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Crime and "Regulation": *United States v. Salerno*

Defendants Salerno and Cafaro were indicted for violations of the Racketeer Influenced and Corrupt Organizations Act, mail and wire fraud, extortion, and gambling offenses. At arraignment, the government moved for pretrial detention under the Bail Reform Act of 1984.[1] The government argued that, because the defendants were the leaders of the Genovese organized crime family, no condition or combination of conditions of pretrial release would assure the safety of the community.[2] The motion was granted,[3] and the defendants appealed. The United States Court of Appeals for the Second Circuit vacated the detention order,[4] holding that pretrial detention for the purpose of preventing future crimes violated the due process clause of the fifth amendment.[5] The government applied for a writ of certiorari. After the writ was granted, Salerno was convicted and sentenced to 100 years imprisonment in an unrelated proceeding, and Cafaro was released from detention for health reasons after posting a $1,000,000 personal appearance bond.[6] The United States Supreme Court, after deciding that a valid controversy still existed, reversed the court of appeals and reinstated the detention order. The Supreme Court held that the Bail Reform Act's authorization of pretrial preventive detention on the ground of future dangerousness was not facially unconstitutional as violative of the fifth amendment's due process clause or the eighth amendment's prohibition of excessive bail.[7] *United States v. Salerno*, 107 S. Ct. 2095 (1987).

The Court limited its holding to the "facial constitutionality" of the statute. It expressly declined to consider the application of the statute to the facts of the case, as that issue had not been raised by the defendants.[8] Likewise, the Court did not express any views on provisions of the statute not implicated by this case.[9] Nevertheless, the decision

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1. 18 U.S.C. §§ 3141-3150 (Supp. III 1985), amended by 18 U.S.C.A. §§ 3141-3150 (West Supp. 1987).

2. In support of this argument, the government proffered the testimony of two witnesses and excerpts from electronic surveillance, which showed murder conspiracies and labor, loansharking, and gambling violence. United States v. Salerno, 631 F. Supp. 1364, 1367-70 (S.D.N.Y. 1986).

3. Id. at 1375.

4. United States v. Salerno, 794 F.2d 64, 74 (2d Cir. 1986), rev'd, 107 S. Ct. 2095 (1987).

5. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

6. 107 S. Ct. at 2106-07 (Marshall, J., dissenting).

7. U.S. Const. amends. V, VIII.

8. 107 S. Ct. at 2100 n.3.

9. Id.

has serious implications. The Court held that, given certain procedural safeguards, a competent adult citizen may be jailed based upon an indictment and a showing that he poses a danger to the community, even though he has not been convicted of any crime. The Court reached this conclusion by finding that the detention is a permissible regulatory measure, as opposed to an impermissible imposition of punishment. Six members of the Court so voted, despite a serious question of mootness.

This note will examine the Supreme Court's decision in *Salerno* and its ramifications. It will first consider the Bail Reform Act of 1984 and the resultant changes in federal bail practice. It will then analyze the opinion in *Salerno* and the earlier decisions upon which the Court based its holding. Following a critique of the majority's decision, the note will conclude by examining the impact of *Salerno* on federal bail practice and constitutional litigation.

THE 1984 ACT AND FEDERAL BAIL PRACTICE

Since the enactment of the Judiciary Act of 1789,[10] the federal bail law has served primarily to ensure the appearance of the defendant at trial.[11] Any danger posed to witnesses by the defendant was a secondary consideration. Generally, if a defendant in a non-capital case was likely to appear for trial, he was admitted to bail.[12] The exclusive use of money bail discriminated against poor defendants. Although otherwise qualified for pretrial release, these defendants would be detained merely because they lacked sufficient resources to post bail. In 1966, Congress amended the bail law to de-emphasize the use of money bail and increase the use of release on recognizance.[13] This led to more defendants being released before trial.[14]

With the increase in pretrial release came an increase in crimes committed by released defendants.[15] Studies indicated rearrest rates ranging from less than one to approximately sixteen percent.[16] This led to

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10. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 91 (1789).

11. Ervin, Preventive Detention, A Species of Lydford Law, 52 Geo. Wash. L. Rev. 113 (1983).

12. Id. at 120-21.

13. Id. at 113-14.

14. Bail Reform Act: Hearings on H.R. 1098, H.R. 3005, and H.R. 3491 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2nd Sess. 109 (1983) [hereinafter Bail Reform Hearings] (testimony of Malcolm M. Feeley, Professor, University of Wisconsin).

