortion, loansharking, illegal gambling, and murder.” *Id.* “The government . . . urges strenuously that no condition of bail or combination of conditions will assure the safety of the community. . . .” *Id.* at 1366.

19. *Id.* at 1371.

20. *Id.* at 1372.

21. *Id.* at 1367.

22. *Id.* at 1370. At his detention hearing, Salerno argued initially that the government’s motion for detention should be denied because it was not made when he was indicted in the “Commission” case. *Id.* at 1372. He charged that the government was aware of all the facts alleged in the current indictment at the time of the previous indictment. *Id.* The court found, however, that the “Commission” indictment had not named Salerno in any specific conspiracy to murder. *Id.* Moreover, the government witness whose testimony supported the murder conspiracy charges in the current indictment had not come forward in the earlier case. *Id.* Salerno ultimately conceded that the

government witnesses were impeachable because they were receiving a favorable deal from the government concerning their past crimes in exchange for their testimony.²³ Salerno also produced more than a dozen character witnesses to testify that they did not consider him to be a threat to the community.²⁴ Moreover, Salerno proposed conditions of bail that would restrict his movements and associations, leaving him virtually under house arrest.²⁵ He was, however, unable to offer evidence to rebut the government's proof of "violent acts, conspiracies, and his position as Boss of the Genovese Family."²⁶ The government had established by clear and convincing evidence that Salerno posed a present threat to the community.²⁷ Furthermore, the proposed conditions of release offered by Salerno were inadequate to diminish or control the danger to the community.²⁸ Thus, Salerno was confined to a corrections facility to await his trial.²⁹

The Second Circuit Court of Appeals heard Salerno's appeal of the detention order and argument that the Bail Reform Act of 1984 was unconstitutional.³⁰ The court found that the Act violated the fifth amendment guarantee of due process by permitting pretrial detention of a

government's failure to seek his detention earlier affected only the weight and credibility of the government's evidence and did not bar the government from seeking detention under the new indictment. *Id.* Salerno argued alternatively that the government should have moved for detention when the information regarding the murder conspiracies became available, and its failure to do so precluded the current motion. *Id.* The court pointed out that the Act barred such action in the previous case because the motion for detention must be made at the defendant's first appearance in a case. *Id.* (construing the Bail Reform Act of 1984, 18 U.S.C. § 3142(f)). The first appearance requirement, however, was satisfied in the current case. *Id.*

23. *Id.* at 1370.

24. *Id.*

25. *Id.* at 1374.

26. *Id.* at 1370.

27. *Id.* at 1366.

28. *Id.* at 1374.

29. *Id.* at 1375.

30. *Salerno II*, 794 F.2d 64 (2d Cir. 1986). Salerno also appealed statutory issues. *Id.* at 66. The Act requires a detention order to "include written findings of fact and a written statement of the reasons for the detention." Bail Reform Act of 1984, 18 U.S.C. § 3142(i)(1). Section 3145 deals with review of detention orders: subsection (b) allows the defendant to file a motion for revocation of an order of detention and subsection (c) provides both the government and the defendant the right to appellate review of a release or detention order or of an order denying revocation or amendment of such an order. *Id.* at § 3145. Although the circuits are split on the appropriate standard of review for an appeal, the Second Circuit refused to disturb the district court's decision unless it was clearly erroneous. *Salerno II*, 794 F.2d at 70. The court found that the government's evidence was sufficient to support the trial court's finding. *Id.* See generally, Serr, *The Federal Bail Reform Act of 1984: The First Wave of Case Law*, 39 ARK. L. REV. 169, 252-55 (1985).

Salerno also challenged the government's use of a recorded conversation in a construction trailer in Edgewater, New Jersey that had been obtained through a court ordered electronic surveillance. *Salerno II*, 794 F.2d at 69. 18 U.S.C. § 2518(9) (1982) deals with the interception of wire communications and requires that each party to a hearing be furnished with a copy of the court

defendant on the ground that his release would pose a danger to the community.³¹ The Act's preventive detention provisions were found to be "repugnant to the concept of substantive due process, which . . . prohibits the total deprivation of liberty simply as a means of preventing future crimes."³² The court remanded the matter to the district court to set conditions of bail.³³ Because the decision created a conflict among the circuits regarding the validity of the Act, the Supreme Court granted certiorari to resolve the disparity.³⁴

B. *Issues*

The issues for review were whether the Bail Reform Act of 1984 violated the fifth amendment due process clause³⁵ or the eighth amendment excessive bail clause.³⁶ The Supreme Court upheld the preventive detention authorized by the Act, finding that incarceration of dangerous individuals pending trial violated neither the substantive or procedural requirements of the fifth amendment³⁷ nor the proscription of excessive bail in the eighth amendment.³⁸

III. LAW PRIOR TO THE CASE

A. *The History of Preventive Detention*

The concept of preventive detention is firmly rooted in Anglo-

order authorizing the interception and accompanying application at least ten days before the hearing. The requirement is intended to provide the defendant an opportunity to make a pretrial motion to suppress the evidence. *Id.* at 70. Salerno argued that the government's evidence should be rejected because he had not received the application and order ten days before the hearing. *Id.* at 69. The court reasoned that Salerno had not been prejudiced by this delay because a pretrial motion to suppress evidence could only be made by "an aggrieved person, . . . a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed . . ." *Id.* at 70. Salerno did not fall in this category because he was neither named in the surveillance order nor a party to the intercepted conversation. *Id.*

31. *Id.* at 71.

32. *Id.* at 71-72.

33. *Id.* at 75. The court stayed its mandate pending the issuance of its mandate in *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986). *Melendez-Carrion* had ordered reevaluation of defendants detained pursuant to the Act on the basis that the length of detention violated the defendants' rights to due process. *Id.* at 1004. The *Melendez-Carrion* mandate had been stayed to allow the parties to appeal the significant issues raised by the case to the Supreme Court. *Id.* at 1005. The mandate in *Melendez-Carrion* had not been issued when *Salerno II* was decided.

34. *Salerno III*, 107 S. Ct. 2095, 2098 (1987).

35. *Id.* at 2100.

36. *Id.* at 2100-01.

37. *Id.* at 2104.

38. *Id.* at 2105.

American jurisprudence.³⁹ It arose in England during the reign of Edward III in response to the inability of the criminal justice system to preserve peace.⁴⁰ The judiciary had the power to require a bond, not because of a crime committed, but because of a threat of future criminal activity by an individual whose past convictions or general behavior provided probable cause to suspect future misconduct.⁴¹ Those who failed to provide the bond were imprisoned.⁴²

The peace bond was adopted in this country as part of the common law heritage⁴³ and is currently reflected in valid state statutory law.⁴⁴ Although the circumstances in which a peace bond is applicable have been narrowed, it continues to be used successfully to deal with minor domestic and neighborhood complaints.⁴⁵ The use of the bond has survived constitutional challenge on the basis that the proceedings are civil in nature rather than criminal.⁴⁶ This clear identification of the civil nature of the peace bond supports a similar civil characterization of the practice of preventive detention as reflected in the Bail Reform Act of 1984.

The use of bail in the criminal justice system has figured significantly in the evolving practice of preventive detention in this country. Although bail was clearly established to be used as a deterrent to the flight of an accused,⁴⁷ it frequently became used:

39. Note, *As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO L. REV. 1055, 1076 n.100 (1987) [hereinafter Note, *Pretrial Incarceration*]; Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1503 (1966) [hereinafter Note, *Preventive Detention*]; Note, "Preventive Justice" — Bonds to Keep the Peace and for Good Behavior, 88 U. PA. L. REV. 331, 332 (1940) [hereinafter Note, *Preventive Justice*].

40. Note, *Preventive Justice*, *supra* note 39, at 332.

41. Note, *Pretrial Incarceration*, *supra* note 39, at 1076 n.100.

42. Note, *Preventive Justice*, *supra* note 39, at 332; Note, *Pretrial Incarceration*, *supra* note 39, at 1076 n.100.

43. Note, *Preventive Detention*, *supra* note 39, at 1503.

44. Note, *Preventive Justice*, *supra* note 39, at 332.

45. Note, *Preventive Detention*, *supra* note 39, at 1504.

46. *Id.* at 1503 n.102. The failure to clearly classify proceedings as civil has made the administration of peace bond statutes difficult and has raised issues related to burden of proof, jurisdiction, evidence, court costs, and territoriality. For example, the burden of proof on the complainant is determined by the nature of the proceeding. Criminal proceedings require proof beyond a reasonable doubt, while civil proceedings require only proof by a preponderance of the evidence. In declaring the action civil, the courts have determined that the action is not one of punishment; and therefore, the law should aid the party seeking to prevent crime. Note, *Preventive Justice*, *supra* note 39, at 333.

