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# The Story of *United States v. Salerno*: The Constitutionality of Regulatory Detention

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**The Story of *United States v. Salerno*: The Constitutionality of Regulatory Detention**

Daniel Richman

In the custody of United States Marshals in March 1986 after his arrest on racketeering charges, Anthony Salerno, known to his associates and a federal grand jury as “Fat Tony,” did not look particularly dangerous. Indeed, even before his arrest, when holding court at the Palma Boy Social Club in East Harlem, the cigar-chomping 74-year-old “Boss” of the Genovese Family of La Cosa Nostra did not look like the kind of person one crossed the street to avoid on a dark night.<sup>1</sup> But under the recently enacted Bail Reform Act of 1984, federal prosecutors could seek the pretrial detention of Salerno and his long-time associate Vincent (“Fish”) Cafaro on grounds of dangerousness. They did, and the district court so found. Salerno thereafter spent the rest of his life in federal custody.

Is it constitutional for the government to lock up people without waiting to convict them at trial? If it is, what are the limits on the government’s power to lock up anyone it deems dangerous? These are issues raised by preventive detention provisions in bail statutes, and addressed in *United States v. Salerno*. The controversy about these bail statutes, once so hotly contested, has died down. But the broader questions about the government’s power to detain suspected criminals without giving them the benefit of full criminal process remain unresolved, and have taken on a new urgency as the nation confronts the threat of more terrorist attacks.

**Bail Background**

The origins of the institution of bail in the United States lie in medieval England. There, people accused of crimes were (in numbers and circumstances that varied over time) allowed to remain at liberty pending trial – which could be far off, depending on the arrival of a traveling judge. All it took was the promise of the accused, or that of an acceptable surety, that the accused would appear for trial. Over the centuries, the system developed into one that allowed

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<sup>1</sup>I was not in court when Salerno was brought in. But I did spend a lot of time with him during trial, and I have seen many surveillance photographs of him taken during the course of the government’s investigation. For a fuller disclosure of my connection to *United States v. Salerno*: As a summer assistant, I helped with electronic surveillance paperwork. Then, after a year of clerking for Chief Judge Wilfred Feinberg and a year clerking for Justice Thurgood Marshall – who both authored dissents in Salerno during years I was not working for them – I became an Assistant U.S. Attorney, just in time to play a small part in the Salerno trial, and quite a large part in the appeals that followed. I also dealt with Cafaro when he was a cooperating witness.

release upon a surety's pledge of money that would be forfeit should the accused fail to appear.<sup>2</sup> It could be abused however, particularly when the Crown wanted to use bail as a tool of political oppression. Indeed, among the grievances against James II listed in the 1689 Bill of Rights was that "excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects." The remedy established by the new constitutional order was a guarantee against "excessive bail."<sup>3</sup> Many defendants still languished in Newgate and other English jails before trial even after 1689,<sup>4</sup> but the importance of the right (at least in principle) was thus recognized.

In the United States, the guarantee in the English Bill of Rights was echoed in the Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Perhaps the Framers and their English predecessors could have been somewhat clearer. This amendment barred courts from imposing "excessive" bail conditions. But is there an absolute constitutional right to bail to begin with? If there is not, as Professor Caleb Foote pointed out, Congress could render the bail clause "entirely moot by enacting legislation denying the right to bail in all cases."<sup>5</sup> In a 1952 case, *Carlson v. Landon*,<sup>6</sup> however, the Supreme Court adhered to a more literal, and limited, interpretation of the bail clause:

The bail clause was lifted with slight changes from the 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 in our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prohibited Congress from defining the classes of cases in which bail shall be allowed in this country.<sup>7</sup>

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<sup>2</sup>See William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Albany L. Rev. 33 (1977); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, at 1-2 (1964) (prepared as a working paper for the National Conference on Bail and Criminal Justice).

<sup>3</sup>An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 Wm. & M., Sess 2, ch.2, 10.

<sup>4</sup>See John H. Langbein, *The Origins of Adversary Criminal Trial* (49-51 (2003) (discussing Eighteenth Century English pretrial detention).

<sup>5</sup>Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 969 (1965).

<sup>6</sup>342 U.S. 524 (1952)

<sup>7</sup>*Id.* at 545-46.

An important piece of evidence favoring the Supreme Court's limited reading was that in the Judiciary Act of 1789, which Congress debated even as it considered the Bill of Rights, the right to bail was qualified: "[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by [judges] who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law."<sup>8</sup> At the time, "the great majority of criminal offenses involving a threat of serious physical injury or death to the victim were punishable by death under state laws" and under federal laws, to the limited extent that federal law address these sorts of crimes.<sup>9</sup> Since most of the original thirteen colonies had similar provisions -- constraining judicial bail decisions, but leaving the decision about which offenses wereailable to the legislature<sup>10</sup> -- the Supreme Court's reading of the bail clause was quite defensible.

Against this constitutional backdrop, the federal government and the states had considerable latitude in how they structured their bail systems. Their general approach was to sit back and allow the market to flourish, as commercial bail bondsmen moved in to take the place of private sureties. In return for a nonrefundable money premium, these firms guaranteed a defendant's appearance at trial; if he fled, they would forfeit their bonds (although they would sometimes be able to recoup their loss from the defendant or his relatives, if those people had signed indemnification contracts).<sup>11</sup> This system entailed a remarkable outsourcing of criminal justice authority, without parallel outside the United States.<sup>12</sup> But it was comfortable for court officials, who relied on bail bondsmen to manage the population of arrested persons, and in turn helped ensure the profitability of selling bail bonds.<sup>13</sup>

In the 1950s, studies in Chicago, Philadelphia and New York conducted by Professor Foote and others highlighted the painful inadequacies of this system. They showed

the dominating role played by bondsmen in the administration of bail, the lack of any

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<sup>8</sup>Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91 (1789).

<sup>9</sup>John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223, 1227 (1969).

<sup>10</sup>See Duker, *supra* note \_\_, at 82.

<sup>11</sup>Freed & Wald, *supra* note \_\_, at 3.

<sup>12</sup>*Id.* at 22 ("A study by the United Nations recently disclosed that the United States and the Philippines are the only countries to allot a significant role to professional bail bondsmen in their systems of criminal justice.").

<sup>13</sup>Forrest Dill, *Discretion, Exchange and Social Control: Bail Bondsmen in Criminal Courts*, 9 Law & Soc'y Rev. 639, 670 (1975).

meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts was beyond their means. The studies also revealed that bail was used to “punish” defendants prior to a determination of guilt or to “protect” society from anticipated future conduct, neither of which is permissible purpose of bail; that defendant detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than convicted criminals.<sup>14</sup>

Responding to these studies, and to high-level efforts throughout the country to put bail reform on the legislative agenda, numerous jurisdictions passed new bail statutes in the 1960s. Leading the way was the federal government – in part because of the leadership of Attorney General Robert Kennedy and Senator Sam J. Ervin, Jr.,<sup>15</sup> but also because criminal justice reform in the federal system is far easier than in state systems, which handle so many more defendants, and in particular defendants accused of violent crimes. The result was the federal Bail Reform Act of 1966<sup>16</sup> which required that every defendant – save those charged with an offense punishable by death – be released on his own recognizance (a simple promise to return to court when required) unless the court determined that “such release will not reasonably assurance the appearance of the person as required.” The starting point was thus to be simple release. Bond was to be imposed only to the extent necessary to assurance the defendant’s return. The drafters of the extent explained the limited purpose of this regime:

This legislation does not deal with the problem of the preventative detention of the accused because of the possibility that his liberty might endanger the public. ... It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.<sup>17</sup>

Such broad pronouncements in the legislative history of the 1966 Act did not mean that

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<sup>14</sup>Wayne H. Thomas, *Bail Reform in America* 15 (1976); see John S. Goldkamp et al., *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court* xi (1995). For an intriguing proposal, under which defendants would be compensated for pretrial detention, see William H. Landes, *The Bail System: An Economic Approach*, 2 *J. Legal Stud.* 79 (1973).

<sup>15</sup>See *Id.* 6-7; 161-64.

<sup>16</sup>Pub. L. No. 89-465, 80 Stat. 215 (codified as amended at 18 U.S.C. §§ 3141 to 3151 (1989)) (repealed 1984).

<sup>17</sup>H.R. Rep. No. 1541, 89<sup>th</sup> Cong., 2d Sess. 5-6, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2293, 2296; see John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventive Detention After United States v. Salerno*, 75 *Va. L. Rev.* 639, 643 (1989).

the possibility of considering a defendant's dangerousness in bail decisions had been removed from the table. Immediately upon becoming President, after a campaign in which anti-crime rhetoric had figured prominently, Richard Nixon proposed amending the Act to permit "temporary pretrial detention" of criminal defendants whose "pretrial release presents a clear danger to the community."<sup>18</sup> While this proposal did not make immediate headway, the administration, with important assistance from William H. Rehnquist, then Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel,<sup>19</sup> soon gained passage of a preventive detention statute for the District of Columbia.<sup>20</sup> However, while many predicted that the new D.C. statute would be used as a model for similar legislation by the states, only twelve states made moves in this direction during the 1970s.<sup>21</sup> One reason states may have held back was uncertainty about the constitutionality of the D.C. statute. Once that was (narrowly) upheld by the Court of Appeals of the District of Columbia in 1981,<sup>22</sup> many more states adopted similar provisions.<sup>23</sup>

The interest of legislators around the country in preventive detention statutes was not simply sparked by developments in constitutional law. There really *was* a crime problem: In 1960, the murder rate (per 100,000) had been 5.1. In 1980, it was 10.2. (It was back down to 5.6 in 2002). In 1960, the violent crime rate had been 1,887.2; in 1980, it was 5,950.0. (In 2002, it was 4,118.8).<sup>24</sup> It was not clear how many crimes were being committed by criminal defendants

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<sup>18</sup>John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223, 1223 (1969). It should be noted that when John Mitchell was later arrested, in 1973, charged with obstructing an S.E.C. investigation of Robert Vesco, he was released on bail. See Photograph, *Mitchell Denies Charges*, N.Y. Times, May 22, 1973, at A1 (showing former Attorney General John N. Mitchell leaving federal court after pleading not guilty).