15. S. Rep. No. 225, 98th Cong., 1st Sess. 6, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3188.

16. Bail Reform Hearings, supra note 14, at 238 (testimony of Ira Glasser, Executive Director, American Civil Liberties Union).

criticism of the bail law as being too liberal insofar as it did not allow a judge to consider the safety of the community when deciding on pretrial release.[17]

In response to this criticism, Congress passed the Bail Reform Act of 1984.[18] Under this statute, a court must consider not only the risk of flight and the danger to witnesses, but also the safety of the community, when setting conditions of pretrial release. The Act retains the earlier law's prohibition of economic discrimination, stating that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person."[19]

The Act requires that upon the defendant's initial appearance before a judicial officer, the officer shall issue an order that the defendant either be released on recognizance, released subject to conditions, or detained.[20] On motion by the attorney for the government, the court shall hold a detention hearing in a case that involves a crime of violence, a capital offense, a drug offense carrying a maximum sentence of ten years or more, or any felony where the accused has been convicted of two or more of the offenses described above.[21] The court may also hold a detention hearing on its own motion if it finds there is a serious risk of flight or obstruction of justice.[22]

In certain situations, a rebuttable presumption arises that no conditions of release will assure the safety of the community. The presumption is invoked if the defendant has been convicted of one of the crimes listed above, the crime occurred while he was on pretrial release, and either the conviction or the release from imprisonment for the conviction occurred within five years of the hearing. The presumption also arises if the defendant is accused of a drug offense which carries a maximum penalty of ten years or more.[23]

At the detention hearing, the defendant has the right to counsel. He may testify and present witnesses, cross-examine the government's

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17. S. Rep. No. 225, supra note 15, at 5, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3187-88.

18. 18 U.S.C. §§ 3141-3150 (Supp. III 1985), amended by 18 U.S.C.A. §§ 3141-3150 (West Supp. 1987).

19. 18 U.S.C.A. § 3142(c)(2) (West Supp. 1987).

20. Id. § 3141(a).

21. 18 U.S.C. § 3142(f)(1) (Supp. III 1985), amended by 18 U.S.C.A. § 3142(f)(1) (West Supp. 1987).

22. 18 U.S.C.A. § 3142 (f)(2) (West Supp. 1987). If a detention hearing is to be held, either the government or the defendant may move for a continuance. The continuance may be of up to five days if sought by the defendant, or up to three days if sought by the government. See id. § 3142(f).

23. Id. § 3142(e).

witnesses, and present evidence by proffer. The rules concerning the admissibility of evidence do not apply.[24]

If the judicial officer finds by clear and convincing evidence that no condition or combination of conditions of release will assure the safety of the community, he shall order the defendant detained pending trial.[25] The judge must issue written reasons for his finding,[26] and the accused has the right to an expedited appeal.[27]

This statute is based in part on the District of Columbia's preventive detention statute,[28] which Congress passed in 1970. A significant difference between the two is that the federal statute has no limitation on the length of time a defendant may be detained.[29] The legislative history shows that Congress intended that the length of detention be controlled by existing provisions,[30] specifically the Speedy Trial Act.[31] Although this ostensibly limits the detention to seventy days,[32] the exceptions contained in the Speedy Trial Act may allow detention for well over a year.[33]

The denial of bail on the grounds of future dangerousness substantially departs from traditional federal bail practice. Congress heard testimony that judges considered dangerousness when setting bail in the past,[34] and that they practiced preventive detention by setting bail at high amounts.[35] The explicit authorization of preventive detention, however, has sparked widespread debate on its constitutionality.[36] Despite this debate, the federal circuits which addressed the issue had uniformly

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24. Id. § 3142(f).

25. Id. §§ 3142(e), 3142(f).

26. 18 U.S.C. § 3142(i)(1) (Supp. III 1985), amended by 18 U.S.C.A. § 1342(i) (West Supp. 1987).

27. 18 U.S.C. § 3145.

28. D.C. Code Ann. § 23-1322 (1981 & Supp. 1987).

29. The District of Columbia provision limits detention to ninety days. See D.C. Code Ann. § 23-1322(d)(4) (Supp. 1987).

30. S. Rep. No. 225, supra note 15, at 22 n.63, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3205 n. 63.

31. Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. III 1985).

32. 18 U.S.C. § 3161(c)(1) (1982).

33. Alschuler, Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process, 85 Mich. L. Rev. 510, 515-16 (1986).

34. S. Rep. No. 225, supra note 15, at 10-11, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3191-93.

35. Id.

36. See, e.g., Ervin, supra note 11; Alschuler, supra note 33; Schlesinger, Bail Reform: Protecting the Community and the Accused, 9 Harv. J.L. & Pub. Pol'y 173 (1986); Berg, The Bail Reform Act of 1984, 34 Emory L.J. 685 (1985); Note, The Loss of Innocence: Preventive Detention under the Bail Reform Act of 1984, 22 Am. Crim. L. Rev. 805 (1985); Note, Preventive Detention and *United States v. Edwards*: Burdening the Innocent, 32 Am. U.L. Rev. 191 (1982).

upheld the statute prior to the Second Circuit's decision in *Salerno*.[37] The Supreme Court did not choose to face the issue until the statute was declared unconstitutional.