47. Hickey, *supra* note 1, at 287; Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329-30 (1982). [hereinafter Note, *The Eighth Amendment*]; Note, *Preventive Detention*, *supra* note 39, at 1489; see *Reynolds v. United States*, 80 S. Ct. 30 (1959) (ensuring the defendant's appearance and submission to the court with the use of bail); *Ex parte Milburn*, 34 U.S. (9 Pet.) 704, 710 (1835) (securing the attendance of the accused with bail); S.

to meet another assumed need of the [criminal justice] system - protection of the community from a defendant during the time it takes the system to operate. This use of bail [was] implemented tacitly through the disingenuous device of requiring money bail in an amount beyond the means of the accused, on the ground that a high risk of flight demands such amount.⁴⁸

This form of detention was accomplished *sub rosa* because dangerous defendants could not be denied bail under existing law.

B. Statutory Law

1. The Bail Reform Act of 1966

The Bail Reform Act of 1966⁴⁹ was enacted primarily to protect those defendants who lacked the financial resources to post bail before trial.⁵⁰ The 1966 Act reflected a reform of the bail system which was prompted by several Supreme Court decisions rejecting financial resources as a relevant factor in the administration of criminal justice,⁵¹ the failure of the surety bond mechanism to motivate a defendant to appear,⁵² a reduction in the instances of successful flight to avoid prosecution,⁵³ and a growing concern for prisoners' rights in the 1960's.⁵⁴

REP. NO. 98-225, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3187.

The Judiciary Act of 1789, ch. 20 § 33, 1 Stat. 7391 and the eighth amendment established the use of bail in the American criminal justice system. Bail is a device for the pretrial release of a criminal defendant after security has been taken for the defendant's future appearance at trial. It serves to balance and accommodate the defendant's interest in liberty while awaiting trial and society's interest in ensuring that the defendant will return for trial. Note, *The Eighth Amendment*, *supra*, at 329-30. The system of bail enables a defendant to stay out of jail until he is tried. *Id.*

48. Hickey, *supra* note 1, at 288 (citations omitted).

49. The Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (codified at 18 U.S.C. §§ 3141-3152 (1982) (repealed 1984)).

50. Note, *Pretrial Incarceration*, *supra* note 39, at 1070.

51. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel for indigents in first appeal for criminal convictions); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel for indigents at critical stages of proceeding); *Smith v. Bennett*, 365 U.S. 708 (1961) (filing fees cannot bar indigent from habeas corpus proceedings); *Burns v. Ohio*, 360 U.S. 252 (1959) (appellate filing fees cannot bar indigent); *Griffin v. Illinois*, 351 U.S. 12 (1956) (lack of funds to buy a stenographic transcript of the trial cannot bar indigent from post conviction proceedings).

52. Hickey, *supra* note 1, at 288-89. The bond is normally posted by a professional bondsman. The defendant's payment of fee to the bondsman is his only investment in the bond, and it is not returned regardless of whether he flees or appears for trial. *Id.*

53. *Id.* at 289. Improvements in law enforcement, communication, identification techniques, and facilities have inhibited successful flight. *Id.* See, Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 973 (1961).

54. Note, *Pretrial Incarceration*, *supra* note 39, at 1070 n.80. See generally Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429 (1967) (discussing events which led up to the passage of the Bail Reform Act of 1966).

The provisions of the 1966 Act were designed to eliminate preventive detention by prohibiting the prevailing practice of imposing excessive financial conditions of bail.⁵⁵ According to the 1966 Act, a court could detain a defendant while awaiting trial only if evidence was sufficient that he would jeopardize the successful operation of the criminal justice system by fleeing before trial or that he would present a threat to a participant in the judicial process.⁵⁶ Release on personal recognizance while awaiting trial was encouraged by the provisions of the 1966 Act and gave rise to a presumption of a right to bail in noncapital offenses.⁵⁷ Congress clearly rejected the use of pretrial bail as a device to protect the community from the possible commission of additional crimes by the arrestee.⁵⁸

Despite the prohibitions of the 1966 Act, the judicial practice of setting unreasonable and excessive bail in order to detain defendants continued to flourish.⁵⁹ Although this *sub rosa* system of preventive detention may have been accepted, its effectiveness was limited because it provided no protection against defendants who were dangerous but financially able, such as organized crime figures.⁶⁰ The fairness of this method of pretrial detention was also questionable because it lacked parameters for determining dangerousness and lacked procedural controls for protecting the accused who was thought to be dangerous.⁶¹

2. The District of Columbia Preventive Detention Statute

Four years after the passage of the Bail Reform Act of 1966, Congress overcame its reluctance to address the issue of pretrial custody and enacted a preventive detention statute for the District of Columbia.⁶² The statute allowed the pretrial detention of defendants, based on a prediction of dangerousness, after a judicial finding that there was substantial probability that the defendant committed the offense with which he was charged.⁶³ Although the measure gave judges broad discretionary power, pretrial detention required a showing that no condition of release

55. Note, *Pretrial Incarceration*, *supra* note 39, at 1071.

56. *Id.* at 1072.

57. *Id.* at 1071.

58. H.R. REP. NO. 1541, 89th Cong., 2d Sess. —, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2293, 2296.

59. Serr, *supra* note 30, at 169; Note, *Preventive Detention*, *supra* note 39, at 1492-93.

60. Note, *Preventive Detention*, *supra* note 39, at 1493.

61. *Id.*

62. The District of Columbia Statute, D.C. CODE ANN. §§ 23-1321 to -1332 (1981 & Supp. 1986).

63. *Id.* at § 23-1322(b)(2)(C).

would assure the safety of the community.⁶⁴ At that time, the District of Columbia was the only jurisdiction with a statutory basis for preventive detention.⁶⁵

Although critics of the District of Columbia statute doubted that it could withstand a constitutional challenge,⁶⁶ the United States Court of Appeals for the District of Columbia Circuit confirmed the validity of the statute in a 1982 decision, *United States v. Edwards*.⁶⁷ In *Edwards*, the defendant had been charged with armed rape.⁶⁸ After a hearing, the court determined that he was a danger to the community, denied him bail, and detained him until trial.⁶⁹ He challenged the statute on a constitutional basis, arguing that pretrial custody violated the fifth⁷⁰ and eighth amendments.⁷¹ The court rejected his argument that preventive detention, as permitted by the statute, violated the due process clause of the fifth amendment by punishing before an adjudication of guilt.⁷² Moreover, the denial of bail permitted by the statute was not inconsistent with the eighth amendment prohibition of excessive bail.⁷³ The *Edwards* court, however, expressed some concerns about preventive detention and implied that the length of detention was critical to the statute's validity.⁷⁴

3. The Bail Reform Act of 1984

Reassured by the ability of the District of Columbia statute to survive constitutional scrutiny in *Edwards*, Congress nationalized the practice of preventive detention by passing the Bail Reform Act of 1984.⁷⁵ This was a legislative response to the problem of crimes being committed

64. *Id.* at § 23-1322(a)(1).

65. *Hunt v. Roth*, 648 F.2d 1148, 1163 (8th Cir. 1981), *vacated as moot sub nom* *Murphy v. Hunt*, 455 U.S. 478 (1982) (*per curiam*).

66. Note, *Pretrial Incarceration*, *supra* note 39, at 1074-75.

67. 430 A.2d 1321 (D.C. 1981) (*en banc*), *cert. denied*, 455 U.S. 1022 (1982).

68. *Id.* at 1324.

69. *Id.* at 1325.

70. *Id.* at 1331.

71. *Id.* at 1325.

72. *Id.* at 1331.

73. *Id.*

74. *Id.* at 1333.

75. S. REP. NO. 98-225, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3191. "Based on its own constitutional analysis and its review of the *Edwards* decision, the Committee is satisfied that pretrial detention is not *per se* unconstitutional." *Id.*

by defendants released from custody⁷⁶ and the need to give judicial officers sufficient authority to regulate pretrial release.⁷⁷ The Act specifically proscribes the use of financial conditions to impose detention.⁷⁸ Instead, the Act's provisions explicitly authorizes a court to consider the arrestee's dangerousness when ordering detention or setting conditions of release.⁷⁹ Although pretrial release is still the general rule under the Act,⁸⁰ detention may be ordered when no condition or combination of conditions will reasonably assure the safety of the community.⁸¹

C. Case Law

During its consideration of the Act, Congress correctly predicted that the excessive bail clause of the eighth amendment, and the due process clause of the fifth amendment, would provide the basis for arguments to invalidate the Act.⁸² Congress relied on the decision in *Edwards* to conclude that the Act would withstand these constitutional challenges.⁸³ The courts in all but three circuits⁸⁴ have addressed these

76. S. REP. NO. 98-225, 98TH CONG., 2d Sess. 3, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3185. "Federal bail laws must address the alarming problem of crimes committed by persons on release. . . ." *Id.*

77. *Id.* "Federal bail laws must . . . give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." *Id.*

78. The Bail Reform Act of 1984, 18 U.S.C. § 3142(c). "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." *Id.*

79. *Id.* at § 3142(g)(4) and (c)(2).