<sup>19</sup> Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 Mich. L. Rev. 510, 512 n. 3 (1986)

<sup>20</sup>Howard, *supra*, 75 Va. L. Rev. at 645; see Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 Minn. L. Rev. 335, 340 (1990) (noting that "pretrial detention system in the District of Columbia was the first expressly based upon the threat of criminality before trial").

<sup>21</sup>Barbara Gottlieb, *Public Danger as a Factor in Pretrial Release: A Comparative Analysis of State Laws* 19 (National Institute of Justice: July 1985).

<sup>22</sup>*United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), cert. denied, 455 U.S. 1022 (1982).

<sup>23</sup>Gottlieb, *supra* note \_\_\_, at 20.

<sup>24</sup>U.S. Census Bureau, *Statistical Abstract of the United States*, at HS-23 (2003) ("Crimes and Crime Rates by Type of Offense: 1960-2002).

out on bail,<sup>25</sup> but, in this environment, Congress was far more receptive to preventive detention provisions. A 1984 Senate report noted that the “broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release.”<sup>26</sup>

Yet there was another factor as well, one that had as much to do with restraining government power as with restraining dangerous defendants. Even though the 1966 Bail Reform Act did not authorize consideration of dangerousness, a Senate Report found ample evidence that judges did so anyway when setting bail, and would regularly impose “excessively stringent release conditions, and in particular extraordinarily high money bonds, in order to achieve detention.” The fault, it was argued, lay less with the judges than with a statute that prevented the judges from candidly addressing a critical societal concern: “Providing statutory authority to conduct a hearing focused on the issue of a defendant’s dangerousness and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively.”<sup>27</sup> As one scholar noted: “[I]f punishment before trial is to be minimized for most felony defendants, it may be necessary to be more candid about the uses of bail as a means of preventive detention. This would elevate the importance of process and how decisions are made since the rationale for preventive detention would have to be clearly stated before taking such a step.”<sup>28</sup>

Out of these various currents came the Bail Reform Act of 1984, part of the Comprehensive Crime Control Act of 1984.<sup>29</sup> Continuing the general presumption of pretrial release from the 1966 Act, the new law nonetheless provided that if a “judicial officer” (judge or magistrate) found that “no condition or combination of conditions” would “reasonably assure” not just the “appearance of the [defendant] as required” but also the “safety of any other person and the community,” the judicial officer “shall order the detention of the person before trial.”<sup>30</sup>

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<sup>25</sup>See Miller & Guggenheim, *supra* note \_\_\_, at 397-405.

<sup>26</sup>S. Rep. No. 225, 98<sup>th</sup> Cong., 2d. Sess., 6, *reprinted in* 1984 U.S. Code Cong. & Admin. News, 3182, 3188.

<sup>27</sup>*Id.* at 11, *reprinted in* 1984 U.S. Code Cong. & Admin. News, at 3194.

<sup>28</sup>Roy B. Flemming, *Punishment Before Trial: An Organizational Perspective of Felony Bail Processes* 155 (1982).

<sup>29</sup>Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 1, 3141-3151 (DATE)).

<sup>30</sup>18 U.S.C. § 3142(e).

This detention order could be entered only after an adversarial hearing, at which, although the rules of evidence would not apply, the defendant had a right to counsel, and could call and cross-examine witnesses. The government bore the burden of showing dangerousness by “clear and convincing evidence”<sup>31</sup> – not “proof beyond a reasonable doubt” (the standard for convicting a defendant at trial), but more demanding than the “preponderance of evidence” standard that usually applies in pre-trial factfinding, and indeed applies when the government seeks to show that a defendant should be detained as a flight risk. Still, there was a presumption (albeit a rebuttable one) that a defendant posed a risk of both flight and danger where there was “probable cause to believe” that the defendant had committed a narcotics offense for which the “maximum term of imprisonment” was ten years or more, or had used a gun in connection with a crime of violence, or under certain other circumstances, including where not more than five years had elapsed since the defendant’s release from imprisonment on state or federal narcotics or violent crime charges.<sup>32</sup> To clear up any misperceptions, the statute noted: “Nothing in this section shall be construed as modifying or limiting the presumption of innocence.”<sup>33</sup>

The new bail statute was immediately the subject of numerous legal challenges in the lower courts. The first case to reach the United States Supreme Court involving this or any of the other state preventive detention statutes was that of Anthony Salerno.

### **Salerno Case Background**

No one would ever have called Anthony Salerno “the Dapper Don.” An obituary writer later paid tribute to his subdued sartorial tastes: “Unlike younger Mafia leaders like John Gotti, Mr. Salerno typified a more old-fashioned gangster ethic that frowned on flamboyance that might attract attention. In sharp contrast to Mr. Gotti’s \$1,000 designer suits, he was known to hold counsel dressed in a fedora and T-shirt.”<sup>34</sup> From his base in East Harlem, however, Salerno built Harlem’s biggest numbers racket and solidified his place in the Genovese Family hierarchy. In 1977, alleging that his numbers operation was taking in at least \$10 million annually, federal authorities brought gambling and tax charges against Salerno.<sup>35</sup> After two mistrials on the tax

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<sup>31</sup>18 U.S.C. § 3142(f).

<sup>32</sup>18 U.S.C. § 3142(e).

<sup>33</sup>18 U.S.C. § 3142(j).

<sup>34</sup>James Dao, Anthony (Fat Tony) Salerno, 80, A Top Crime Boss, Dies in Prison, N.Y. Times, July 29, 1992, at D19.

<sup>35</sup>See Arnold H. Lubasch, Reputed Organized-Crime Figure Charged With Running a \$10 Million Yearly Racket, N.Y. Times, May 4, 1977, at 29.



counts, however, he plead the case out and received a six month sentence.<sup>36</sup> But the heat would soon get more intense.

By the time Salerno, then age 74, was arrested on March 21, 1986, on the charges for which he would be detained, he probably felt rather comfortable in federal court. In fact, he was already out on bail on another federal racketeering indictment, also filed in the Southern District of New York (in Manhattan).

That prior indictment, unsealed on February 26, 1985, charged that Salerno was the boss of the Genovese Family and a member of the “commission” that “had the power to resolve disputes and to regulate relations between and among La Cosa Nostra Families.”<sup>37</sup> Among other things, Salerno and his co-defendants (who included Gambino boss Paul Castellano until his murder on December 16, 1985, outside Spark’s Steakhouse<sup>38</sup>) were charged with using their control over the concrete workers union to control the allocation of large concrete construction jobs in New York, and with resolving a leadership dispute within the Bonanno Family by authorizing the murder of that family’s boss, Carmine Galante.

The “Commission” indictment was just one component of a broad structural attack on “traditional” organized crime in New York City – “traditional” being the way law enforcement distinguished the five Mafia families and associates from the “emerging” or “non-traditional” groups of non-Italian origins that would strut the boards by the 1990s. The statutory tool for this attack, the Racketeer Influenced and Corrupt Organizations (“RICO”) Act had been on the books since 1970. And the FBI had seriously targeted La Cosa Nostra at least since J. Edgar Hoover acknowledged its existence in the late 1950s.<sup>39</sup> In the early 1980s, however, the Justice Department strategy evolved from piecemeal takedowns into larger scale cases designed to dismantle whole chunks of families. This strategy predated the arrival of Rudolph W. Giuliani as U.S. Attorney the Southern District of New York in 1983, but was given new energy and focus by Giuliani’s high-profile methods.<sup>40</sup> Salerno was certainly a conspicuous target in these efforts,

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<sup>36</sup>See Arnold H. Lubasch, Salerno, 67, Given 6 Months in Prison In Gambling Case, N.Y. Times, Apr. 20, 1978, at D20.

<sup>37</sup>James B. Jacobs, Christopher Panarella & Jay Worthington, Busting the Mob: United States v. Cosa Nostra 95 (1994) (excerpting from indictment).

<sup>38</sup>John Gotti, Castellano’s successor as head of the Gambino family, was later convicted for his role in the murder. United States v. Locasio, 6 F.3d 924 (2d Cir. 1993).

<sup>39</sup>See Tony G. Poveda, “Controversies and Issues,” in Athan G. Theoharis, The FBI: A Comprehensive Reference Guide, 101, 119-20 (1999).

<sup>40</sup>See Selwyn Raab, Curbing Mob Chiefs, N.Y. Times, Feb. 27, 1985, at B2; Leslie Maitland Werner, U.S. Officials Cite Key Successes in War Against Organized Crime, N.Y.

having topped *Fortune Magazine*'s Fall 1986 list of the "50 Biggest Mafia Bosses."

After Salerno's arrest on the "Commission" indictment, he was released on bail, set at \$2 million.<sup>41</sup>

In March 1986, months before trial began on the "Commission" indictment, Salerno was arrested again. This indictment that, like the prior one, charged violations of the RICO Act. While the focus of the "Commission" indictment had been horizontal – arrangements between and among Cosa Nostra families – the focus of the new indictment was vertical. The enterprise charged here was "the Genovese Organized Crime Family" and the defendants were all members or associates of that family. Salerno was, again, alleged to be the Boss of the Family, and, among the other defendants, Vincent ("Fish") Cafaro was alleged to be a "capo" (a lieutenant). The racketeering activity charged in this indictment included acts relating to the bid-rigging scheme charged in the Commission indictment; a scheme to elect and control the president of the Teamsters International; sundry acts of extortion, and illegal numbers and bookmaking operations.<sup>42</sup> Among the other defendants charged in the indictment were Matthew ("Matty the Horse") Ianniello, a longtime "capo" in the Genovese Family; Nicholas Auletta, whose concrete company became the largest concrete construction company in New York as a result of the illegal bid rigging scheme, and Edward ("Biff") Halloran, whose alliance with the mob allowed him to obtain a virtual monopoly over the supply of concrete in Manhattan.<sup>43</sup>

At Salerno and Cafaro's arraignment, the government conceded that neither defendant posed a risk of flight, but it moved that both be detained on the ground that no bail condition or combination of bail conditions would assure the safety of the community or any person. At a detention hearing, a few days later, the government called no actual witness but "proffered"<sup>44</sup> evidence derived from court-ordered electronic surveillance at various locations, including the Palma Boy Social Club, the club in East Harlem where Salerno seemed to spend most of his waking hours when he was in New York City (and not at his residence in rustic Rhinebeck, N.Y.). These conversations provided graphic proof of the violence with which Cafaro, under Salerno's occasional supervision, ran the gambling operation.