THE MAJORITY'S DECISION IN *Salerno*

The majority began by dismissing the claim that pretrial detention based on dangerousness was punishment before trial in violation of due process. It reasoned that the fact of detention alone does not mean that one is being punished; rather, one must distinguish between "impermissible punishment" and "permissible regulation."[38]

It is axiomatic that the imposition of punishment for a crime requires conviction. The government controls behavior in other ways, however, which fall short of being "punishment." The Supreme Court thus developed a distinction between "punishment," which may not be imposed without a prior conviction, and "regulation," which requires only that the person receive due process.[39] The Court has used this distinction in cases involving the loss of citizenship,[40] deportation and detention of aliens,[41] and alleged bills of attainder.[42] In *Kennedy v. Mendoza-Martinez*,[43] Justice Goldberg summarized the tests used to determine a sanction's true nature:

> 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 are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.[44]

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37. See United States v. Portes, 786 F.2d 758 (7th Cir. 1985); United States v. Perry, 788 F.2d 100 (3d Cir.), cert. denied, 107 S. Ct. 218 (1986); United States v. Zannino, 798 F.2d 544 (1st Cir. 1986); United States v. Rodriguez, 803 F.2d 1102 (11th Cir. 1986).

38. 107 S. Ct. 2095, 2101 (1987).

39. See generally Note, Punishment, Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases, 34 Ind. L.J. 231, 232 (1959).

40. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554 (1963); Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590 (1958).

41. Wong Wing v. United States, 163 U.S. 228, 16 S. Ct. 977 (1896).

42. United States v. Lovett, 328 U.S. 303, 66 S. Ct. 1073 (1946).

43. 372 U.S. 144, 83 S. Ct. 554 (1963).

44. Id. at 168-69, 83 S. Ct. at 567-68 (footnotes and citations omitted).

In that case, the majority concluded that the loss of citizenship for draft evasion was punishment, and thus required a conviction.[45]

In the past, the Court used this distinction to strike down governmental actions which effectively punished without a conviction. In a recent series of cases, however, the Court has used it to uphold governmental actions as regulatory, even if the acts occurred in the context of a criminal proceeding. The first of these cases was *Bell v. Wolfish*.[46]

The pretrial detainee plaintiffs in *Bell* sought to enjoin certain practices of the detaining authorities on the grounds that the practices violated due process. These practices included assigning two persons to one-person rooms, banning the receipt of books or magazines except from publishers or bookstores, banning the receipt of food and personal property from outside the facility, random searches of the detainees' living areas, and searches of the detainees' body cavities.[47] Writing for the majority, Justice Rehnquist stated that the proper inquiry was whether these practices constituted punishment, and concluded that the practices were permissible regulation. Because the officials had no intent to punish, the procedures were required only to be rationally related to a legitimate governmental concern. Since those practices related to the government's concern over security at the detention facility, they did not violate due process.[48]

The importance of a relationship between the restriction and a legitimate government objective was reinforced in *Schall v. Martin*.[49] *Schall* dealt with the preventive detention of juveniles by a state pending a delinquency hearing. Once again, Justice Rehnquist wrote the majority opinion. Addressing the due process question raised by the plaintiffs, the court said that the first consideration must be whether the detention served a legitimate state objective. It found this legitimate objective in the combination of the state's interest in preventing crime and its interest in acting in *parens patriae* to preserve the welfare of the child. The Court noted that the detention was "consistent with the regulatory and *parens patriae* objectives relied upon by the State."[50] Reasoning that a juvenile who is constantly subject to control by adults has a lesser liberty interest than an adult, the Court concluded that the government's interests outweighed those of the juvenile, and due process was not violated.[51]

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45. Id. at 165-66, 83 S. Ct. at 566.

46. 441 U.S. 520, 99 S. Ct. 1861 (1979).

47. The detainees did not challenge the constitutionality of their detention. See infra text accompanying notes 80-81.

48. 441 U.S. at 561-62, 99 S. Ct. at 1886.

49. 467 U.S. 253, 104 S. Ct. 2403 (1984).

50. Id. at 271, 104 S. Ct. at 2413.

51. Id. at 265, 104 S. Ct. at 2410.

Because there was a legitimate state objective, and there was no express intent to impose punishment, the detention was found to be regulatory and upheld.[52]

In *Salerno*, the Court used the rational relation test formulated in *Bell* and *Schall*, saying that "[t]o determine whether a restriction or liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent."[53] This initial inquiry into legislative intent effectively determined the issue. In the absence of an express intent to punish, a mere rational relationship with a legitimate state objective is sufficient to establish that the action is regulatory. The Court thus used the fact that the restriction on liberty would be permissible under a regulatory analysis to establish the applicability of that analysis.[54] The Court in *Salerno* found no express intent to punish, and concluded that Congress had formulated pretrial preventive detention as a potential solution to the "pressing societal problem" of crime committed by persons released on bail.[55]

Having found a regulatory purpose, the Court then addressed the issue of whether the means used to achieve the purpose were excessive. It found that they were not. Congress had carefully limited the cases in which detention could be sought and had provided for a prompt hearing. The Court said that the length of the detention was limited by the "stringent time limitations" of the Speedy Trial Act. Since there was an intent to regulate, and the conditions were not excessive, the Court found that pretrial preventive detention did not constitute impermissible punishment.[56]

After deciding that the detention in *Salerno* was regulatory, the Court still had to determine whether it violated due process. The majority chose to use an interest-balancing due process test. Since the Court was not considering the application of the statute to the facts of Salerno's case,[57] it looked to prior jurisprudence to determine if there were any circumstances which would justify the detention of individuals prior to trial on the grounds of dangerousness.