80. Serr, *supra* note 30, at 169.

81. The Bail Reform Act of 1984, 18 U.S.C. § 3142(e).

82. S. REP. NO. 98-225, 98th Cong., 2d Sess. 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3191.

83. *Id.*

84. Although the courts in the Fourth, Fifth, and Sixth Circuits have addressed statutory challenges, none have addressed the constitutional challenges presented in *Salerno III*, 107 S. Ct. 2095 (1987). See *United States v. Williams*, 753 F.2d 329, 335 (4th Cir. 1985) (discussing the type of evidence of dangerousness required to be presented by the government to constitute clear and convincing); *United States v. Fortna*, 769 F.2d 243, 251 (5th Cir. 1985) (discussing release conditions which may constitute reasonable assurance of appearance at trial); *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985) (discussing the burdens of production and persuasion as affected by the rebuttable presumption of flight).

Other issues have also been addressed. The courts have upheld the probable cause standard for evaluating the underlying criminal charges as a constitutionally adequate basis for pretrial detention. *United States v. Freitas*, 602 F. Supp. 1283 (N.D. Cal. 1985); *United States v. Payden*, 598 F. Supp. 1388 (S.D.N.Y. 1984), *rev'd on other grounds*, 759 F.2d 202 (2d Cir. 1985). The Bail Reform Act of 1984, 18 U.S.C. § 3142(e) requires detention upon a finding that release conditions will not assure appearance at trial and the safety of the community. The courts have determined that detention may be justified solely on either risk of flight or risk of danger. *United States v. Jessup*, 757 F.2d 378, 388 (1st Cir. 1985); *United States v. Delker*, 757 F.2d 1390, 1401 (3d Cir. 1985); *United States v. Kouyoumdjian*, 601 F. Supp. 1506, 1510 (C.D. Cal. 1985); *United States v. Askari*, 608 F. Supp. 1045, 1048 (E.D. Pa. 1985). 18 U.S.C. § 3142(e) includes the presumption that no conditions of release will assure the safety of the community. The presumption is triggered by the nature of the underlying crime or the history of the defendant. The courts have determined that the effect of this

challenges and, with the exception of the Second Circuit,⁸⁵ have rejected the argument that the Act is unconstitutional on its face.

1. The Eighth Amendment

The validity of the Act depends initially on the interpretation of the eighth amendment provision⁸⁶ that "excessive bail shall not be required."⁸⁷ Interpreted broadly, the clause implies a right to bail. Interpreted narrowly, the clause prohibits excessive bail, but operates only in circumstances where bail is otherwise authorized.⁸⁸ The scope of the guarantee provided by the eighth amendment has been a controversial question and has not been interpreted directly by the Supreme Court.⁸⁹

The federal courts addressing the constitutionality of the Act have narrowly interpreted the eighth amendment guarantee and found no absolute right to bail. To reach this conclusion, the courts have relied primarily on one of two precedential bases: (1) the history of the eighth amendment discussed by the Supreme Court in *Carlson v. Landon*;⁹⁰ or (2) the exhaustive, multi-factored evaluation presented in *United States v.*

presumption is to shift to the defendant the burden of production of evidence to rebut the presumption. The defendant, however, does not bear the burden of persuasion; he does not have to prove that there are conditions of release that would assure the safety of the community. *Jessup*, 757 F.2d at 381; *Freitas*, 602 F. Supp. at 1293; *United States v. Moore*, 607 F. Supp. 489, 497 (N.D. Cal. 1985).

85. Prior to the appellate court decision in *Salerno II*, 794 F.2d 64 (2d Cir. 1986), the Second Circuit had found that the provisions of the Act related to detention for risk of danger were unconstitutional in violation of the substantive due process provisions of the fifth amendment. The case was remanded to the lower court to determine if the defendants who had been detained originally on the basis of risk or danger had also posed a risk of flight. The lower court determined that they had. On appeal after remand, the appeals court upheld the provisions of the Act related to detention for risk of flight. *United States v. Melendez-Carrion*, 790 F.2d 984, 1002 (2d Cir. 1985).

86. If the eighth amendment contains an absolute right to bail, the Act is unconstitutional on its face, and no other issues are reached. By implication, the court in *Salerno II*, 794 F.2d 64 (2d Cir. 1986), found no absolute right to bail and limited its discussion to other issues. Although the Supreme Court failed to squarely address the nature of the right contained in the eighth amendment, its reasoning allowed it to discuss the fifth amendment issue first. *See infra* notes 137-42 and accompanying text.

87. U.S. CONST. amend. VIII.

88. Note, *The Eighth Amendment*, *supra* note 47, at 328.

89. *See Duker, The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977) (no right to bail); Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965) (eighth amendment provides a right to bail); Meyer, *Constitutionality of Pretrial Detention (pt. 1)*, 60 GEO. L.J. 1140 (1972) (no right to bail); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) (no right to bail); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970) (right to bail).

90. 342 U.S. 524, 544 (1952). Cases relying on this basis include *United States v. Perry*, 788 F.2d 100, 111 (3d Cir.) *cert. denied*, 107 S. Ct. 218 (1986); *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 506 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985); *United States v. Hazzard* 598 F. Supp. 1442, 1448 (N.D. Ill. 1984).

Edwards.⁹¹

The Court in *Carlson* determined that the eighth amendment did not grant a right to bail in deportation proceedings.⁹² *Carlson* involved the denial of bail, pending deportation hearings, to alien Communists who were believed dangerous.⁹³ To determine if the eighth amendment provided a right to bail in these specific circumstances, the Court analyzed the history of the amendment:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.⁹⁴

Lower courts have relied on and expanded this narrow holding to deny a constitutional right to bail in other circumstances.⁹⁵

During its evaluation of the District of Columbia's preventive detention statute, the court in *United States v. Edwards*⁹⁶ examined many factors to conclude that the eighth amendment does not guarantee a right to bail. To reach this conclusion, the *Edwards* court analyzed the history of the English system of bail,⁹⁷ colonial and state constitutional bail rights,⁹⁸ the history of the Bill of Rights,⁹⁹ case law,¹⁰⁰ and the constitutional scheme.¹⁰¹ Federal courts have relied upon various elements of the *Edwards* discussion without further elaboration.¹⁰²

91. 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982). Cases relying on the *Edwards* analysis of the right to bail include: *United States v. Portes*, 786 F.2d 758, 766 (7th Cir. 1985); *United States v. Rawls*, 620 F. Supp. 1358, 1360 (E.D. Pa. 1985); *Acevedo-Ramos*, 600 F. Supp. at 505.

92. *Carlson*, 342 U.S. at 546. "We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these [deportation] cases." *Id.*

93. *Id.* at 550.

94. *Id.* at 545 (footnotes omitted).

95. *Edwards*, 430 A.2d at 1330; *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203, 206 (S.D.N.Y. 1969). See generally Note, *Preventive Detention*, *supra* note 39, at 1498-1500.

96. 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

97. *Id.* at 1326-27.

98. *Id.* at 1327-28.

99. *Id.* at 1328-29.

100. *Id.* at 1329-30.

101. *Id.* at 1330-31.

102. See, e.g., *United States v. Rawls*, 620 F. Supp. 1358, 1360 (E.D. Pa. 1985). Other federal courts have employed sound independent reasoning to deny an absolute right to bail. The court in *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986), for example, concluded that the existence of traditional instances of denial of bail argued against an absolute guarantee of bail. *Id.* at 998.

The court in *Hunt v. Roth*, 648 F.2d 1148, 1158 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982) reasoned that only arbitrary and unreasonable denial of bail

2. The Fifth Amendment

The validity of preventive detention, as authorized by the Act, must be evaluated in light of the fifth amendment guarantee that “[n]o person shall . . . be deprived of life, liberty or property, without due process of law. . . .”¹⁰³ In order to protect the interests of individuals, the Court has fashioned two parameters of due process for evaluating government deprivations. First, substantive due process addresses the nature of the government action and “prevents the government from engaging in conduct that ‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered liberty.’”¹⁰⁴ Second, procedural due process addresses the method used to implement the restriction.¹⁰⁵ Both aspects of the Act have been challenged.

a. Substantive due process

The substantive validity of the Act turns on whether detention prior to trial constitutes punishment. The right to be free of punishment is inherent in the word liberty as used in the due process clause and interpreted in previous Court decisions.¹⁰⁶ If the deprivation of liberty through physical confinement serves as punishment, it cannot be imposed without a proof of guilt as required by the fourth and fifth amendments.¹⁰⁷ Thus, the focus of any analysis of preventive detention is whether the restraint is imposed to punish or whether the detention is incidental to some other legitimate governmental purpose.