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Times, Nov. 7, 1983, at A1; see also James B. Jacobs, generally.

<sup>41</sup>See Arnold H. Lubasch, U.S. Indictment Says 9 Governed New York Mafia, N.Y. Times, Feb. 27, 1985, at A1.

<sup>42</sup>United States v. Salerno, 631 F. Supp. 1364 (S.D.N.Y. 1986)[fn No DJ bar to this successive prosecution – cite CA]

<sup>43</sup>Brief for the United States in United States v. Salerno, 88-1464 (2d Cir.), at 10-11.

<sup>44</sup>Such proffers had previously been found an acceptable way for the government to meet its burden in detention hearings. See United States v. Martir, 782 F.2d 1141 (2d Cir. 1986).

More powerful, however, was the government's proffer of the prospective testimony of two mob turncoats, James ("Jimmy the Weasel") Fratianno and Angelo Lonardo, the former head of the Cleveland Family that reported to the Genovese Family in New York. Fratianno had long been a star witness in mob prosecutions.<sup>45</sup> As he had at a previous trial, Fratianno was prepared to testify that, back in 1976, he had attended a meeting in the back room of a store at which Salerno and other Genovese Family members had voted a "hit" on a Family loanshark, John Spencer Ullo. The district court later noted that the "'contract' was not carried out when Ullo got wind of the plan in California and was himself able to kill the hitman."<sup>46</sup>

The proffer from Lonardo may well have been more significant, in part because it involved more recent murderous plotting by Salerno and in part because the lateness of Lonardo's cooperation – he had not started cooperating with the government until August 1985 – gave the government a reason to explain why their position on Salerno's bail had changed since the "Commission" indictment.<sup>47</sup> Lonardo had told of Salerno's direct involvement in a 1980 "contract" that *was* carried out, on one John Simone, a/k/a "Johnny Keyes," and in two other murder conspiracies.

Salerno's ability to order "hits" was corroborated by intercepted conversations. In one, from January 1985, a Genovese loanshark asked his permission to kill a debtor. Salerno responded: "If you want to kill him, we will kill him."<sup>48</sup> An intercept from 1984 also caught Salerno announcing what he would say if a debtor questioned his status: "Who am I? I'm the f\_\_\_\_\_g boss."

Salerno proffered more than a dozen witnesses, ready to testify that "they had known Salerno for many years, considered him a friend, and did not consider him to be any danger to the community." He also proffered a letter from his doctor telling of "a long standing history of high blood pressure complicated by congestive heart failure."<sup>49</sup>

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<sup>45</sup>For more on Fratianno's checkered career as a mobster and government witness, see Ovid Demaris, *The Last Mafioso* (1986). Also see Michael J. Zuckerman, *Vengeance Is Mine: Jimmy the Weasel Fratianno Tells How He Brought the Kiss of Death to the Mafia* (1987).

<sup>46</sup>631 F. Supp. at 1367.

<sup>47</sup>The admissibility of statements that Lonardo made to a narcotics co-conspirator before Lonardo's conviction and eventual cooperation were at issue in another Supreme Court case, decided less than a month after the Salerno bail decision. *Bourjaily v. United States*, 483 U.S. 171 (1987).

<sup>48</sup>631 F. Supp. at 1368.

<sup>49</sup>631 F. Supp. at 1370.

In an opinion issued April 2, 1986, Judge John M. Walker, Jr., concluded that the government had “met its burden of proof by clear and convincing evidence. The information it had received of Salerno’s danger to the community, Judge Walker noted, was “overwhelming.” “By ‘clear and convincing’ proof, the government has established that Salerno is the head, or ‘Boss,’ of an organization engaged in extortion, loansharking, illegal gambling, and murder. ... The government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word ‘hit.’”<sup>50</sup> Finding “ample information to conclude that Cafaro and others under Salerno’s control [had] the means to carry out the violent acts,” the court also noted that “[n]owhere does Salerno claim that his vascular condition will affect his ability to run the Genovese Family enterprise if he is released.”

Judge Walker also reviewed the evidence of the violence with which Cafaro managed his gambling operation and noted:

The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose to the community is self-evident.<sup>51</sup>

## **The MCC**

Pursuant to Judge Walker’s order, Salerno and Cafaro were detained in the Metropolitan Correctional Center (“MCC”) in downtown Manhattan, adjacent to the federal courthouse. Despite its title, the MCC is a short-term custodial facility, designed to primarily to house pretrial detainees. In a 1979 Supreme Court case arising out of complaints that the conditions of confinement in the MCC were unconstitutional, the Court painted an almost rosy picture of the facility, built just four years earlier: “The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities.”<sup>52</sup>

But a jail it was. The 1979 case noted that MCC inmates were locked into their rooms at night and during “head counts”; “were not permitted to receive packages from outside the facility containing items of food or personal property, except for one package of food at Christmas,” and were subject to unannounced searches of their rooms, and to visual body cavity searches after

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<sup>50</sup>631 F. Supp. at 1371.

<sup>51</sup>631 F. Supp. at 1375.

<sup>52</sup>Bell v. Wolfish, 441 U.S. 520, 525 (1979).

every contact visit with a person from outside. Indeed, pretrial detention facilities are often more forbidding than the prisons to which defendants are sent if they are convicted. This is less a result of legal rules than of the iron laws of real estate: Prisons can be placed in suburban or rural areas, where there is ample space for outdoor activities. Jails, at least those used for detaining defendants facing trial in metropolitan jurisdictions, cannot be too far from the courthouses they serve.<sup>53</sup> That puts them in areas where space is at a premium. And whatever efforts are being made to provide recreational and educational opportunities to prisoners are not likely to be focused on short-termers like those in detention facilities.

## **Court of Appeals**

After Judge Mary Johnson Lowe, to whom the case was assigned for trial, refused to reconsider Judge Walker's detention order, Salerno and Cafaro appealed both judges' decisions to the Second Circuit Court of Appeals. There, they raised several statutory challenges, including one claiming that the evidence presented was insufficient to support Judge Walker's findings. They also raised a constitutional claim: that detaining a defendant on the ground that "his release would pose a danger to the community or any person" violated the due process clause.

A three-judge Second Circuit panel heard the case with appropriate dispatch and rendered a decision on July 3, 1986. The court made short work of the defendants' statutory claims and found that their detention order did not violate the Bail Reform Act. But it found the Act unconstitutional. While pretrial detention could properly be used to address a risk of flight or a danger that a defendant would "tamper with or intimidate witnesses or jurors," it could not be used as a regulatory measure to protect the community generally against future crimes. The Act's authorization of detention on this ground, Judge Amalia Kearse wrote, was "repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes."

The very concept of a "substantive" procedural protection is elusive, and to its critics like Justices Antonin Scalia and Clarence Thomas and others, mis-begotten.<sup>54</sup> The Supreme Court, however, has long held that the due process clause "contains a substantive component that bars

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<sup>53</sup>When pretrial detainees are housed too far away from courthouses where they will be tried, as they all too frequently are, their lawyers are severely handicapped in preparing for trial or engaging in plea negotiations. See Douglas J. Klein, Note, The Pretrial Detention "Crisis": The Causes and the Cure, 52 J. Urban & Contemp. L. 281, 295-96 (1997).

<sup>54</sup>See *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment) (noting readiness to reconsider "our substantive due process cases" as inconsistent with "the original understanding of the Due Process Clause"); *Albright v. Oliver*, 510 U.S. 266, 275-76 (1994) (Scalia, J., concurring); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (1980) ("'Substantive due process' is a contradiction in terms - sort of like 'green pastel redness.'").

certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them."<sup>55</sup> The doctrine's malleability has made it a powerful instrument of judicial power, to be used for good or ill, with the definition of "good" or "ill" often being in the mind of the beholder. Among its more notable applications have been in *Lochner v. New York*<sup>56</sup> (declaring a New York maximum-hours statute for bakers unconstitutional); *Roe v. Wade*<sup>57</sup> (striking down abortion statute), and *Lawrence v. Texas*<sup>58</sup> (striking down Texas sodomy statute).<sup>59</sup>

To distinguish this substantive application of the due process clause from procedural applications, Judge Kearse drew on a recent opinion by another member of the panel, Judge Jon O. Newman, in a different detention case. Judge Newman had explained:

Incarcerating dangerous persons not accused of any crime would exceed due process limits not simply for lack of procedural protections. Even if a statute provided that a person could be incarcerated for dangerousness only after a jury was persuaded that his dangerousness had been established beyond a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due process, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause*. This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause -- indeed, by all of the criminal justice guarantees of the Bill of Rights -- is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as*

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<sup>55</sup>*Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

<sup>56</sup>198 U.S. 45 (1905)

<sup>57</sup>410 U.S. 113, 155 (1973).

<sup>58</sup>123 S. Ct. 2472 (2003)

<sup>59</sup>See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

*regulation of those feared likely to commit future crimes.*<sup>60</sup>

Judge Kearse also offered an answer to the hypothetical offered by the third member of the panel, Chief Judge Wilfred Feinberg, who dissented from her opinion. Chief Judge Feinberg had observed: “[I]f a member of a terrorist organization is indicted for blowing up an airliner for political reasons and there is clear and persuasive evidence that the defendant will do so again if not confined, it is not self-evident to me that society must nevertheless immediately release him on bail until he is tried.”<sup>61</sup> Judge Kearse answered:

Even the risk of some serious crime . . . must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by incarceration simply because untested evidence indicates probable cause to believe he has committed one crime and is a risk to commit another one. Surveillance would doubtless be the government's response if confidential information, not disclosable to obtain an indictment, alerted the government to such a risk by a person not charged with a crime. It should be no less effective in cases where an indictment has been returned, even assuming, which is unlikely, that a person posing such a risk would not be detained despite a well-grounded fear that he would flee.<sup>62</sup>

In his dissent, Chief Judge Feinberg reviewed the due process precedents and highlighted the procedural protections of the Bail Reform Act. He concluded that “detaining indicted defendants under the Bail Reform Act for a limited time on the basis of clear and convincing evidence that nothing short of confinement will prevent them from violating the law while on release does not violate any norm of decency implicit in the concept of ordered liberty, and does not violate the Due Process Clause.”<sup>63</sup> Having resolved that the Act was not unconstitutional on its face, Chief Judge Feinberg would also have found that the detention of Salerno and Cafaro for “a little over three months” had not, under the circumstances, “degenerated into punishment.”<sup>64</sup>

Later in July, the government sought review of the Second Circuit’s decision in the Supreme Court. On November 3, 1986, the Supreme Court agreed to hear the case because of the conflict among the Circuits. As the Court later noted, “[e]very other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional

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<sup>60</sup>794 F.2d at 72 (quoting *United States v. Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986) (emphasis added in Salerno)).