Chief Justice Rehnquist, writing for the majority, noted that the Court had "repeatedly held that the government's interest in community safety can, in appropriate circumstances, outweigh an individual's liberty

52. Id. at 281, 104 S. Ct. at 2419.
53. 107 S. Ct. 2095, 2101 (1987).
54. See infra text accompanying notes 93 & 94.
55. 107 S. Ct. at 2101.
56. Id at 2102.
57. Id. at 2100 n.3.

interest."[58] He cited cases which purportedly upheld the detention of individuals without a prior conviction.

Ludecke v. Watkins[59] and *Moyer v. Peabody*[60] were cited for the proposition that, in times of war or insurrection, persons deemed "dangerous" could be detained by the executive.[61] These cases both arose in extraordinary circumstances. *Ludecke* dealt with the detention of enemy aliens during World War II; *Moyer* concerned the detention of a leader of an insurrection in Colorado. In *Moyer*, however, Justice Holmes provided an ample distinction for these two cases, saying, "When it comes to a decision by the head of the state upon *a matter involving its life*, the ordinary rights of individuals must yield to what he deems the necessities of the moment."[62]

Chief Justice Rehnquist next wrote, "[W]e have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings,"[63] mentioning *Carlson v. Landon*[64] and *Wong Wing v. United States*.[65] In *Wong Wing* it was held that aliens could not be imprisoned for a year prior to deportation; in dicta, the Court said that temporary confinement pending the deportation would be valid "as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens . . . ."[66] Distinguishing deportation proceedings from criminal cases, the Court in *Carlson* held that the denial of bail to alien communists pending a deportation hearing was justified as an exercise of Congress's sovereign power to determine which aliens may remain in the United States.[67]

Citing *Addington v. Texas*,[68] the *Salerno* Court next said "[T]he government may detain mentally unstable individuals who present a danger to the public."[69] In *Addington*, the Court addressed the issue of the standard of proof required for an involuntary commitment, holding that only clear and convincing proof of mental illness and dangerous tendencies was required for the commitment. The Court noted that the power to commit arose from a combination of the parens patriae interest

58. Id. at 2102.
59. 335 U.S. 160, 68 S. Ct. 1429 (1948).
60. 212 U.S. 78, 29 S. Ct. 235 (1909).
61. 107 S. Ct. at 2102.
62. 212 U.S. at 85, 29 S. Ct. at 237 (emphasis added).
63. 107 S. Ct. at 2102.
64. 342 U.S. 524, 72 S. Ct. 525 (1952).
65. 163 U.S. 228, 16 S. Ct. 977 (1896).
66. Id. at 235, 16 S. Ct. at 980.
67. 342 U.S. at 544-45, 72 S. Ct. at 536.
68. 441 U.S. 418, 99 S. Ct. 1804 (1979).
69. 107 S. Ct. at 2102, citing Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804 (1979).

in caring for the incompetent and the general police power to protect the community.[70]

The majority then stated that the government may detain dangerous defendants who become incompetent to stand trial. In *Greenwood v. United States*,[71] the petitioner challenged the power of the federal government to commit a defendant who was found to be mentally incompetent to stand trial. Such commitment was held valid as a necessary adjunct to the power to prosecute federal crimes.[72] In *Jackson v. Indiana*,[73] the Court struck down the commitment of a defendant which was based upon less stringent standards than those required for a civil commitment. Noting that the Court had previously held that equal protection required affording convicts the same safeguards as any other citizens in commitment cases,[74] the Court in *Jackson* stated, "If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, *the mere filing of criminal charges surely cannot suffice.*"[75]

Schall v. Martin[76] was cited as authorizing the preventive detention of juveniles. As in *Addington*, however, this was justified by a combination of the police power and the state's *parens patriae* interest in the detainee's welfare.[77]

The majority said that the police may hold a person until a neutral magistrate determines whether probable cause exists. The Court in *Gerstein v. Pugh*[78] held that the fourth amendment requires a timely determination of probable cause by the magistrate; the detention involved was merely an administrative adjunct to arrest.[79]