The majority of federal courts which have upheld the Act in response to substantive due process challenges have determined that the detention is regulatory rather than punitive.¹⁰⁸ The character of the government action is established by a multi-faceted test as employed in two cases dealing with preventive detention statutes, *United States v. Edwards*¹⁰⁹ and *Schall v. Martin*.¹¹⁰

violated the prohibition of excessive bail. The right to bail, then, can be regulated if done so “rationally, reasonably, and without discrimination.” *Id.* at 1161 (footnote omitted).

103. U.S. CONST. amend V.

104. *Salerno III*, 107 S. Ct. 2095, 2101 (1987) (citations omitted).

105. *Id.*

106. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

107. U.S. CONST. amends. IV & V.

108. *United States v. Zannino*, 798 F.2d 544, 546 (1st Cir. 1986) relies on the dissent in *Salerno II*, 794 F.2d 64 (2d Cir. 1986) without elaboration. *United States v. Perry*, 788 F.2d 100, 112-13 (3d Cir.), *cert. denied*, 107 S. Ct. 218 (1986) relies on a line of cases authorizing detention of the mentally ill.

109. 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982). The cases relying

The federal courts agree that the passage of time is an integral component of the due process analysis. Every appellate court that has examined the substantive due process aspects of the Act has indicated that preventive detention may be invalid if prolonged unduly.¹¹¹ Moreover, some courts have found pretrial detention too prolonged in certain instances to withstand the due process challenge and have ordered release.¹¹² However, only the Second Circuit Court of Appeals has held that the failure of the Act to strictly limit the period of detention renders the Act unconstitutional on its face.¹¹³ This disagreement between the circuits prompted the Court to hear the *Salerno* challenge.

b. Procedural due process

The validity of the procedural provisions of the Act depends upon whether the procedures properly balance the competing interests of the individual with that of the government, as well as afford sufficient protection against erroneous or unnecessary detention. A test for evaluating procedures for compliance with due process was originally articulated by the Supreme Court in *Mathews v. Eldridge*.¹¹⁴ The test requires consideration of three factors: (1) the private interest that will be affected by the action, (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional or substitute procedures, and (3) the government's interest in prompting the action.¹¹⁵ The federal courts that have addressed the procedural issue have relied on this

on this discussion of the test include: *United States v. Portes*, 786 F.2d 758, 767 (7th Cir. 1985); *United States v. Maull*, 773 F.2d 1479, 1485 (8th Cir. 1985).

110. 467 U.S. 253 (1984). Cases relying on this application of the test include: *United States v. Melendez-Carrion*, 790 F.2d 984, 998 (2d Cir. 1986); *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 505 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985).

111. *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986); *United States v. Colombo*, 777 F.2d 96, 101 (2d Cir. 1985); *United States v. Portes*, 786 F.2d 758, 768 (7th Cir. 1985); *cf. Edwards*, 430 A.2d at 1337 (stressing the time limits on detention in upholding the D.C. Statute).

112. *See, e.g., Melendez-Carrion*, 790 F.2d 984. Considering the eight month detention for dangerousness of members of a terrorist organization accused of a \$7.6 million Wells Fargo robbery, one member of the three judge panel found the Bail Reform Act of 1984 unconstitutional on its face. *Id.* at 1004. Another found the Act as applied unconstitutional. *Id.* at 1008. The case was remanded to the lower court to determine if the defendants posed a risk of flight. *Id.* at 1004. In *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986), a defendant, denied severance from codefendants and detained more than four months, was ordered to be tried or released within thirty days because pretrial detention assumes a punitive character when it is prolonged significantly. *Id.* at 1516-17. In *United States v. Lofranco*, 620 F. Supp. 1324, 1325 (S.D.N.Y. 1985), *appeal dismissed sub nom.*, *U.S. v. Cheeseman*, 783 F.2d 38 (2d Cir. 1986), the case was remanded with instructions to release under appropriate circumstances after the defendant had been detained over six months.

113. *See supra* notes 30-33 and accompanying text.

114. 424 U.S. 319, 335 (1976).

115. *Id.*

test to affirm the validity of the Act.¹¹⁶

IV. DECISION OF THE CASE

In *United States v. Salerno*,¹¹⁷ the Supreme Court validated preventive detention as authorized by the Act. The Court analyzed the provisions of the Act in light of the prohibition of excessive bail found in the eighth amendment and the substantive and procedural requirements of the fifth amendment. In the opinion of the Court, the practice of incarceration prior to trial in order to protect the community does not violate the Constitution.¹¹⁸

A. *The Eighth Amendment*

In concluding that the Act does not violate the substantive limitations of the eighth amendment,¹¹⁹ the *Salerno* Court found it unnecessary to establish or deny a constitutional right to bail.¹²⁰ Although the Court failed to resolve this issue, it established that the government may pursue compelling interests through the regulation of bail.¹²¹ The right to reasonableness in setting either conditions of release or detention is the ultimate guarantee of the bail clause.¹²² Moreover, the Act is reasonable as a response to the perceived dangers to society occasioned by the release of certain defendants described in the Act.¹²³

116. *United States v. Perry*, 788 F.2d 100, 113 (3d Cir.), *cert. denied*, 107 S. Ct. 218 (1986) relies on the test as originally articulated in *Mathews*. *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 506 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985) and *United States v. Hazzard*, 598 F. Supp. 1442, 1450 (N.D. Ill. 1984) rely on the test as applied in *Schall v. Martin*, 467 U.S. 253 (1984). *United States v. Delker*, 757 F.2d 1390, 1397 (3d Cir. 1985) relies on the test as applied in *Gerstein v. Pugh*, 420 U.S. 103 (1975) (evaluating procedures used at the bail hearing of defendants charged by prosecutor's information).

117. 107 S. Ct. 2095 (1987).

118. *Id.* at 2100-05. "We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government — a concern for the safety and indeed the lives of its citizens — on its face violates either the Due Process Clause . . . or the Eighth Amendment." *Id.* at 2105.

119. *Id.*

120. *Id.* The Court has considered this right twice in its history: *Stack v. Boyle*, 342 U.S. 1 (1951) (addressing the reduction of excessive bail) and *Carlson v. Landon*, 342 U.S. 524 (1952) (addressing the denial of bail). Lower courts have relied alternatively on dicta from both cases to find or deny a constitutional right to bail, but have failed to achieve a consistent result. *United States v. Edwards*, 430 A.2d 1321, 1330 (D.C. 1981) (*en banc*), *cert. denied*, 455 U.S. 1022 (1982). See Note, *Preventive Detention*, *supra* note 39, at 1498-1500.

121. *Salerno III*, 107 S. Ct. at 2105. "We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail." *Id.*

122. *Id.*

123. *Id.*

The Court dismissed the argument that bail could be denied only for reasons related to the risk of flight by distinguishing *Stack v. Boyle*,¹²⁴ a case holding that bail set at an amount greater than necessary to assure the presence of the accused at trial was excessive.¹²⁵ *Stack* involved a statute permitting bail for the declared limited purpose of ensuring the presence of the defendant at trial.¹²⁶ The bail set was excessive in light of the stated purpose of the statute and thus violated the eighth amendment.¹²⁷ Because the defendants had been admitted to bail, the *Stack* Court addressed only the right to bail defined in the statute and had no occasion to consider what universal right might exist under the eighth amendment.¹²⁸

The *Salerno* Court relied on the analysis of the history of the eighth amendment espoused in *Carlson v. Landon*¹²⁹ to affirm the validity of the Act.¹³⁰ Because the English bail clause on which the eighth amendment was based did not accord a right to bail in all cases, no right was inherent in the American bail clause.¹³¹ Moreover, the very language of the amendment failed to announce such a right.¹³²

B. *The Fifth Amendment*

The *Salerno* Court analyzed the provisions of the Bail Reform Act of 1984 in light of the substantive and procedural parameters of the fifth amendment guarantee that "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."¹³³ and determined that the Act reflected a limited exception to the liberty interest.¹³⁴ Because preventive detention is regulatory rather than punitive and serves the government's legitimate and compelling interest in community safety, it satisfies substantive due process requirements.¹³⁵ Moreover, the

124. 342 U.S. 1 (1951). The Court in *Salerno III* distinguished *Stack*: "The . . . dicta in *Stack v. Boyle* is far too slender a reed on which to rest this argument." *Salerno III*, 107 S. Ct. at 2104.

125. *Stack*, 342 U.S. at 5.

126. *Id.* at 5.

127. *Salerno III*, 107 S. Ct. at 2104. "[T]he Court had to determine only whether bail, admittedly available in that case, was excessive . . ." *Id.*

128. *Id.* "The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail . . ." *Id.*

129. 342 U.S. 524 (1952).

130. *Salerno III*, 107 S. Ct. at 2104-05.

131. *Carlson v. Landon*, 342 U.S. 524, 545.

132. *Id.* at 545-46.