<sup>61</sup>794 F.2d at 77.

<sup>62</sup>794 F.2d at 74.

<sup>63</sup>794 F.2d at 77-78.

<sup>64</sup>794 F.2d at 79.

challenge.”<sup>65</sup>

Meanwhile, the trial of Salerno and his co-defendants on the “Commission” indictment went forward on September 8, 1986. It ended on November 19, 1986, with a verdict of guilty on all counts and on all racketeering acts. On January 13, 1987 – less than two weeks before the Supreme Court was to hear arguments regarding Salerno and Cafaro’s detention – District Judge Richard Owen sentenced Salerno to 100 years’ imprisonment. Judge Owen, however, took care not to render the issue of Salerno’s pre-trial detention moot. The bail statute shifted the burden of proof for convicted defendants and permitted their release on bail pending appeal only where a court found “by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any person or the community if release.” Nonetheless, Judge Owen ordered that, “[i]nasmuch as defendant Anthony Salerno was not ordered detained in this case, but is presently being detained pretrial in [the Genovese Family case],” Salerno’s bail status in the Commission case would “remain the same . . . pending further order of the Court.”<sup>66</sup>

Although Salerno’s bail status thus did not change while he awaited oral argument on his detention order before the Supreme Court, Cafaro’s status decidedly did. On October 9, 1986, Judge Lowe ordered that he be released “temporarily for medical care and treatment.”<sup>67</sup> Bail was set at a \$1 million personal recognizance bond, with the government’s consent.<sup>68</sup> Why government had become so solicitous of Cafaro’s health was not quite clear at the time. After all, Salerno’s proffered medical testimony had won him only a direction from Judge Walker to the Warden of Metropolitan Correctional Center in downtown Manhattan, where Salerno was being held, “to permit Salerno to receive his regular medication and . . . use an exercise bike twice a day, every day.”<sup>69</sup> It was only later, on March 20, 1987, after the Supreme Court had heard oral argument on the bail issue, that real reason for Cafaro’s release emerged. That day, U.S. Attorney Giuliani announced that Cafaro had been cooperating with the government since the fall, and had made a controlled purchase of four pounds of high-purity heroin for \$420,000 from Ralph (“the General”) Tutino, whom Giuliani described as “a major Mafia drug dealer.”<sup>70</sup> In return for Cafaro’s cooperation, the government had agreed to let him plead to a single

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<sup>65</sup>481 U.S. at 741 (citing cases).

<sup>66</sup>Salerno, 481 U.S. 756 n.1 (Marshall, J., dissenting).

<sup>67</sup>481 U.S. at 757.

<sup>68</sup>1988 LEXIS 14032, at 22 n. 27.

<sup>69</sup>631 F. Supp. at 1374.

<sup>70</sup>Arnold H. Lubasch, Major Mafia Leader Turns Informer, Secretly Recording Meeting of Mob, N.Y. Times, Mar. 21, 1987, at 31; see *United States v. Tutino*, 883 F.2d 1125 (2d Cir. 1989).



racketeering count, and to drop the charges then pending against Cafaro's son, Thomas.<sup>71</sup>

The risk that the government will use pretrial detention as a means of putting pressure on defendants to cooperate is a real one, and one highlighted by Justice Marshall in his Supreme Court dissent. It would be unfair to assume that this is what happened here, or even that the allure of immediate release from detention was the main factor in Cafaro's decision to break his Cosa Nostra oaths of secrecy and loyalty. The chance to obtain immunity for his son Thomas might well have played an important role. One ought not lightly to make assumptions about Cafaro's personal calculus, particularly in matters involving Thomas. According to one recent report, even after cooperating Cafaro withheld information from the FBI as part of a deal with a Genovese leader, in return for protecting Thomas from retaliation.<sup>72</sup>

On April 6, 1987, the day trial began for Salerno and his ten co-defendants, the government moved to sever proceedings against Vincent and Thomas Carfaro. The trial would go on for thirteen months, ending May 4, 1988.<sup>73</sup>

## Supreme Court

By the time Salerno's challenge to his detention reached the Supreme Court, the facts of the case had lost any legal importance. His was a facial challenge to the Bail Reform Act, one that freed his counsel (Cafaro understandably did not send a lawyer), and the Court, from any obligation to navigate the gritty realities of the New York underworld. With this freedom from ugly facts came a heavy legal burden, however – one that required him to “establish that no set of circumstances exist[ed] under which the Act would be valid.”<sup>74</sup> Indeed, as Chief Justice Rehnquist noted at the beginning of his opinion for the Court, handed down on May 26, 1987: “The fact the [] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid,” since it was only in the limited First Amendment context – where a defendant could claim that, say, his freedom of speech was being “chilled” by the mere presence of an expansive statute – that a statute could be challenged as overbroad.<sup>75</sup> In other words, if the Court could imagine any person under any circumstances

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<sup>71</sup>United States v. Cafaro, 1988 U.S. Dist. LEXIS 14032 (S.D.N.Y. 1988)

<sup>72</sup>See Jerry Capeci, *Gangland*, Feb. 6, 2003, available at <<http://ganglandnews.com/column316.htm>>

<sup>73</sup>United States v. Salerno, 837 F.2d 797 (2d Cir. 1991).

<sup>74</sup>481 U.S. at 745.

<sup>75</sup>*Id.*; see also *Schall v. Martin*, 467 U.S. 267 n. 18 (1984); *New York v. Ferber*, 458 U.S. 747 (1982). The doctrine in this area is somewhat less than clear. See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235 (1994). But the Court recently

whom it would not be unconstitutional to detain pretrial on dangerousness grounds, Salerno would lose.

One nagging factual issue Rehnquist had to deal with was the dissent's assertion that the case had been mooted out by the combination of Salerno's 100-year sentence in the "Commission" case and Cafaro's cooperation and release. Rehnquist disposed of the point in a footnote: Salerno had been released on bail in the "Commission" case and the detention order at issue remained the authority for Salerno's incarceration. "The case is therefore very much alive and is properly presented for resolution."<sup>76</sup>

Rehnquist then turned to the merits of Salerno's constitutional challenges, starting with his substantive due process claim. The essence of this claim was that Salerno's pretrial detention constituted "punishment" and that the only way such punishment could be constitutionally inflicted was after a full-blown criminal trial. Implicit in the Court's treatment of this threshold issue was its recognition of the enormous doctrinal consequences that follow from labeling adverse treatment by the state as "punishment." For the government to "punish" a criminal defendant before he ever faced trial -- and had all the benefit of trial rights like the right to a jury, to the presumption of innocence and to proof beyond a reasonable doubt -- would be bad enough. To tie that punishment to future crimes he had yet to commit would be quite beyond the pale, even for those justices who have taken a dim view of substantive due process claims.<sup>77</sup>

But the mere fact that Salerno had lost his liberty did not mean that he had been "punished." From the Court's perspective, he simply had been the subject of a regulatory measure. In drawing this distinction between punishment and regulation, the Court did not rely solely on indications in the Bail Reform Act's legislative history that Congress had the

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noted: "[W]e have recognized the validity of facial attacks alleging overbreadth [] in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Sabri v. United States*, 541 U.S. \_\_ (2004).

<sup>76</sup>481 U.S. at 744 n.2.

<sup>77</sup>In *Chavez v. Martinez*, 538 U.S. 760, 775 (2003), Justice Thomas noted:

The Court has held that the Due Process Clause also protects certain "fundamental liberty interests" from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Only fundamental rights and liberties which are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" qualify for such protection. [*Id.*]. Many times, however, we have expressed our reluctance to expand the doctrine of substantive due process, [] in large part "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

“regulatory” purpose of preventing danger to the community. It also looked to whether the restrictions that the measure imposed were “excessive in relation to” that non-punitive purpose. And it found that they were not. The Act, Rehnquist noted, “carefully limits the circumstances under which detention may be sought to the most serious of crimes. . . . The arrestee is entitled to a prompt detention hearing [], and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.” Moreover, detainees had to be housed “in a ‘facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.’”<sup>78</sup>

Now Rehnquist had to confront the Second Circuit’s reasoning, which had not turned on the characterization of pretrial detention on dangerous grounds as “punishment” but had held such a regulatory deprivation of liberty to be “beyond the constitutional pale.” But he was not long detained, for, he asserted, the lower court had misread the constitutional map: “We have repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”<sup>79</sup> “For example,” Rehnquist went on, “in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.”<sup>80</sup> Rehnquist then noted that “[e]ven outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous person,” and he cited cases involving the “mentally unstable individuals who present a danger to the public,” “dangerous defendants who become incompetent to stand trial,” and “juveniles [found to] present a continuing danger to the community.” He concluded:

Given the well-established authorities of the government, in special circumstances, to restrain individuals’ liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in [these other cases].<sup>81</sup>

The Court then did the usual balancing. On one side, it looked at the “government’s interest in preventing crime by arrestees,” which it found “legitimate and compelling.” This was no generalized interest in public safety. What Congress had done was “narrowly focus[] on a particularly acute problem in which the Government interests are overwhelming.” The Act

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<sup>78</sup> 481 U.S. at 747-48 (quoting 18 U.S.C. § 3142(i)(2)).

<sup>79</sup> 481 U.S. at 748.

<sup>80</sup> *Id.* (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding the detention and deportation of a Nazi – albeit one who had fallen out with that party’s leadership in 1933 – interned under the Alien Enemy Act during World War II)).