Finally, the Court mentioned that an arrestee may be incarcerated until trial if he presents a risk of flight, citing *Bell v. Wolfish*.[80] The plaintiffs in *Bell* were challenging only the conditions of their confinement, not the confinement itself. In the *Bell* opinion, Justice Rehnquist

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70. Id at 426, 99 S. Ct. at 1809.
71. 350 U.S. 366, 76 S. Ct. 410 (1956).
72. Id. at 375, 76 S. Ct. at 415.
73. 406 U.S. 715, 92 S. Ct. 1845 (1972).
74. Id. at 723-24, 92 S. Ct. at 1851, citing Baxstrom v. Herold, 383 U.S. 107, 86 S. Ct. 760 (1966).
75. 406 U.S. at 724, 92 S. Ct. at 1851 (emphasis added).
76. 467 U.S. 253, 104 S. Ct. 2403 (1984).
77. Id. at 264-66, 104 S. Ct. at 2410-11.
78. 420 U.S. 103, 95 S. Ct. 854 (1975).
79. Id. at 126, 95 S. Ct. at 869.
80. 441 U.S. 520, 99 S. Ct. 1861 (1979).

emphasized at several points that the detention was not an issue and that its constitutionality was not being decided.[81]

After citing these decisions, the Court conceded a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial."[82] The ultimate determination of constitutionality, however, depended upon a weighing of the particular governmental interest with that of the individual. Since Congress had determined that the individuals affected by the statute (those arrested for serious crimes) were highly likely to be responsible for dangerous acts, the Court said that "society's interest in crime prevention is at its greatest."[83] On the other side of the scale, the individual has a "strong interest in liberty." The Court stated:

> We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society . . . . 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."[84]

The Court then addressed the claim that preventive detention violated procedural due process. Deciding that the procedures utilized were adequate to authorize the pretrial detention of at least some defendants, the Court noted that the procedures of the Act were designed to ensure an accurate determination of the danger posed by the defendant. It cited the protections afforded the defendant, including the right to counsel, the right to testify and present witnesses, and the right to cross-examine witnesses presented by the government. It further noted that the judicial officer must base his decision on certain statutory factors, and that the government must prove its case by clear and convincing evidence. Finally, the judicial officer must provide written reasons for his detention decision, and the defendant has the right to an immediate appeal. The Court decided that these procedures "suffice[d] to repel a facial challenge."[85]

Having disposed of the due process claims, the Court turned to the defendants' eighth amendment challenge. Noting that the amendment states merely that "[e]xcessive bail shall not be required," the majority concluded that the amendment said nothing about whether bail shall be

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81. Id. at 523, 533-34 n.15, 99 S. Ct. at 1865-66, 1871 n.15.

82. 107 S. Ct. 2095, 2102 (1987).

83. Id. at 2103.

84. Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 332 (1934)).

85. 107 S. Ct. at 2104.

available at all.[86] The Court questioned whether the amendment imposes any limitations on Congress's power to define those classes of criminal cases which shall be bailable. It declined to decide this issue, however, saying, "[E]ven if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid."[87]

The Court reached this conclusion by rejecting the defendants' contention that the amendment allows only risk of flight to be considered as a basis for denying pretrial release. The Court distinguished earlier statements to that effect, stating that earlier bail laws had only advanced the government's interests in seeing that the defendant appeared at trial and did not threaten witnesses. In contrast, the present law also advances the governmental interest in protecting society. The majority concluded that to determine whether conditions of bail are "excessive" under the eighth amendment,

> we must compare that response against the interest the government seeks to protect by means of that response . . . . 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.[88]

CRITIQUE

Justice Marshall dissented in an opinion joined by Justice Brennan. Initially, he criticized the majority's assumption of jurisdiction. Noting that Salerno had been convicted and sentenced to imprisonment in an unrelated proceeding, and that Cafaro was currently on release under a $1,000,000 appearance bond, Justice Marshall argued that no controversy existed as to their pretrial detention.[89] He then attacked the basis of the majority's decision, saying, "The majority proceeds as though the only substantive right protected by the Due Process Clause is the right to be free from punishment before conviction."[90] He argued that the effect of the Bail Reform Act is to transform the indictment into evidence against the accused. He concluded that this eviscerates the presumption of innocence, and is thus unconstitutional.[91]

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86. Id.
87. Id. at 2105.
88. Id.
89. Id. at 2106-07 (Marshall, J., dissenting).
90. Id. at 2108.
91. Id. at 2109-11.

Justice Stevens also dissented. He agreed with Justice Marshall's conclusion that the statute was unconstitutional. While he did not think that preventive detention would be unconstitutional in all cases, he said that the mere fact of indictment could not be given weight in reaching the decision.[92]

The distinction between regulation and punishment developed as a method of determining which governmental actions require the constitutional protections afforded a criminal defendant.[93] The test conceived by the Court in *Bell* and applied in *Salerno*, however, fails to make this distinction. Under this test, the first inquiry is whether there is an express intent to punish. If so, the test is superfluous. If not, the court must then determine if "the alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."[94] If this test is met, the action is pronounced regulatory and upheld. If this test is not met, then the action is invalid even when considered as a regulatory measure. Thus, in the absence of an express intent to punish, a defendant seeking to invoke the greater protections against punishment must first show that the sanction violates the lesser protections against regulation.