133. U.S. CONST. amend. V.

134. *Salerno III*, 107 S. Ct. at 2105.

135. *Id.* at 2101-02.

procedures leading to detention are narrowly tailored to provide adequate safeguards to the rights of an accused, and therefore, satisfy the procedural due process requirements.¹³⁶ The pretrial detention authorized by the Bail Reform Act of 1984 does not deprive a defendant of liberty without due process.¹³⁷

1. Substantive Due Process

The *Salerno* Court originally focused on whether preventive detention was imposed to punish or whether it was incidental to some other legitimate governmental purpose. Because the Supreme Court has squarely held that due process of law prohibits punishment of a defendant prior to an adjudication of guilt,¹³⁸ the government in *Salerno* never took the position that pretrial detention could be sustained if it were "punishment."¹³⁹ Instead, it characterized the Act as regulatory in nature. Moreover, although the court of appeals invalidated the Act, it viewed the incarceration permitted by the Act as regulatory rather than punitive.¹⁴⁰ The defendant, however, argued that the pretrial detention authorized by the Act constituted impermissible punishment.¹⁴¹ The Court, therefore, focused on whether the restraint was imposed to punish or whether it was incidental to some other legitimate governmental purpose.

The Court looked first, as it has traditionally, to legislative intent¹⁴² to determine that the restriction on liberty allowed by the Act constitutes permissible regulation rather than impermissible punishment.¹⁴³ Congress, no doubt in anticipation of judicial review, presented a legislative history replete with references to its intent not to punish, but rather to address the compelling needs of community safety and to protect the community from the pressing problem presented by dangerous defendants.¹⁴⁴ The history of the Act required no analysis to conclude, as did the Court, that Congress did not intend pretrial detention to impose

136. *Id.* at 2103-04.

137. *Id.* at 2104.

138. *Bell v. Wolfish*, 441 U.S. 520, 528 (1979). "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535.

139. *Salerno III*, 107 S. Ct. at 2101.

140. *Id.*

141. *Id.*

142. *See Nixon v. Administrator of Gen. Ser.*, 433 U.S. 425, 478 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-70 (1963); *United States v. Lovett*, 328 U.S. 303, 308-14 (1946).

143. *Salerno III*, 107 S. Ct. at 2101.

144. S. REP. NO. 98-225, 98TH CONG., 2d Sess. 3, 7, 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, at 3185, 3190, 3191.

punishment.¹⁴⁵

Finding no express congressional intent to prescribe punitive restrictions, the Court focused on a two-pronged ends-means test to determine the character of the detention: (1) was there a rational alternative non-punitive purpose for the detention, and (2) was the detention reasonably related to a legitimate government objective.¹⁴⁶ The legislative history of the Act demonstrated that despite the potential penal effects of detention, the law was enacted to solve a serious societal problem.¹⁴⁷ Protecting the community from dangerous defendants was a legitimate regulatory goal, and the preventive detention authorized by the Act was reasonably related to that goal.¹⁴⁸ To further support the conclusion that the sanction and the goal were reasonably related, the Court pointed to the carefully limited circumstances under which the Act could be invoked,¹⁴⁹ the time constraints on both the original decision to detain¹⁵⁰ and the detention,¹⁵¹ and the physical conditions of the confinement.¹⁵²

In its final test of the substantive nature of the Act, the Court balanced the government's interest in preventing crime with the defendant's strong interest in liberty.¹⁵³ The Act applies only to individuals who have been arrested for specifically designated dangerous offenses.¹⁵⁴ Additionally, the government must demonstrate probable cause that the arrestee committed the crime charged,¹⁵⁵ and must convince a neutral decision-maker, by clear and convincing evidence, that no conditions of release will assure the safety of the community.¹⁵⁶ Under these circumstances, the Court found society's overwhelming interest in crime prevention is at its greatest and must override the individual's strong interest in

145. *Salerno III*, 107 S. Ct. at 2101.

146. *Id.* at 2101-03.

147. *Id.* at 2101.

148. *Id.*

149. *Id.* (citing the Bail Reform Act of 1984, 18 U.S.C. § 3142(f)). Detention on the basis of dangerousness is permitted only in cases that involve a crime of violence, an offense punishable by death or life imprisonment, certain drug offenses punishable by imprisonment for ten years or more, or felonies committed after certain prior convictions. *Id.*

150. *Id.* The detention hearing must be held at the defendant's first appearance before a judicial officer subject to a maximum continuance of only five days. *Id.*

151. *Id.* (citing the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. §§ 3161-3174 (1982 & Supp. III 1985))). Maximum detention prior to trial is limited to ninety days, subject to certain excludable periods of delay. *Id.*

152. Bail Reform Act of 1984, 18 U.S.C. § 3142(i). The defendant is to be confined in facilities separate from persons awaiting or serving sentence or being held in custody pending appeal, to the extent practicable. *Id.*

153. *Salerno III*, 107 S. Ct. at 2102-03.

154. Bail Reform Act of 1984, 18 U.S.C. § 3142(f).

155. *Id.* § 3142(e).

156. *Id.*

liberty.¹⁵⁷

Although the Court noted that detention becomes punitive when prolonged excessively,¹⁵⁸ it failed to address the permissible length of pretrial detention. The Court found that the provisions of the Speedy Trial Act, on its face, limit the period of pretrial incarceration.¹⁵⁹ However, the *Salerno* Court provided no parameters for determining when the provisions of the Speedy Trial Act, as applied, result in a period of detention that violates the limits of due process.

2. Procedural Due Process

Having found nothing in the substance of the Act which violated some fundamental principle of justice,¹⁶⁰ the Court briefly addressed the procedures of the Act and found them sufficient to protect the liberty interest of the defendant.¹⁶¹ The Act specified that defendants “have a right to counsel at the detention hearing, . . . may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing.”¹⁶² Furthermore, the government had to prove its prediction of dangerousness by clear and convincing evidence,¹⁶³ and the statute enumerates factors to support the prediction.¹⁶⁴ The judicial officer must prepare for appellate review “written findings of fact and a . . . statement of reasons for a decision to detain.”¹⁶⁵ The Court found the procedures narrowly tailored to improve the accuracy of the prediction of dangerousness¹⁶⁶ and comprehensive in providing substantial safeguards for the rights of the accused.¹⁶⁷

157. *Salerno III*, 107 S. Ct. at 2103.

158. *Id.* at 2101 n.4. “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.” *Id.*

159. *Id.* at 2101. “[T]he maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.” *Id.*

160. *Id.* at 2103.

161. *Id.* at 2104.

162. *Id.* at 2103-04 (noting the requirements under the Bail Reform Act of 1984, 18 U.S.C. § 3142(f)).

163. *Id.* at 2104 (citing the Bail Reform Act of 1984, 18 U.S.C. § 3142(f)).

164. *Id.* (citing the Bail Reform Act of 1984, 18 U.S.C. § 3142(g)). The factors include: the nature and circumstance of the charges including whether the crime involves violence or drugs; the weight of the evidence; the history and character of the defendant; and the nature and seriousness of the danger posed by the defendant’s release. *Id.*

165. *Id.* (citing the Bail Reform Act of 1984, 18 U.S.C. § 3142(i)).

166. *Id.* at 2103. “[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination.” *Id.*

167. *Id.* at 2104. “We think these extensive safeguards suffice to repel a facial challenge.” *Id.*

V. ANALYSIS

A. *The Eighth Amendment*

The *Salerno* Court concluded that the right to be free of excessive bail guaranteed by the eighth amendment does not prohibit the preventive detention authorized by the Act.¹⁶⁸ Although the Court based its conclusion that bail can be denied by Congress on an arguable interpretation of the history of the eighth amendment, there remains ample support for detention in the history and evolution of federal bail statutes. Ultimately, as with other constitutional rights, the reasonableness of the restraint determines its validity.

Although the Court found precedential value for congressional denial of bail in *Carlson v. Landon*,¹⁶⁹ this case is inapplicable to denial of bail in criminal cases because it deals with alien deportation. Aliens have traditionally received a reduced level of constitutional protection.¹⁷⁰ Moreover, special considerations applicable to deportation¹⁷¹ have given rise to basic policy differences¹⁷² that distinguish criminal and deportation cases. The *Carlson* Court itself emphasized the broad power of Congress to deal with aliens¹⁷³ and cited previous cases questioning the applicability of the eighth amendment to deportation cases.¹⁷⁴ The *Carlson* Court concluded that if applicable at all, the eighth amendment did

168. *Id.* at 2105.