<sup>81</sup> 481 U.S. at 749.

selects out only those defendants “arrested for a specific category of extremely serious offenses.” Not only must the Government have first shown there to be probable cause that a defendant have committed the charged offense, but then “[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaking by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.” The Court concluded: “Under these narrow circumstances, society’s interest in crime prevention is at its greatest.”<sup>82</sup>

“On the other side of the scale, of course,” Rehnquist recognized “the individual’s strong interest in liberty.” But where “the government’s interest is sufficiently weighty – as it was here, given the care with which Congress “delineat[ed] the circumstances under which detention would be permitted” – an individual’s right could be “subordinated to the greater needs of society.”<sup>83</sup>

Rehnquist then addressed Salerno’s claim that the Bail Reform Act violated the excessive bail clause. Seizing on language from a case about what it meant for bail to “excessive,”<sup>84</sup> Salerno had argued that the only risk that could constitutionally be considered in a bail determination was that of flight. The Court brushed the language aside as “dicta” and concluded: “Nothing in the test of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.”<sup>85</sup>

## Dissents

Justice Marshall’s dissent, in which he was joined by Justice William J. Brennan, opened in a tone of decided outrage:

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic

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<sup>82</sup>Id. at 750.

<sup>83</sup>Id. at 750-51.

<sup>84</sup>Stack v. Boyle, 342 U.S. 1 (1951).

<sup>85</sup>481 U.S. at 754.

principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.”<sup>86</sup>

Marshall followed with jab at the Court for disregarding the facts that Salerno had already been sentenced to “a century of jail time in another case” and that Cafaro had been released upon signing up as a cooperator. “Only by flatly ignoring these matters is the majority able to maintain the pretense” that a live controversy existed between the parties of the sort required by Article III of the Constitution.<sup>87</sup>

Turning to the merits, Marshall chided the majority for the “sterile formalism” of its division of Salerno’s challenge into due process and excessive bail components. To be sure, Marshall found fault with each aspect of Rehnquist’s opinion. The majority’s “cramped” substantive due process analysis, Marshall complained, gave far too much license to legislators interested in using detention to serve the “regulatory” goal of preventing danger to the community. And its bail clause analysis failed to recognize that there are limits to the kinds of interests that Congress can further through the denial of bail. Because detention on dangerousness grounds authorized by the Bail Reform Act, “bears no relation to the Government’s power to try charges supported by a finding of probable cause,” “the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment.”<sup>88</sup> What most troubled Marshall, however, is the way in which pretrial detention for dangerousness undermined the presumption of innocence. A mere indictment, he argued, “has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he soon will be guilty of something else.”<sup>89</sup>

Justice John Paul Stevens could not join Justice Marshall’s opinion. Unable to disregard Chief Justice Feinberg’s airline bomber hypothetical – not very hypothetical in 1987 and certainly not today<sup>90</sup> – he conceded that “it is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he would she would otherwise kill a group of innocent people in the immediate future.” In his separate dissenting opinion, Stevens agreed with Marshall that “the fact of indictment cannot, consistent with the presumption of innocence and the Eighth Amendment’s Excessive Bail Clause, be used to create a special class, the members of which are, alone, eligible for detention because of future

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<sup>86</sup>Id. at 755-756.

<sup>87</sup>Id. at 716.

<sup>88</sup>Id. at 765.

<sup>89</sup>Id. at 764.

<sup>90</sup>See *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (affirming conviction for conspiracy to bomb twelve U.S. commercial airliners in Southeast Asia in 1995).

dangerousness.” But, in a move Marshall would hardly have made, Stevens went on to suggest: “If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense.”<sup>91</sup>

### Critique of Decision

The main intellectual challenge Rehnquist faced in *Salerno* was to explain why a decision upholding the Bail Reform Act as an acceptable regulatory measure would not license legislatures to freely toss around regulatory justifications whenever they wanted to restrain or even imprison the subjects of their suspicions. The Chief Justice’s success in meeting this challenge was middling at best. As Rehnquist recognized, reliance on legislative intent for distinguishing regulation from punishment has its limits. A court might not be able “to discern the true intentions of a legislative body.”<sup>92</sup> And even if they could be discerned, “making those intentions dispositive ‘encourages[s] hypocrisy and unconscious self-deception.’”<sup>93</sup> Particularly since the regulation here put its subjects in facilities that looked a lot like the prisons used to punish convicted criminals, the persuasiveness of Rehnquist’s opinion turned on the extent to which he could show that the Bail Act had been appropriately tailored to its ostensibly limited regulatory goal.

Yet Congress actually had painted with a pretty broad brush. After all, the class of defendants whose dangerousness is presumed include all those facing narcotics charges with more than a 10-year maximum. And it is hard to find a federal narcotics charge that does *not* expose a defendant to more than ten years. The street dealer who sells a glassine of heroin, or a single vial of crack faces a *twenty*-year maximum.<sup>94</sup> These cases are not usually prosecuted in federal court, but they regularly find their way there.<sup>95</sup> To be sure, courts have read the presumption provision

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<sup>91</sup>481 U.S. at 768-69.

<sup>92</sup>Note, Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders, 109 Harv. L. Rev. 1711, 1720 (1996); see Maria Foscarinis, Note, Toward a Constitutional Definition of Punishment, 80 Colum. L. Rev. 1667, 1672 (1980).

<sup>93</sup>Note, supra note \_\_, Harv L. Rev., at 1720 (quoting Herbert L. Packer, The Limits of the Criminal Sanction 33 (1968)).

<sup>94</sup>See 21 U.S.C. § 841(b)(1)(C).

<sup>95</sup>The U.S. Attorney’s Office that prosecuted Salerno would regularly prosecute street narcotics sales as part of its “Federal Day” program. See Jo Thomas, Odds Heavily Favor Leniency for Drug Dealing in the City, N.Y. Time, June 30, 1986, at A1.; United States v. Aguilar, 779 F.2d 123, 125 (2d Cir. 1985) (noting that “garden-variety state law drug offenses” had been converted into federal offenses”).

merely to impose “the burden of production” on the defendant. The “burden of persuasion” remains with the government. Yet “when a defendant comes forward with no evidence, the presumption alone supports the conclusion that no conditions of release could reasonably assure the appearance of the defendant and the safety of the community.”<sup>96</sup> Whether or not this creative shifting of burdens makes sense or not is not the point, which is merely that Congress did not take great pains in deciding which felony defendants should face preventive detention.

As for the safeguards offered by the Speedy Trial Act against lengthy pretrial detention, here, too, Rehnquist may have been a bit too charitable. The Speedy Trial Act – which requires that defendants be indicted within 10 days of their arrest if they have been detained, and that trial begin within 70 days of indictment – does compel courts to move cases along.<sup>97</sup> But its clock can be stopped for numerous reasons, including the making and consideration of defense motions. Defendants unwilling to sacrifice these avenues of legal relief for the sake of a speedy trial may end up spending considerable time in jail. And while the Court did not preclude a successful challenge by a defendant subjected to a particularly lengthy period of pretrial detention, defendants have not met with success in this regard. In one case, the Seventh Circuit held that continued detention for two years pending trial did not amount to a due process violation, and “suggested that, absent a showing of government culpability, no amount of time in detention, by itself, can constitute a due process violation.”<sup>98</sup> In another, the Second Circuit countenanced 30 months of pretrial detention for a narcotics kingpin on both flight and dangerous grounds, and noted that “the constitutional limits on a detention period based on dangerousness to the community may be looser than the limits on a detention period based solely on risk of flight. In the former case, release risks injury to others, while in the later case, releases only the loss of a conviction.”<sup>99</sup>

The Chief Justice may also have been overly charitable when he envisioned a custodial scheme that kept pretrial detainees separate from convicted prisoners. That is indeed a goal of the federal scheme, but the relevant provisions demands that it be achieved only “to the extent practicable.” Federal Bureau of Prisons regulations, however, currently note: “What is practicable is contingent upon the individual institution’s design, structure, and operation. When it is not practicable to keep pretrial inmates separate, [] staff may permit, based on sound correctional judgment, pretrial inmates who do not present a risk to the institution’s security or

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<sup>96</sup>Federal Judicial Center, *The Bail Reform Act of 1984* 19-20 (2d ed. 1993) (citing cases).

<sup>97</sup>Speedy Trial Act, 18 U.S.C. §§ 3161-3174.

<sup>98</sup>Federal Judicial Center, *The Bail Reform Act of 1984* (2d ed., 1993) (discussing *United States v. Infelise*, 934 F.2d 103 (7<sup>th</sup> Cir. 1991)).

<sup>99</sup>*United States v. Millian*, 4 F.3d 1038, 1048 (2d Cir. 1993) (quoting *United States v. Orena*, 986 F.2d 628, 631 (2d Cir. 1993))

orderly running to have regular contact with convicted inmates.”<sup>100</sup>

In short, very little in the majority’s opinion offers doctrinal assurance that the state’s compelling interest in preventing future crime will not, someday, be allowed to justify the “*indefinite* preventive detention of individuals acquitted or not even charged.”<sup>101</sup>

On the other hand, Marshall had only middling success in addressing why society simply lacked the power to restrain those who had been shown to pose a danger to its members. Those accused of crimes must indeed be “presumed innocent,” and at trial, that presumption can be overcome only by proof beyond a reasonable doubt. But not even Marshall would have found any inconsistency in maintaining this presumption and nonetheless considering the strength of the evidence against the defendant and his prior record when deciding whether he poses a risk of flight or a threat to witnesses, should he be released on bail. And if the possibility that a defendant has committed the crime can be considered in this regard, why cannot it also be considered as a factor in deciding whether the accused poses a threat not just to witnesses but to others? Predictions of such harm can be difficult,<sup>102</sup> yet is the government required to release someone in its custody whom it is convinced will proceed to inflict such harms? Marshall’s categorical answer to the categorical question was “no,” and he had to accept Chief Judge Feinberg’s imminent airplane bombing as the price of liberty.

Stevens would not accept the bombing, and was thus obliged to distinguish that case from the one before him. Yet once he accepted the general proposition of preventive detention, his critique of the Bail Act ended up being that it is too narrow, rather than too broad. A nice counterintuitive debating point,<sup>103</sup> but not particularly satisfying for those who believe that the government does well to legislate in reasonable increments, and can legitimately take a special interest in the risk that someone it releases from custody might go out to hurt others.