The test is thus no test at all; the sole determinative factor is the intent of Congress. The Supreme Court, led by Chief Justice Rehnquist, has transformed the distinction between regulation and punishment into a mere euphemistic device. In *Salerno*, the Court failed to recognize the fact that, whether one is being "regulated" or "punished," jail is jail. The distinction lives on, however, because "regulating the dangerous" is more palatable than "imprisoning the presumably innocent."

The use of the distinction enabled the Court to engage in an interest-balancing due process test. Unlike the "fundamental concepts of liberty" test used in cases such as *Palko v. Connecticut*,[95] under this balancing test *any* individual right can be outweighed by a sufficiently compelling governmental interest.[96] The compelling interest in *Salerno* was the federal government's interest in preventing crime and protecting the community.

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92. Id. at 2112 (Stevens, J., dissenting).

93. See Note, supra note 39, at 232.

94. Bell v. Wolfish, 441 U.S. 520, 538, 99 S. Ct. 1861, 1874 (1979), citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963) (citations omitted; clarification in original).

95. 302 U.S. 319, 58 S. Ct. 149 (1937); but see Boston v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969) (overruling *Palko*).

96. For a discussion and criticism of the interest-balancing due process test, particularly as applied to preventive detention, see Alschuler, supra note 33, at 520-27, 532-36 (arguing that the interest-balancing test is flawed because it allows governmental action which should be struck down and overturns governmental action which should be upheld).

Examining the cases cited by the Court, it is apparent that this interest alone has never been held sufficient to justify detention, even when invoked by the states under their plenary police power. Rather, detention was upheld only when practiced pursuant to the war powers clause,[97] the power of a state to put down rebellion,[98] the sovereign power to regulate immigration,[99] a combination of the police power and a parens patriae interest,[100] or as an administrative step incident to arrest.[101] Even if *Bell v. Wolfish*[102] were read to authorize detention, as the Court suggests, the governmental interest in that case was assuring the appearance of the defendants at trial.[103] This, of course, is the classic purpose of the law of bail, to ensure the integrity of the judicial process. *Salerno* is thus unique in authorizing preventive detention based solely on the federal government's interest in preventing the commission of crimes in the future.[104]

Perhaps the most troublesome aspect of the Court's action in *Salerno* is the eagerness of the Court to uphold the detention. Twenty-eight days prior to the grant of certiorari in *Salerno*, the Court denied the application in a similar case in which the Third Circuit had upheld the constitutionality of the Act.[105] It then decided the issue in *Salerno*, a case which presented neither a fact situation to consider nor a live controversy.[106] The Court obviously wanted to make a statement about the Act, yet its ultimate holding is narrow. The Court reserved judgment on the application of the Act to particular fact situations, and declined to consider any part of the Act not implicated in Salerno's case.[107] In its haste to uphold the Act's facial validity, the Court may have raised more questions than it answered.

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97. Ludecke v. Watkins, 335 U.S. 160, 68 S. Ct. 1429 (1948).

98. Moyer v. Peabody, 212 U.S. 78, 29 S. Ct. 235 (1909).

99. Carlson v. Landon, 342, U.S. 524, 72 S. Ct. 525 (1952); Wong Wing v. United States, 163 U.S. 228, 16 S. Ct. 977 (1896).

100. Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403 (1984); Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804 (1979).

101. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854 (1975).

102. 441 U.S. 520, 99 S. Ct. 1861 (1979).

103. Id. at 534 n.15, 99 S. Ct. at 1871 n.15.

104. As noted by Justice Marshall, *Salerno* also raises a substantial question of the extent of the federal government's powers in relation to the states, a question ignored by the majority. See 107 S. Ct. at 2108 n.4 (Marshall, J., dissenting).

105. Certiorari was denied in United States v. Perry, 788 F.2d 100 (3rd Cir.), cert. denied, 107 S. Ct. 218 (1986), on October 6, 1986. Certiorari was granted in *Salerno*, 107 S. Ct. 397 (1986), on November 3, 1986.

106. See supra text accompanying notes 6 and 89. Justice Marshall's complete discussion of the procedural posture of the case is found in his dissenting opinion, 107 S. Ct. at 2106-07.

107. 107 S. Ct. at 2100 n.3.