169. 342 U.S. 524 (1952). In both cases, the defendants were lawfully arrested. *Salerno III*, 107 S. Ct. at 2105. In *Carlson*, the defendant was charged with violations of the Smith Act, 18 U.S.C. §§ 371, 2385 (1982), a statute proscribing communist activities. In *Salerno*, the defendant allegedly violated the RICO Act, 18 U.S.C. § 1962 (1982), a statute proscribing racketeering activities. The defendants in both cases were awaiting proceedings to consider limitations on their future liberty. In *Carlson*, the Immigration and Naturalization Service would conduct a hearing to consider deportation. *Carlson*, 342 U.S. at 526-27. In *Salerno*, the defendant awaited a criminal trial to determine guilt and punishment. In both cases, the defendants had been determined to be dangerous and denied bail for that reason.

170. Note, *The Eighth Amendment*, *supra* note 47, at 341 n.78.

171. *Jonal Corp. v. District of Columbia*, 533 F.2d 1192, 1202 (D.C. Cir.) (Leventhal, J., dissenting in part) ("exigencies of volume and location" have given rise to "special tradition and requirements" in deportation proceedings), *cert. denied*, 429 U.S. 825 (1976).

172. See, e.g., Comment, *Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120 (1982).

173. *Carlson v. Landon*, 342 U.S. 524, 542-44 (1952).

174. *Id.* at 545 (citing *United States ex rel. Potash v. District Director*, 169 F.2d 747 (2d Cir. 1948) which reported previous denial of the applicability of the eighth amendment to deportation proceedings); *United States ex rel. Klig v. Shaughnessy*, 94 F. Supp. 157 (S.D.N.Y. 1950) (questioning whether deportation proceedings fall within the scope of the eighth amendment).

not require bail in deportation cases.¹⁷⁵ The congressional ability to regulate bail in deportation cases¹⁷⁶ is clearly inapplicable as a basis for authority to regulate bail for criminal defendants.

The *Salerno* Court's reliance on the conclusion in *Carlson*, that the absence of a fundamental right to bail under English law precluded the existence of the right in the eighth amendment,¹⁷⁷ was misplaced. The history of the eighth amendment as a basis for denying a right to bail has been significantly discounted by scholars,¹⁷⁸ lower courts,¹⁷⁹ and the Supreme Court itself.¹⁸⁰ The United States Court of Appeals for the District of Columbia Circuit conducted an exhaustive examination of the origins of the excess bail clause in *United States v. Edwards*¹⁸¹ and found that the history of the eighth amendment shed no light on the right to bail.¹⁸² Moreover, the Supreme Court acknowledged in *Bridges v. California*¹⁸³ that one of the purposes of the American Revolution was to secure greater and additional personal rights than those enjoyed under the English Bill of Rights.¹⁸⁴ The history of the eighth amendment, therefore, does not compel the conclusion that no right exists in the Constitution.

Neither the failure of constitutional history to determine the parameters of a right to bail, nor the Court's questionable conclusion that it did, undermines the validity of preventive detention as expressed in the Act. The historical evidence demonstrates that the framers of the eighth

175. *Carlson*, 342 U.S. at 546. "We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of [deportation] cases." *Id.*

176. *Id.* at 545. "The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country." *Id.*

177. See *supra* note 94 and accompanying text.

178. Note, *The Eighth Amendment*, *supra* note 47. "The specific intent of the Framers simply cannot be divined from the historical evidence of the pre-1789 period. Perhaps the only reasonable conclusion that can be drawn from this evidence is that the Framers did not consider the parameters of a right to bail at all when they passed the eighth amendment." *Id.* at 350. See also Duker, *The Right To Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); Meyer, *Constitutionality of Pretrial Detention (pt. 1)*, *supra* note 89; Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, *supra* note 89.

179. *United States v. Edwards*, 430 A.2d 1321, 1330 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

180. *Bridges v. California*, 314 U.S. 252, 264 (1941).

181. 430 A.2d 1321, 1325-31 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

182. *Id.* at 1326. "The history of the Eighth Amendment . . . is generally unilluminating. . . ." *Id.*

183. 314 U.S. 252 (1941).

184. *Id.* at 264.

amendment did not consider the denial of bail on the grounds of dangerousness.¹⁸⁵ This does not mean that the eighth amendment can be fairly interpreted to prohibit or permit the denial of bail on those grounds. It means only that the history of the eighth amendment provides no direct support for preventive detention.

Congressional denial of bail finds its authority, not in the history of the Constitution, but in the history of federal statutes. At the federal level, the right of a defendant in a criminal case to be free while awaiting trial has always been regulated by Congress.¹⁸⁶ From the Judiciary Act of 1789¹⁸⁷ to the Bail Reform Act of 1984,¹⁸⁸ bail in noncapital cases has traditionally been a right grounded in federal statutes.¹⁸⁹ Thus, Congress can alter the statutory right.

As the *Carlson* Court suggested and the *Salerno* decision confirms, the right to be free from excessive bail, when construed in the light of statutory history, reflects only the right to be free of *unreasonable* denial of bail.¹⁹⁰ The parameters for this denial are not found in the eighth amendment. The substantive and procedural protections of personal liberty inherent in the due process clause of the fifth amendment dictate the standards for denial of bail and determine when detention is a reasonable denial of liberty.

B. *The Fifth Amendment*

1. Substantive Due Process

The *Salerno* Court concluded that the preventive detention authorized by the Bail Reform Act of 1984 did not violate the fifth amendment.¹⁹¹ Analysis of the nature of the detention led the Court to decide that the provisions of the Act were regulatory and, therefore, did not constitute punishment before trial, a practice prohibited by substantive due process.¹⁹² The length of detention allowed by the Act was critical to the Court's conclusion that pretrial incarceration was not an excessive

185. *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

186. Meyer, *Constitutionality of Pretrial Detention (pt. 1)*, *supra* note 89 at 1164. "[W]hether . . . a person arrested for a crime has a right to be released pending the disposition of his case has, on the federal level, always been regulated by statutes." *Id.*

187. The Judiciary Act of 1789, ch. 20 § 33, 1 Stat. 91 (1845).

188. Bail Reform Act of 1984, 18 U.S.C. § 3141-50.

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

190. *Carlson v. Landon*, 342 U.S. 524, 540-41 (1952); *Salerno III*, 107 S. Ct. 2095, 2099 (1987).

191. *Salerno III*, 107 S. Ct. at 2103.

192. *Id.* at 2101-03.

means for achieving the government's regulatory goal.¹⁹³

a. The punitive/regulatory distinction

In order to determine if the purpose of an action is punitive or regulatory, courts have traditionally applied a multi-faceted test to determine the character of a governmental act:

whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a 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. . . .¹⁹⁴

Because the many factors to be considered in making the punitive/regulatory distinction point in differing directions, the *Salerno* Court chose to articulate only those elements of the test which clearly supported its ultimate decision.¹⁹⁵ Although the failure to fully communicate the analysis may lessen the precedential value of the opinion in resolving future punitive/regulatory distinctions, it does not weaken the Court's conclusion.

The differing conclusions that can be drawn about the character of detention are obvious in the consideration of the nature of the restraint¹⁹⁶ and its historical characterization.¹⁹⁷ No analysis is required to conclude that detention is punitive and imposes an affirmative restraint on individual liberty. In terms of the nature of the imposition and its impact on the

193. *Id.* at 2101.

194. *United States v. Edwards*, 430 A.2d 1321, 1332 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982) (citing *Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979), which quotes *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). Although *Schall* applies this test, it does not articulate it as clearly or completely.

195. *Salerno III*, 107 S. Ct. at 2108. (Marshall, J., dissenting). "The majority's technique for infringing this right [to be free from punishment before conviction] is simple: merely redefine any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition." *Id.*

196. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (termination of deported alien's social security benefits is not punishment); *United States v. Lovett*, 328 U.S. 303, 316 (1946) (exclusion from government service is punishment); *Ex parte Garland*, 4 Wall. 333, 343 (1866) (loyalty oath for admission to the bar constitutes punishment).

197. See *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (imprisonment at hard labor considered punishment); *Ex parte Wilson*, 114 U.S. 417, 426-29 (1885) (imprisonment at hard labor for a term of years considered punishment); *Cummings v. Missouri*, 4 Wall. 277, 320-21 (1866) (denial of civil rights considered punishment).

detainee, pretrial detention is essentially indistinguishable from punishment.¹⁹⁸ On the other hand, historical evidence supports the conclusion that pretrial detention is not regarded as punishment.¹⁹⁹ Incarceration to prevent flight or to prevent the coercion or intimidation of witnesses is not regarded as punishment.²⁰⁰ Other exceptions to the view of detention as punishment include the time that a defendant spends in custody between arrest and arraignment,²⁰¹ the civil commitment of mentally ill persons unable to take care of themselves,²⁰² and the state's physical control over juveniles in its *parens patriae* capacity without benefit of trial.²⁰³

The factors of scienter and of triggering behavior suggest a punitive character of detention. The detention authorized by the Act comes into play only after arrest for certain dangerous crimes, all of which include the element of scienter.²⁰⁴ Scienter, a backward looking and personal factor, is associated with punishable actions and is inconsistent with a forward looking, general regulatory scheme.²⁰⁵ A punitive character is also indicated by the clear criminal nature of the behavior which triggers the detention.²⁰⁶ The defendant in *Salerno* and others had been detained because it was determined that if released, they would again commit the crimes for which they were arrested.²⁰⁷

Furtherance of the traditional aims of punishment is another factor which fails to clearly determine if preventive detention is punitive or regulatory. Detention was not intended to promote the traditional penal

198. *Bell v. Wolfish*, 441 U.S. 520, 560-61 (1979) (upholding prison regulation of activities of defendants detained on the basis of risk of flight).