Yet, to be fair to all sides, substantive due process cases often end up being exercises in

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<sup>100</sup>Federal Bureau of Prisons, U.S. Dep’t of Justice, Program Statement: Pretrial Inmates, PS 7331.04 (Jan. 31, 2003).

<sup>101</sup>Stephen J. Schulhofer, Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws, 7 J. Contemp. L. Issues 69, 86 (1996).

<sup>102</sup>See John Monahan, *Prediction of Crime and Recidivism*, in 3 Encyclopedia of Crime & Justice 1125 (2d ed. 2002); John Monahan et al., *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence* (2001).

<sup>103</sup>See also Tribe, *supra* note \_\_, at 405 (“If two men appear equally likely to commit a violent crime, it is arbitrary to imprison the man who is about to be tried for the past offense while imposing no restraint on the man who is not facing trial.”).



contestable, even semi-arbitrary, line-drawing and interest balancing. Just because a government measure might feel like punishment to those subjected to it does not necessarily mean that those people should get all the protections guaranteed to criminal defendants. To hold otherwise would be to require the government to produce proof beyond a reasonable doubt before it could, say, quarantine an infected individual, or detain someone found dangerously mentally ill in a civil proceeding. A true legislative intent to further the general good must count for something. On the other hand, as Miller and Guggenheim have noted, if “legislative intent is the sole determinant of punishment, legislatures could circumvent rights expressly protecting the individual from government authority . . . by obfuscating the real purpose of punitive regulation.”<sup>104</sup> Enormous constitutional consequences will follow the determination of whether a measure constitutes “regulation” or “punishment,” yet we lack the doctrinal tools to make such determinations rest on much more than ipse dixit or complex inquiries on whose conclusions reasonable minds can differ.<sup>105</sup>

Some have tried a different tack, arguing that the use of dangerousness as a basis for incarceration should be limited to those situations in which the criminal justice system *could not* punish – as would be the case for both quarantines (where there is no justification for punishment) or the detention of the dangerous mentally ill who lacking criminal culpability cannot be punished.<sup>106</sup> This is an utterly defensible position. Yet it does leave a contestable gap between the civil and criminal confinement systems when it comes to dangerous agents who are capable of bearing blame after the danger they pose is realized.<sup>107</sup> Is the domain of criminal law so exclusive that the government must always wait until after a crime (however grievous) has been committed, if the perpetrator is mentally capable of standing trial? Giving the government license to lock blameworthy dangerous people without the niceties of a full-blown criminal trial risks whole-sale circumvention of the criminal justice system. But flatly denying the government such power under all circumstances risks sacrificing innocent bystanders on the alter of legal formalism.

We will shortly explore how these unresolved questions continue to haunt the case law.

## Afterward

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<sup>104</sup>Miller & Guggenheim, *supra* note \_\_\_, at 367.

<sup>105</sup>See Miller & Guggenheim, *id.* at 370-73; Carol Steiker, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 *Geo. L.J.* 775 (1997).

<sup>106</sup>See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 *Harv. L. Rev.* 1429 (2001).

<sup>107</sup>See Stephen J. Morse, Uncontrollable Urges and Irrational People, 88 *Va. L. Rev.* 1025, 1025-26 (2002); see also Stephen J. Morse, Preventive Confinement of Dangerous Offenders, 32 *J. L. Med. & Ethics* 56 (2004); Stephen J. Morse, An Essay on Preventive Detention, 76 *B.U. L. Rev.* 113 (1996).

Will look at three aspects of the legacy of *United States v. Salerno*: What happened to Salerno and Cafaro; what happened to Bail Statute, and what happened to doctrine that the Supreme Court deployed to affirm it.

### **What happened to Salerno and Cafaro**

In May 1988, the trial of Salerno and his co-defendants (but not Cafaro) concluded with his conviction on RICO substantive and conspiracy charges and on numerous other counts, including mail fraud (relating to the bid rigging in the concrete superstructure industry), extortion, and running an illegal numbers business. All the other defendants standing trial were also convicted on various counts. But Salerno was not convicted on counts or specifications relating to the two murders alleged in the Government's bail proffer. The jury found the "racketeering act" alleging his involvement in John Simone's murder had not been proven. And the Government had consented to dismissal of the racketeering act charging the conspiracy to murder John Spencer Ullio "after the sole witness to the crime was unable to identify Salerno in court."<sup>108</sup>

In October 1988, Judge Lowe sentenced Salerno to a total of seventy years' imprisonment, to run consecutive to the 100-year sentence that Judge Owen previously had imposed on him in the Commission case. While the irrelevance of the extra time perhaps reduced Salerno's interest in challenging this new conviction, the war was waged on his behalf by co-defendants who had more at stake. And a long war it was. In June 1991, a Second Circuit panel reversed all the convictions, finding that the trial court had committed reversible error in refusing to allow the defendants to introduce certain exculpatory grand jury testimony. The panel concluded that the "spillover taint" from this error "undermined [its] confidence in the accuracy of all of the guilty verdict."<sup>109</sup> The Government took the case to the Supreme Court, which overturned the panel's opinion and sent the case back down.<sup>110</sup> But the panel again reversed the convictions.<sup>111</sup> So the Government sought and obtained en banc review by entire Circuit, which overturned the panel in 1993.<sup>112</sup> By this time, however, Salerno was no longer alive, having died on July 27, 1992, at age 80, in the Springfield, Missouri, Medical Center for Federal Prisoners.<sup>113</sup>

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<sup>108</sup>Brief for the United States, *US v. Salerno*, 88-1464, at 38.

<sup>109</sup>937 F.2d 797 (2d Cir. 1991).

<sup>110</sup>505 U.S. 317 (1992).

<sup>111</sup>974 F.2d 231 (2d Cir. 1992).

<sup>112</sup>*United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (en banc).

<sup>113</sup>James Dao, Anthony (Fat Tony) Salerno, 80, A Top Crime Boss, Dies in Prison, *N.Y. Times*, July 29, 1992, at D19.

Salerno continued to play parts in federal mob trials after his death. But his role changed. In 1997, at the federal racketeering and murder trial of Vincent Gigante, the Government's theory was that sometime in the early 1980s, long before Salerno's arrest, Gigante had taken the reins as the Boss of the Genovese Family. While Salerno had been out front as the ostensible boss, Gigante, who wandered around Greenwich Village in his bathrobe, pretending to be crazy, had the real power.<sup>114</sup>

Cafaro, for his part, had a bumpy relationship with government following his initial decision to cooperate. Shortly before the trial of the mob heroin dealer he had set up for the government, Cafaro announced that he would no longer cooperate. When called as a witness at that trial, he asserted his Fifth Amendment privilege. But months later, without having made any new agreement with the prosecutors, he appeared as a witness before the Senate Permanent Subcommittee on Investigations.<sup>115</sup> Eventually, Cafaro and the government reached a new *modus vivendi*, and he went on to do a star turn at a number of major organized crime trials. He has since disappeared into the Witness Protection Program.<sup>116</sup> His son Thomas did a short stint in prison (as a result of Vincent's breach of his cooperation agreement), was released, and, in 2003 went back in, having pleaded guilty, along with co-defendant Vincent Gigante, in another Genovese racketeering case.<sup>117</sup>

### **What happened to the bail statute**

The Supreme Court's decision and the statute it upheld were roundly criticized by many academics<sup>118</sup> and editorial writers.<sup>119</sup> But, as Laurie Levenson recently noted: "Attitudes have changed. Following *Salerno*, the public and courts predictably moved into an era in which we are

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<sup>114</sup>See Joseph P. Fried, *Gigante Lawyers Say U.S. Saw Another as Genovese Boss*, N.Y. Times, July 9, 1997, at B3; Patricia Hurtado, *FBI Agent Asked: Who is Real Don?*; Gigante, Salerno Both Cited, *Newsday*, July 9, 1997, at A4.

<sup>115</sup>*United States v. Tutino*, 883 F.2d at 1139.

<sup>116</sup>Jerry Capeci, Feb. 6, 2003 column. *Supra*

<sup>117</sup>Anthony M. DeStefano, *Taking One On the "Chin"*; Gigante: I Faked Mental Woes, *Newsday* (New York), Apr. 8, 2003, at A26.

<sup>118</sup>See Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 *Loyola of L.A. L. Rev.* 1217, 1218 n.4 (2002) (citing critical commentaries); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *Harv. L. Rev.* 1429, 1445 (2001).

<sup>119</sup>*Id.* at 1218-19 (citing editorial criticism in newspapers including *New York Times*, *Chicago Tribune*, *Los Angeles Times*).

relatively comfortable with preventive detention.”<sup>120</sup>

A government study found that the percentage of federal defendants detained jumped from 26% before the 1984 Bail Reform Act to 31% after.<sup>121</sup> In 1996, ten years after Salerno was detained, of 56,982 defendants arraigned in federal court, 19,254 were ordered detained. For 42.3% of these defendants, the basis for the detention order was “risk of flight.” For 10%, it was danger to the community, and for 47.0% it was a combination of flight and danger.<sup>122</sup> Although the breakdown in the bases for detention is not available for 2002, that year detention orders were entered for about 40% of all defendants, and the average length of detention for all defendants was 110.9 days.<sup>123</sup>

By 1988, nineteen states had enacted or were on the verge of enacting statutes allowing for preventive detention.<sup>124</sup> But the regularity with which defendants are detained on dangerousness grounds in federal court soon became part of the attraction of federal jurisdiction in the violent crime area, and was touted by federal enforcers as a reason for taking federally cases that would normally have been prosecuted in state court.<sup>125</sup>

Does preventative detention really make communities safer? Intuitive and anecdotal responses can vary. The lone criminal’s ability to personally attack people is certainly limited by his detention. But crimes can still be planned by detainees who, like Salerno himself, have the ability to order others to act on their behalf. In June 1987, during Salerno’s trial and in the very facility Salerno was being held, another detainee used his visiting and telephone privileges to tamper with

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<sup>120</sup>Id. at 1219.

<sup>121</sup>General Accounting Office, *Criminal Bail: How Bail Reform is Working in Selected District Courts* 18 (1987).