The Court, in upholding the preventive detention provisions of the Bail Reform Act, justified its conclusions with a litany of the procedural protections afforded potential detainees. Since the Court did decide that pretrial preventive detention is not facially unconstitutional, the question now becomes which of the protections cited are constitutionally compelled? The answer to this question will determine the future of preventive detention on both the state and federal levels.[108]

Questions Left Open

Salerno is important as the first United States Supreme Court decision authorizing the use of pretrial preventive detention. One commentator has predicted an increased use of existing preventive detention measures by both state and federal prosecutors;[109] another has suggested that the decision will lead to increased pressure on states without such measures to adopt preventive detention statutes of their own.[110] Those who hail the decision as a blanket authorization of preventive detention, however, will find themselves mistaken.

Salerno establishes the method of analysis of future preventive detention cases. Because the detention is regulatory, the government's interests in each particular case must be weighed against those of the particular defendant, and the defendant must receive at least some of the procedural protections cited by the Court. Future litigation will be necessary to determine the validity of the remainder of the Bail Reform Act.

One of the questions left unanswered is exactly what constitutes a threat to the "safety of the community."[111] This would not have been a likely issue in *Salerno* even if the character of the defendants had been under consideration. The government proffered evidence that Salerno and Cafaro were Mafia chieftains, and the prosecution had tapes of them ordering executions.[112] The statutory language, however, offers little guidance, and, as the Senate Judiciary Committee's report on the bill stated, "The Committee intends that the concern about safety be given

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108. The states, of course, remain free to provide greater protection to criminal defendants. See, e.g., La. Const. art. I, § 18 ("[A] person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great.")

109. Stewart, Pretrial Detentions Upheld, 73 A.B.A. J. 54, 58 (Aug. 1, 1987).

110. States Likely to Look Anew at Pretrial Detention, 9 Nat'l L.J., June 8, 1987, at 5, col. 1.

111. 18 U.S.C.A. § 3142(e) (West Supp. 1987).

112. United States v. Salerno, 631 F. Supp. 1364, 1367-70 (S.D.N.Y. 1986), vacated, 794 F.2d 64 (2d Cir. 1986), rev'd, 107 S. Ct. 2095 (1987).

a broader construction than merely danger of harm involving physical violence."[113] This interpretation has been repeated by some of the lower courts.[114] The Court in *Salerno*, however, characterizes the governmental interest as "overwhelming,"[115] and relies upon prior cases which involved dangers on the scale of threats to the very existence of a state.[116] This supports a narrower interpretation of the statute, which would encompass only the gravest dangers to the community. Such a reading of the statute is also supported by the Senate Committee's statement that detention is meant to be applied only to a small, identifiable class of arrestees.[117]

Another problem with the Act is the presumption of dangerousness which arises in certain situations.[118] The lower courts have interpreted this presumption as shifting only the burden of production, rather than the burden of persuasion, to the defendant.[119] Nevertheless, this presumption is at odds with the presumption of innocence. Although the Supreme Court has said that "the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . . [and] it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"[120] that statement arose in the context of detainees seeking to use the presumption to challenge the conditions of their confinement and not the confinement itself. In contrast, the situation of a defendant seeking to determine whether he will be detained at all is more analogous to a trial, where the government bears the burden of proof in an adversary proceeding. The decision in *Salerno* is predicated on an assumption that the government has met its burden of proving dangerousness by clear and convincing evidence; this proof is what gives rise to the compelling governmental interest.[121] After showing that the defendant is likely to commit a serious crime, the government has an interest in preventing that crime.

On the other hand, if the finding of dangerousness comes solely from a congressional decision that those accused of certain crimes, or

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113. S. Rep. No. 225, supra note 15, at 12, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3195.

114. United States v. Acevedo-Ramos, 600 F. Supp. 501 (D.C.P.R. 1984), aff'd, 755 F.2d 203 (1st Cir. 1985); United States v. Yeaple, 605 F. Supp. 85 (M.D.Pa. 1985).

115. 107 S. Ct. at 2103.

116. Moyer v. Peabody, 212 U.S. 78, 29 S. Ct. 235 (1909).

117. S. Rep. No. 225, supra note 15, at 10, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3192-93.

118. 18 U.S.C.A. § 3142(e) (West Supp. 1987).

119. United States v. Jessup, 757 F.2d 378 (1st Cir. 1985); United States v. Medina, 775 F.2d 1398 (11th Cir. 1985).

120. Bell v. Wolfish, 441 U.S. 520, 533, 99 S. Ct. 1861, 1870-71 (1979).

121. 107 S. Ct. at 2103.

those arrestees who possess certain characteristics, are more likely to commit crimes while released, the government's interest is less compelling. If the government is unable to show that a particular defendant is likely to commit such a crime, that defendant should not be detained. The fact that a person has been convicted of a crime at some point in the past, or has been accused of a particular crime, should not result in that person having fewer procedural protections than other defendants. This presumption violates both due process and equal protection;[122] any detention based solely on the presumption should be overruled.