199. See *infra* notes 200-03 and accompanying text.

200. *United States v. Edwards*, 430 A.2d 1321, 1332 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); *Carbo v. United States*, 82 S. Ct. 662, 668 (1962) (trial court can detain to safeguard its own process).

201. *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975) (upholding a brief period of detention for administrative steps incident to arrest).

202. *Addington v. Texas*, 441 U.S. 418 (1979).

203. *Schall v. Martin*, 467 U.S. 253, 266-67 (1984) (every state permits preventive detention of juveniles).

204. Bail Reform Act of 1984, 18 U.S.C. § 3142(f); see *Child Labor Tax Case*, 259 U.S. 20, 37-38 (1922) (tax designed to penalize is punishment); *Helwig v. United States*, 188 U.S. 605, 610-12 (1903) (additional customs duty imposed for carelessly understated value is punishment).

205. *Bell v. Wolfish*, 441 U.S. 520, 581-82 n.10 (1979) (Stevens, J., dissenting) "Long-term incarceration and other postconviction sanctions have significant backward-looking, personal, and normative components. Because they are primarily designed to inflict pain or to 'correct' the individual because of some past misdeed, the sanctions are considered punitive." *Id.*

206. See *United States v. Constantine*, 296 U.S. 287, 295 (1935) (tax triggered by criminal charge is penalty); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) (tax triggered by criminal charge is penalty).

207. *Salerno I*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986) ("this court recognizes a strong incentive on the part of [the Genovese Family] leadership to continue business as usual").

goals of retribution or deterrence.²⁰⁸ Incarceration, however, does result in incapacitation, one of the classic purposes of punishment.²⁰⁹ Moreover, it is difficult, if not impossible, to reconcile the stated nonpunitive goal of detention with statutes that credit regulatory time spent in jail prior to a conviction toward subsequent punitive time after conviction.²¹⁰

Because these elements of the test proved inconclusive, the Court turned its focus to discovering a purpose for preventive detention, other than punishment, and evaluating the reasonableness of the detention in light of that purpose. Congress had declared a goal of preventing danger to the community, and the Court confirmed that it was legitimate. The Court then weighed the government's regulatory interest in community safety against the individual's interest in liberty and determined that preventive detention was permissible.²¹¹

The Court discussed several cases, characterizing them as established exceptions to the general rule prohibiting detention prior to a judgment of guilt in a criminal trial²¹² and attempted to fit *Salerno* within the exceptions. These previous decisions, however, are inappropriate representations of a general rule related to the criminal justice system or the rule's exceptions, because all of the cases cited in which dangerousness influenced the decision to detain were civil cases. Although the cases demonstrate valid subordination of an individual's liberty interest to the government's regulatory interest, the cases do little to support the Court's argument because the opinion failed to clearly characterize the Act as civil in nature. The common thread linking *Salerno* and the cases cited is that in each instance a lawful arrest was made and in each case a

208. S. REP. NO. 98-225, 98th Cong., 2d Sess. 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3191. "[P]retrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence, but . . . is designed to curtail reasonably predictable conduct . . ." *Id.* See *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (purposes of punishment are to reprimand the wrongdoer and deter others); *United States v. Constantine*, 296 U.S. 287, 295 (1935) (tax triggered by criminal charges was intended as a deterrent).

209. See *United States v. Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986) (incapacitation is a classic purpose of punishment); *Nixon v. Administrator of General Services*, 433 U.S. 425, 476 n.40 (1977) (traditional purpose of criminal punishment includes preventive aspects); *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967) (imprisonment inflicted punishment even though sanction was designed for preventing individuals from harming public); *United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons . . . is to keep [suspects] from inflicting future harm, but that does not make imprisonment any the less punishment"); *In re Ballay*, 482 F.2d 648, 650 (D.C. Cir. 1973) (traditional justifications for institutional confinement are retribution, rehabilitation, deterrence, and protection).

210. 18 U.S.C. § 3568 (1982) (to be repealed and recodified at 18 U.S.C. § 3585(b) (effective Nov. 1, 1987)) (giving a defendant credit toward a prison term for any time spent in official detention prior to the time the sentence begins).

211. *Salerno III*, 107 S. Ct. 2095, 2102 (1987).

212. *Id.*

prediction of future dangerous conduct was the basis for confinement. However, the element missing from the precedents that distinguishes them from *Salerno* was that none of the arrestees were held pending a criminal trial.

Ludecke v. Watkins,²¹³ *Carlson v. Landon*,²¹⁴ and *Wong Wing v. United States*²¹⁵ provided no precedents for *Salerno* because the cases concerned the detention of potentially dangerous aliens pending deportation proceedings. The defendant in *Salerno* was neither an alien nor facing deportation. The special considerations, applicable to deportation and basic policy differences between criminal and deportation cases, render inappropriate any analogies that might be drawn between these cases and *Salerno*.²¹⁶

Similarly, cases dealing with the confinement of the mentally ill are distinguishable from criminal cases. *Addington v. Texas*,²¹⁷ *Jackson v. Indiana*,²¹⁸ and *Greenwood v. United States*²¹⁹ concerned mentally unstable detainees. Although arrest was the first step in the confinement process in each case, the fact that criminal charges were pending against the defendants was legally immaterial as the basis for confinement. Furthermore, in each case, one of the stated goals of confinement was treatment.²²⁰ In contrast, the defendant in *Salerno* suffered no apparent mental abnormality nor was his confinement intended to be therapeutic.

Although *Schall v. Martin*²²¹ is factually similar to *Salerno*, it too fails to support the Court's conclusions. The case validated the practice of detaining juveniles prior to a juvenile proceeding if they were considered to be a continuing danger to the community.²²² As the Court in *Schall* acknowledged, however, a juvenile proceeding is fundamentally

213. 335 U.S. 160 (1948).

214. 342 U.S. 524 (1952). See *supra* note 90 and accompanying text.

215. 163 U.S. 228 (1896).

216. See *supra* notes 171-72 and accompanying text. Similarly, *Moyer v. Peabody*, 212 U.S. 78 (1909) does not lend itself to comparison with *Salerno*. *Moyer* dealt with arrest and detention under martial law. No parallels can be drawn because under those circumstances there is no judicial process, either civil or criminal.

217. 441 U.S. 418 (1979).

218. 406 U.S. 715 (1972).

219. 350 U.S. 366 (1956).

220. *Addington*, 441 U.S. at 421 ("appellant required hospitalization in a closed area to treat his condition"); *Jackson*, 406 U.S. at 721-23 (civil commitment statutory scheme requires confinement of individuals with psychiatric disorders because they require "care, treatment, training or detention in the interest of the welfare of such person"); *Greenwood*, 350 U.S. at 367 (purpose of commitment statute was to "provide for the care and custody of insane persons").

221. 467 U.S. 253 (1984).

222. *Id.* at 255-57.

different from an adult criminal trial.²²³ Moreover, the preventive detention scheme analyzed in the case was designed to protect the child, as well as society, “from the potential consequences of his criminal acts” and took into consideration the needs and interests of the child.²²⁴ No such consideration was given to the needs and interests of the defendant in *Salerno*.²²⁵

Preventive detention under the Act is a civil proceeding, not an exception to a general rule of criminal justice. Congress determined that the danger of repeated criminal acts is greatest in the case of defendants awaiting trial.²²⁶ As a result of this policy judgment, Congress has developed a civil proceeding to provide preventive detention before trial.²²⁷ The Act is analogous to those commitment statutes designed to protect society by confining certain offenders, such as sexual psychopaths and defective delinquents, who have shown a course of habitual misconduct.²²⁸ Moreover, the Court has previously acknowledged that Congress has the authority to identify a class presenting a special danger if the classification is reasonable and directly related to the legislative goal.²²⁹

Despite the location of the Act in the title of the United States Code dealing with crimes, the pretrial detention proceeding results in a commitment that is essentially civil in nature, not criminal.²³⁰ The detention hearing is an involuntary civil commitment proceeding. Although the decision to detain is made in connection with a criminal prosecution, the commitment to protect the community is civil, not criminal, in nature. Congress could have chosen some other act or event to trigger the detention hearing; its decision to use a criminal charge as the triggering event

223. *Id.* at 263.