<sup>122</sup>John Scalia, Bureau of Justice Statistics Special Report: *Federal Pretrial Release and Detention, 1996*, at 4, tbl.3 (Feb. 1999) (NCJ 168635). For the final 0.6%, the basis was danger to witness or juror.

<sup>123</sup>Bureau of Justice Statistics, U.S. Dep’t of Justice, *Compendium of Federal Justice Statistics, 2002*, tbls. 3.7 & 3.11 at 47, 50 (2004).

<sup>124</sup>Michael W. Youtt, Note, *The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 Ga. L. Rev. 805, 805 n.3 (1988).

<sup>125</sup>See Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 379 (2001); Malcolm Russell-Einhorn, Shawn Ward & Amy Sheerman, *Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999: Drugs, Weapons, and Gangs*, 28 (2000) (Abt Associates report prepared for National Institute of Justice).

witnesses and obstruct justice.<sup>126</sup> On the other hand, the same case provides a nice example of how detention allows the government to monitor inmate communications and thereby detect and foil planned crimes. The bottom line is that detention allows the government to narrow the window of opportunity for committing further crimes. But the window remains open.

Precisely how much has been gained from preventive detention provisions? How many crimes have jurisdictions using such provisions been able to prevent? These questions are impossible to answer, and therein lies a problem. As Miller & Guggenheim noted: “Conducting a proper blind test of an operative pretrial detention system is difficult politically because it would involve releasing some individuals who would otherwise be detained.”<sup>127</sup> And in the absence of such tests, or conclusive results from field studies,<sup>128</sup> it is all too easy to assume success: “Once the government has instituted a system of imprisonment openly calculated to prevent crimes by persons awaiting trial, the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. . . . [W]hen the system detains persons who could safely have been released, its errors will be invisible.”<sup>129</sup>

### **What happened to legal doctrine**

As Rehnquist noted, *Salerno* was not the first case to uphold detention on the grounds of dangerousness. The other cases, however, involved war time or juveniles who were outside regular criminal justice system. In explicitly targeting adults who could potentially be held criminally responsible for the crimes the detention was meant to prevent, the 1984 Bail Act marked an important policy shift, and the decision to uphold it entailed a doctrinal shift of great significance.

Long before the Act was passed, Laurence Tribe explained the basis of his opposition to it:

Throughout history, governments have been tempted to establish order by identifying and imprisoning in advance all likely troublemakers. Our society, however, has made the basic decision not to entrust such sweeping power to the state. We have relied instead upon the moral and deterrent effects of laws which define particular acts as crime and which punish all who violate their proscriptions. For those believed dangerously ill and hence incapable of

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<sup>126</sup>See *United States v. Willoughby*, 860 F.2d 15 (2d Cir. 1988); see also *United States v. LaFontaine*, 210 F.3d 125, 127 (2d Cir. 2000) (another witness tampering effort by someone confined in the MCC).

<sup>127</sup>Miller & Guggenheim at 384.

<sup>128</sup>See Thomas Bak, *Pretrial Release Behavior of Defendants Whom the U.S. Attorney Wished to Detain*, 30 *Am. J. Crim. L.* 45 (2002);

<sup>129</sup>Laurence H. Tribe, *An Once of Detention: Preventive Justice in the World of John Mitchell*, 56 *Va. L. Rev.* 371, 375 (1970).

controlling their behavior in response to this system of deterrents, we have devised programs of civil commitment. For the rest, we have relied on the threat of sanctions. Recognizing that this threat will not deter all those who can control their behavior, we have accepted some risk of crime as the inevitable price of a system that promises to punish no man until it is shown beyond a reasonable doubt that he has committed a specifically illegal act.<sup>130</sup>

Yet acceptance of Tribe's broad propositions was breaking down, even as he wrote them. It is no coincidence that, in October 1985, Surgeon General C. Everett Kopp convened a Workshop on Violence and Public Health, "which signaled public health's entry into the field of violence prevention."<sup>131</sup> To be sure, public health experts were not proposing the use of detention as a public health tool, and focused instead on measures to change social and physical environments and individual knowledge, skills or attitudes. But by de-emphasizing moral accountability,<sup>132</sup> they gave intellectual support a mix of anti-crime measures that relied less on criminal punishment and more on regulation.

The extent to which criminal procedural had become elaborately constitutionalized played a role as well. As Carol Steiker has noted, with the "revolution in criminal procedure" raising "the cost to government of using the criminal process [,] state and federal legislators and regulators have sought civil avenues to address what might be more plausibly classified as criminal conduct."<sup>133</sup> And the result has been the creation of what Steiker has called "the preventive state," which has deployed a panoply of "prophylactic measures," including detention, in the service of its preventive goals.<sup>134</sup> The 1984 Bail Act must be seen as part of this broader and continuing trend. As Steiker reports:

[P]retrial detention of both juveniles and adults has become much more common in recent

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<sup>130</sup>Tribe, *supra* note \_\_, at 376; see also See Louis Michael Seidman, Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State, 7 J. Contemp. L. Issues 97 (1996) ("[E]ven someone unambiguously committed to the regulatory perspective would want to retain a social practice that effectively communicated blame. Inculcating internal moral inhibitions against antisocial conduct is probably the most cost-effective means of crime control. The criminal justice system teaches these moral lessons only if it is perceived as punishing the blameworthy and vindicating the blameless.").

<sup>131</sup>See James A. Mercy, et al., Public Health Policy for Preventing Violence, 12 Health Affairs 7, 7 (1993), available at <http://content.healthaffairs.org/cgi/reprint/12/4/7>.

<sup>132</sup>See Mark H. Moore, Violence Prevention: Criminal Justice or Public Health 34, 43 (1993).

<sup>133</sup>Steiker, 85 Geo. L.J. at 780.

<sup>134</sup>Carol Steiker, The Limits of the Preventive State, 88 J. Crim. L. & Crim. 771, 774-75 (1998) (hereinafter "Limits").

years. Many states are seeking to prevent sexual assaults, particularly those against children, by enacting sex offender registration and/or community notification statutes and by creating or reviving “sexually violent predator” statutes that permit the indefinite civil commitment of convicted sex offenders who would otherwise be released at the end of their prison terms.<sup>135</sup>

In upholding these measures, courts have drawn on the public health model as well, if only by analogy, creating what Edward Richards has called a “jurisprudence of prevention” that applies “traditional public health rationales and procedures to individuals who pose a threat to society.”<sup>136</sup> “In the prevention cases,” Richards observes, “the Supreme Court has transformed the traditional police power to restrict disease carriers into a general power to restrict individuals whose criminal activity poses a threat to society.”<sup>137</sup>

Since *Salerno*, what limits are there on when the State can use detention on a regulatory measure in the service of these preventive goals? Some answers can be found in *Foucha v. Louisiana*,<sup>138</sup> decided in 1992, but they are quite tentative. After Foucha was tried for violent crime and acquitted by reason of insanity, he was committed to a psychiatric hospital. Although hospital officials thereafter decided he was not insane and recommended his release, state law provided that commitment would continue, even in the absence of mental illness, unless a defendant so acquitted could prove he was not dangerous to himself or others. Hospital officials found he had an “anti-social” personality and refused to certify him as non-dangerous. So Foucha remained in detention.

The Supreme Court found that Louisiana’s scheme violated Foucha’s right to due process. Justice Byron White (who had voted with the majority in *Salerno*) noted:

It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. . . . Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond

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<sup>135</sup>Id. at 777.

<sup>136</sup>Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 *Hastings Con. L. Q.* 329, 330 (1989).

<sup>137</sup>Id. at 384.

<sup>138</sup>504 U.S. 71 (1992).

reasonable doubt to have violated a criminal law.<sup>139</sup>

The implication of this reasoning, according to Stephen Schulhofer, is “to confine *Salerno* to regimes of temporary detention pending trial and to indefinite confinement unconstitutional in the absence of mental illness.”<sup>140</sup> Yet the message of *Foucha* was mixed. For one thing, it was a 5-4 decision. For another, there was Justice O’Connor’s separate concurrence. While she joined the majority’s opinion, O’Connor suggested that it might indeed “be permissible for Louisiana to confine the insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee’s continuing dangerousness. See *United States v. Salerno*....”<sup>141</sup>

O’Connor’s concurrence in *Foucha* presaged her voting with the majority in *Kansas v. Hendricks*,<sup>142</sup> which involved the first use of Kansas’ Sexually Violent Predator Act. That act, passed in 1994, authorizes the civil commitment of persons who, due to a “mental abnormality” or a “personality disorder,” are likely to engage in “predatory acts of sexual violence.” The state moved to commit Hendricks, who had a long history of sexually molesting children and who was due to be released from prison after serving time for a serious of convictions for sexual assault of minors. After a hearing at which Hendricks testified that he could not control his sexual desires for children when he got “stressed out,” the jury determined that he was a sexually violent predator, and he was committed.

Upholding Hendrick’s commitment, the Supreme Court concluded that civil detention of sex offenders, based on a finding of “mental abnormality,” was neither “punishment” as a constitutional matter, nor, as a regulatory measure, did it amount to a substantive due process violation. Writing for the Court, and without substantial disagreement from the dissenting justices on this point,<sup>143</sup> Justice Thomas noted:

Although freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," . . . that liberty interest is not absolute. The Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context . . . Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of

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<sup>139</sup>504 U.S. at 82-83.

<sup>140</sup>Schulhofer, supra note \_\_ (Contemp Issues) at 89.

<sup>141</sup> 504 U.S. at \_\_ ; see Schulhofer at 90.

<sup>142</sup>521 U.S. 346 (1997).