A final problem with the Act is its failure to set a time limit on the detention. The Court in *Salerno* noted the congressional reliance on the Speedy Trial Act, and implicitly held this sufficient to meet the test of facial constitutionality.[123] Nevertheless, the Court also recognized that at some point regulatory detention may become punitive, though it declined to indicate when this might occur.[124] In a pre-*Salerno* decision, the Second Circuit decided that detention of over eight months on the sole ground of dangerousness violated due process as constituting impermissible punishment.[125] A solution to this problem would be to interpret the congressional citation of the Speedy Trial Act as a justification for using that Act's nominal seventy day time limit[126] as the outer boundary for regulatory detention.[127] This would provide a bright-line rule which has some support in the legislative history.[128] It would avoid the problem of a dangerous defendant, accused of a relatively minor "crime of violence," being detained for a longer period than he would be sentenced to upon conviction. This time limit would restrict the use of preventive detention to those cases in which the guilt of the defendant can be readily proved.

Salerno will also have consequences for the various state preventive detention schemes.[129] These vary widely in the procedures used. The

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122. See, e.g., Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845 (1972) (striking down on equal protection grounds a civil commitment of an accused which was based on a lesser standard of proof than that required in normal proceedings).

123. 107 S. Ct. at 2101.

124. Id. at 2101 n.4.

125. United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir.), cert. dismissed, 107 S. Ct. 562 (1986).

126. 18 U.S.C. § 3161(c)(1) (1982).

127. For an example of the Court borrowing time limits from one statute to fill a gap in another, see Agency Holding Corp. v. Malley-Duff, 107 S. Ct. 2759 (1987) (borrowing the Clayton Act's statute of limitations for use in civil RICO actions).

128. Bail Reform Hearings, supra note 14, at 148 (statement of the Honorable John D. Butzner, Jr., Chairman, Committee of Administration of the Criminal Law of the Judicial Conference of the United States).

129. For an analysis of the various state provisions, see B. Gottlieb, Public Danger

federal Act now provides a benchmark against which these statutes can be measured, but the Court's decision offers little guidance as to which of the measures will survive. All that can be said is that those statutes which provide at least as much protection to the defendant as the federal Act are likely to be upheld. Whether those with less protection will be sustained is a matter of conjecture.

Finally, the Court leaves open several questions about the impact and operation of the eighth amendment. The Court suggests that it may not even limit the power of Congress to define those crimes which may be bailable. If this is the case, Congress would theoretically be able to eliminate bail altogether. A lower court has held that the eighth amendment requires individual determinations with respect to bail decisions;[130] this is at odds with the suggestion in *Salerno*. The only thing that is certain about the eighth amendment after *Salerno* is that it does not constitute a right to bail.

CONCLUSION

Salerno is important in the area of individual rights as a bellwether of the Rehnquist Court's attitudes. The decision evinces the judicial restraint one would expect from a conservative Court in its deference to the decisions of a coordinate branch of government. This respect extends to the point of adopting Congress's suggested method of analysis.[131]

On the other hand, the Court's rush to decide this obviously moot case shows an activist desire to uphold governmental action wherever it may be questioned. These conflicting tendencies will probably continue to manifest themselves as the majority attempts to delineate the extent of governmental power, particularly in the area of criminal law and procedure.

The decision also signals the continuing approval of interest-balancing in due process adjudication.[132] As discussed above, this test leads

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as a Factor in Pretrial Release: A Comparative Analysis of State Laws (1985). The adoption of preventive detention in Louisiana would require a constitutional amendment, since La. Const. art. I, § 18 guarantees criminal defendants a right to bail in non-capital cases.

130. Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), reversed on other grounds sub. nom. Murphy v. Hunt, 455 U.S. 478, 102 S. Ct. 1181 (1982).

131. The Senate Committee's report analyzed the proposed legislation in terms of the regulatory-penal distinction, and concluded that the bill was regulatory and thus constitutional. See S. Rep. No. 225, supra note 15, at 7-8, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3190-91.

132. See Alschuler, supra note 33, at 526 (because of the multitude of due process formulas, the Court "has been able to select some formulas . . . while silently disregarding others").

to the expansion of governmental power over the individual. Given the composition of the Court, both now and in the foreseeable future, it can be expected that well-recognized rights will continue to be protected, but that there will be little or no new recognition of individual rights implicit under the due process clause.

United States v. Salerno is a curious case which wraps a narrow holding in ribbons of very broad language. Although it purports to "solve" the problem of preventive detention, it actually raises more questions than it answers. Given a properly narrow reading, it should do little more than validate the practice of detaining dangerous arrestees. It may be, however, the Supreme Court's final statement on the issue. If that is the case, and courts in the future read *Salerno* in the broad fashion suggested by the decision itself, then Justice Marshall's evocation of a police state[133] may not be far from the mark.

Donald W. Price

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133. Throughout the world today there are men, women, and children interred indefinitely, awaiting trials while may never come or which may be a mockery of the word, because their governments believe them to be 'dangerous'. Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. . . . But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves.

107 S. Ct. at 2112 (Marshall, J., dissenting).