224. *Id.* at 264 (citations omitted).

225. *Salerno I*, 631 F. Supp. 1364, 1374 (S.D.N.Y. 1986). Although the detention decision did not reflect a consideration of Salerno’s needs, he was allowed to receive regular medication and use an exercise bike as treatment for an alleged vascular condition. *Id.*

226. S. REP. NO. 225, 98th Cong., 2d Sess. 6, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3189. “[T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition [sic] of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.” *Id.*

227. Bail Reform Act of 1984, 18 U.S.C. § 3142(f).

228. Note, *Preventive Detention*, *supra* note 39, at 1504. “Although most such statutes require that the defendant be convicted of a crime before he may be committed, some states provide that anyone charged with a criminal offense may be committed.” *Id.*

229. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274-75 (1940). “[T]he legislature is free to recognize degrees of harm, and . . . confine its restriction to those classes of cases where the need is deemed to be clearest.” *Id.* at 275.

230. *United States v. Perry*, 788 F.2d 100, 109 (3d Cir.), *cert. denied*, 107 S. Ct. 218 (1986).

does not alter the nature of the proceeding.²³¹ The commitment, which lasts only until the criminal charge is resolved, through conviction or acquittal, is not dependent upon the criminal justice system for its authority.

The Court's mischaracterization of the cited precedents as an exception to the rule of criminal justice, prohibiting punishment before conviction, does not undermine the validity of the precedents. The cases provide clear examples of legitimate subordination of an individual's liberty interest to a compelling governmental goal. When the preventive detention provisions of the Act are correctly viewed as a form of civil commitment, the Act clearly comports with the principles defined in the precedents. As the Court concluded, the Act specifies circumstances when society's interest in crime prevention is at its greatest and must override an individual's strong interest in liberty.²³²

b. Length of detention

Perhaps the most significant impact of the *Salerno* decision will result from the Court's failure to address the permissible length of pretrial detention. Federal courts have addressed this critical and controversial issue and have agreed that detention may be invalid if unduly prolonged.²³³ They have not agreed, however, on the point at which confinement violates due process.²³⁴ This failure to establish parameters for the period of detention will tend to increase the number of petitions from detainees seeking release on the basis that the Act is unconstitutional as applied.

The Court has acknowledged that the length of incarceration is integral to the due process analysis.²³⁵ The decision that preventive detention of juveniles was consistent with the fifth amendment relied significantly on the fact that the detention period was strictly limited.²³⁶ Moreover, a statute allowing commitment of incompetent criminal defendants was invalidated because of the indefinite period of detention.²³⁷ The *Salerno* opinion based its punitive/regulatory distinction in part on the premise that the maximum length of pretrial detention is limited²³⁸

231. *Id.* at 117.

232. *Salerno III*, 107 S. Ct. 2095, 2103 (1987).

233. *See supra* notes 111-13 and accompanying text.

234. *Id.*

235. *See Schall v. Martin*, 467 U.S. 253 (1984); *Jackson v. Indiana*, 406 U.S. 715 (1972).

236. *Schall*, 467 U.S. at 269.

237. *Jackson*, 406 U.S. at 736.

238. *Salerno III*, 107 S. Ct. 2095, 2101 (1987).

and acknowledged that if detention is excessively prolonged it becomes punitive.²³⁹ The Court, however, declined to discuss at what point the character of detention changes.²⁴⁰

The failure to address the period of detention is consistent with the view that the validity of detentions should be evaluated on a case-by-case basis.²⁴¹ While the statute may operate unconstitutionally by unduly prolonging detention in some circumstances, this does not make the Act unconstitutional on its face.²⁴² Although appellate courts have identified primary factors to assist in determining when due process demands release from detention, these factors focus on the facts peculiar to each case.²⁴³ The subjective nature of these factors and the Court's position on individualized determinations leave the door open for continued challenge to the Act.

2. Procedural Due Process

Predicting future conduct is inherently speculative and difficult. Congress acknowledged that the predictions required under the Act would not be infallible; however, Congress attempted to design procedures that would narrow the exercise of discretion and result in an acceptable level of accuracy.²⁴⁴ The Court, without detailed analysis, found that Congress was successful.²⁴⁵

The Court's failure to articulate the basis of its approval is not fatal because it has long accepted and relied on predictions of future criminal conduct in many decisions and has required less than complete accuracy. These predictions play a role in imposing a death sentence²⁴⁶ and in

239. *Id.* n.4.

240. *Id.* at 2101. The defendant in *Salerno* did not raise the length of confinement issue. Prior to the argument before the Court, he had been convicted on charges in another case and sentenced to 100 years in prison. Therefore, even if the Act had been overturned, he would have remained in confinement. Had the judgment in the other case been executed immediately, as is usually done, the case presented to the Court would have been moot. *Id.* at 2106 and n.1 (Marshall, J., dissenting).

241. *Schall*, 467 U.S. at 273.

242. *Salerno III*, 107 S. Ct. at 2100. The Court does not recognize "an 'overbreadth' doctrine outside the limited context of the first amendment." *Id.* (citing *Schall*, 467 U.S. at 269 n.18).

243. *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986). In addition to the factors relevant to the initial detention decision, the court considered the length of detention that had occurred, the complexity of the case, and whether the strategy of one side or the other had added needlessly to the complexity. *Id.*

244. S. REP. NO. 225, 98th Cong., 2d Sess. 9, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3192.

245. *Salerno III*, 107 S. Ct. at 2104.

246. *Jurek v. Texas*, 428 U.S. 262, 274-75 (1976).

granting and revoking parole.²⁴⁷ To base decisions on these predictions, the Court requires only that procedures be adequate to ensure *some* accuracy.²⁴⁸

The prediction of dangerousness issue has been strongly criticized²⁴⁹ because the ability to predict who will engage in criminal activity in the future is limited.²⁵⁰ Even the psychological community has acknowledged that its members are not competent to make predictions of future violent behavior.²⁵¹ Furthermore, measuring the accuracy of predictions made under the Act is impossible because there is no method of determining which detained defendants, if released, would commit crimes.

The ultimate procedural issue concerns the burden of proof that the government must sustain to support its prediction. A standard of proof beyond a reasonable doubt has historically been limited to criminal cases because the decisions are punitive in purpose, and society has determined that the risk of error to the individual must be minimized.²⁵² A subjective judgment, such as that used in predicting dangerousness, however, does not demand the same level of certitude attained in criminal cases. Moreover, the Court has consistently held that significant restraints may be imposed upon a finding based on a lesser standard of proof.²⁵³ On this basis, the *Salerno* Court continued to maintain that the prediction of future criminal conduct is not inherently unattainable.²⁵⁴

247. *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 9-10 (1979) (grant of parole); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (parole revocation).

248. *Schall v. Martin*, 467 U.S. 253, 264 (1984). Procedures leading to the detention of juveniles predicted to be dangerous need only be adequate to authorize at least some of those charged with crimes. *Id.*

249. The decisions of the courts hearing Salerno's case provide excellent examples of the predictive abilities of judicial offices. At the detention hearing of Vincent Cafaro, one of Salerno's original codefendants, the court concluded that "in view of the substantial evidence proffered, this court cannot envision any set of conditions that could ensure the safety of the community from Cafaro." *Salerno I*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986). The court apparently had not envisioned that Cafaro would become a cooperating witness. Six months after its original finding, the court released Cafaro. *Salerno III*, 107 S. Ct. at 2106.

250. Note, *Pretrial Incarceration*, *supra* note 39, at 1073 n.90.

251. *Id.* (quoting Task Force, American Psychological Ass'n, *Report on the Role of Psychology in the Criminal Justice System*, 1978 AM. PSYCHOLOGIST, 1099, 1110).

252. *Addington v. Texas*, 441 U.S. 418, 428 (1979) (rejecting a burden of proof beyond a reasonable doubt for involuntary civil commitment).

253. *Addington*, 441 U.S. at 428-33 (involuntary civil commitment based on clear and convincing evidence); *Gerstein v. Pugh*, 420 U.S. 103, 119-21 (1975) (pretrial detention based on probable cause); *Gagnon v. Scarpelli*, 411 U.S. 778, 782-89 (1973) (probation violations found on the basis of probable cause); *Morrissey v. Brewer*, 408 U.S. 471, 485-89 (1972) (parole violations found on the basis of probable cause).

254. *Salerno III*, 107 S. Ct. 2095, 2103 (1987) (citations omitted).

VI. CONCLUSION

United States v. Salerno brings an end to the argument that the Bail Reform Act of 1984 is unconstitutional on its face. In *Salerno*, the Court held that neither the due process clause of the fifth amendment nor the excessive bail clause of the eighth amendment prohibits the preventive detention scheme presented in the Act. The courts, however, will continue to receive challenges that the Act as applied results in prolonged detention and thus violates the requirements of due process.

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