<sup>143</sup>521 U.S. at 373-78 (Breyer, J., dissenting) (agreeing that the Kansas statute does not violate substantive due process).



people who are unable to control their behavior and who thereby pose a danger to the public health and safety. . . . We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. . . . It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.<sup>144</sup>

Notwithstanding the lack of controversy, the Court had indeed expanded the universe of “dangerous” individuals whom a state could choose to lock up. Previous cases had involved “mental illness,” which “however defined, carries with it the legal connotation [] of the kind of mental state sufficient to impair cognition or volition so seriously as to render the individual legally irresponsible and thus not properly subject to criminal punishment.”<sup>145</sup> “Mental abnormality” or “personality disorder” are far broader terms, and the Court’s opinion left open “the degree of cognitive or volitional impairment” constitutionally necessary for indefinite confinement on dangerousness grounds to occur.<sup>146</sup> In 2002, in *Kansas v. Crane*,<sup>147</sup> the Court returned to the Kansas statute, and Justice Breyer, writing for a healthy majority, addressed the issue (still without wholly clarifying it). Although the Constitution does not require that the state show “total or complete lack of control,” before it could confine someone, the Court did say it required that there be some sort of finding as to his lack of control.<sup>148</sup>

Incremental shifts can also be found in the Court’s post-*Salerno* cases involving deportable aliens. *Zadvydas v. Davis*,<sup>149</sup> decided in 2001, involved a statutory provision allowing the detention of aliens whose deportation had been ordered but could not be removed, there being no country to receive them. The Court, by a 5-4 vote, interpreted the statute not to authorize indefinite confinement. Yet before reading the provision to avoid a “constitutional problem,”<sup>150</sup> Justice Breyer, writing for the majority, explained what this problem would be. Under the Court’s cases, he noted, government detention violates substantive due process

unless the detention is ordered in a *criminal* proceeding, see *United States v. Salerno*, [] or in certain special and “narrow,” non-punitive “circumstances,” [citing *Foucha*], where a special justification, such as harm-threatening mental illness, outweighs the “individual’s

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<sup>144</sup>521 U.S. at 356-57.

<sup>145</sup>Steiker, Limits, supra note \_\_\_, at 786.

<sup>146</sup>Id. at 788.

<sup>147</sup>534 U.S. 407 (2002).

<sup>148</sup>Id. at 411.

<sup>149</sup>533 U.S. 678 (2001).

<sup>150</sup>533 U.S. at \_\_\_.

constitutionally protected interest in avoiding physical restraint.” *Kansas v. Hendricks* [].<sup>151</sup>

And he found “no sufficiently strong special justification here for indefinite civil detention, at least as administered under this statute.”<sup>152</sup>

Addressing a quite separate immigration detention provision in 2003, *Demore v. Kim*,<sup>153</sup> was not necessarily inconsistent with *Zadvydas*, but its tone and deference to legislative judgment was markedly different. The provision here legislatively *required* detention during removal proceedings for limited class of deportable aliens, including those who had previously been convicted of an aggravated felony. Focusing on the limited nature of the detention (compared to that in *Zadvydas*), the Court held that “Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [Kim] be detained for the brief period necessary for their removal proceedings.”<sup>154</sup> In dissent, Justice Souter, joined by Justice Stevens and Ginsburg, made an important point, however: “Due process calls for an individual determination before someone is locked away. In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause by doing what § 1226(c) does, by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away....”<sup>155</sup>

Post 9/11

Carol Steiker observed in 1998 that “[t]he preventive state is all the rage these days,”<sup>156</sup> and could provide considerable evidence to support for point. By 2003, fifteen states had joined Kansas in passing laws allowing the civil commitment of sexually violent predators.<sup>157</sup> But, for all the controversy over the legislation reviewed in these post-*Salerno* cases, and the decisions that generally upheld these measures, the categories of people subject to preventive detention in the United States

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<sup>151</sup>533 U.S. at \_\_.

<sup>152</sup>*Id.* at \_\_.

<sup>153</sup>538 U.S. 510 (2003).

<sup>154</sup>538 U.S. at \_\_.

<sup>155</sup>*Id.* at \_\_ (Souter, J., dissenting); see David Cole, In Aid of Removal: Due Process Limits on Immigration Detentions, 51 *Emory L.J.* 1003 (2002).

<sup>156</sup>Steiker, *Limits*, at 774.

<sup>157</sup>See Peter C. Pfaffenroth, Note, The Need for Coherence: States’ Civil Commitment of Sex Offenders in the Wake of *Kansas v. Crane*, 55 *Stan. L. Rev.* 2229, 2232 n.22 (2003) (citing statutes).

were pretty limited. Defendants facing charges for past crimes. Individuals said to be suffering from some mental abnormality. Deportable aliens. The legal reasoning upholding these measures did not so clearly cabin the State's power. But whether because of policy, fiscal restraint, or self-conscious constitutional interpretation, legislators did not slide too far down the slippery slope.<sup>158</sup>

Then came the coordinated al Qaeda terrorist attacks of September 11, 2001, and the expectation of further terrorist attacks, with the fear that they would involve weapons of mass destruction.

Faced with the catastrophic consequences of such attacks, and unwilling to rely on the deterrent effects of *ex post* prosecutions, the Department of Justice immediately used -- and, in the eyes of many critics, abused -- available tools for detaining people it thought might be involved in further terrorist activity. Between September and December 2001, it detained more than 600 aliens on immigration charges, and a total of 762 between September 2001 and August 2002.<sup>159</sup> It detained other people on material witness warrants, obtained in connection with grand jury proceedings.<sup>160</sup> And it brought criminal charges for offenses that ostensibly had no terrorism connection, as a means of gaining custody over terrorism suspects.<sup>161</sup>

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<sup>158</sup> Frank B. Cross, Institutions and Enforcement of the Bill of Rights, 85 Cornell L. Rev. 1529 (2000) (discussing how majoritarian politics can help protect constitutional rights); see also David Cole, The Priority of Morality: The Emergency Constitution's Blind Spot, 113 Yale L.J. 1753, 1787-88 (2004) (endeavoring to harmonize cases).

<sup>159</sup>Office of the Inspector General, Dep't of Justice, The September 11 Detainee: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, at 5, 23 (Apr. 2003). As part of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), Congress also gave the Attorney General the power to detain an alien for limited periods upon certification that he "has reasonable grounds to believe" that an alien is engaged in terrorist activity or in any other activity endangering the national security of the United States. *Id.* at § 412; see Developments in the Law, The Law of Prisons, Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens, 115 Harv. L. Rev. 1915 (2002); Shirin Sinnar, Note, Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act, 55 Stan. L. Rev. 1419 (2003).

<sup>160</sup>See *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003); Levenson, *supra* note \_\_; see also Letter & Report of Jamie E. Brown, Asst. Atty. General, Leg. Affairs, to Hon. F. James Sensenbrenner, Jr., Chrm., House Judiciary Committee, at 50 (noting that fewer than 50 people had been detained on material witness warrants in connection with the September 11 investigation, and that 90% of these had been detained for 90 days or less).

<sup>161</sup>See Daniel C. Richman & William J. Stuntz, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 Colum. L. Rev. 583, 618-24 (2005).

Yet questions arose, first in theory: What if the government was presented with a situation in which it believed a that person posed a grave terrorist threat and, for some reason, it could not detain the person on immigration charges or as a material witness? Would its avenues for action be restricted to those allowed by the criminal process: arrest on probable cause and then indictment? What if it lacked sufficient evidence to bring such charges but had enough to make action imperative? We thus came back to the problem posed by Chief Judge Feinberg in his *Salerno* dissent. But now presented in the wake of attacks that killed 3000 people in one day.

Then, on June 10, 2002, the hypothetical became a reality when Attorney General John Ashcroft announced that Abdullah Al Muhajir, an American citizen born “Jose Padilla,” who had already been arrested and detained pursuant to a material witness warrant, had been transferred to the custody of the Defense Department for indefinite detention. Padilla, Ashcroft explained, was “a known terrorist who was exploring a plan to build and explode a radiological dispersion device, or ‘dirty bomb,’ in the United States. And “[t]he safety of all Americans and the national security interests of the United States” required that he be detained as “an enemy combatant.”<sup>162</sup> He offered few details then or later.

Padilla was incarcerated in a Navy brig in South Carolina and was prevented from meeting with his lawyer until 2004. But she nonetheless challenged his detention in a case that wound its way up to the Supreme Court.<sup>163</sup> Shortly before the Court decided the case (but long after it was argued), the Justice Department offered a few more details about Padilla. Padilla, the department revealed, had received explosives training at an al Qaeda camp, and had proposed a plan to al Qaeda leaders involving an improvised nuclear bomb. The leaders never thought anything would come of that idea, but instead suggested that Padilla blow up high-rise apartment buildings in the U.S. Deputy Attorney General James Comey explained:

Had we tried to make a case against Jose Padilla through our criminal justice system, something that [the U.S. Attorney’s office] could not do at that time without jeopardizing intelligence sources, he would very likely have followed his lawyer’s advice and said nothing, which would have been his constitutional right.

He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week, and hope – pray, really – that we didn’t lose him.<sup>164</sup>

The Supreme Court did not reach the merits of Padilla’s case, holding only that the challenge

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<sup>162</sup>CNN, Ashcroft Statement on “Dirty Bomb” Suspect, June 10, 2002.

<sup>163</sup>Padilla ex rel Newman v. Bush, 352 F.3d 695 (2d Cir. 2003), reversing, 233 F. Supp.2d 564 (S.D.N.Y. 2002).

<sup>164</sup>CNN, Transcript of News Conference on Jose Padilla, June 1, 2004.

to his detention should have been filed in another district.<sup>165</sup> But, in another case decided the same day, *Hamdi v. Rumsfeld*,<sup>166</sup> the Court faced a somewhat different case – an American citizen captured in Afghanistan and detained in the United States as an enemy combatant. (Had he not been a citizen, he likely would have been sent to the Guantanamo Bay, Cuba, Naval Base, where the military has been detaining foreign nationals captured abroad during hostilities.<sup>167</sup>) A majority of the Court upheld the government’s power to detain such combatants, at least for the duration of the hostilities in Afghanistan. Justice O’Connor, joined by Chief Justice Rehnquist, and Justices Kennedy and Breyer, concluded that the Executive had been authorized by the Authorization for Use of Military Force<sup>168</sup> passed by Congress in the immediate wake of September 11 to detain enemy combatants, regardless of their citizenship.<sup>169</sup> Writing separately, Justice Thomas agreed, and went on to suggest that “the President very well may have inherent authority to detain those arrayed against our troops.”<sup>170</sup> Justice O’Connor’s plurality, joined in a separate opinion by Justices Souter and Ginsburg,<sup>171</sup> concluded that Hamdi had a due process right to contest the basis for his detention before a neutral decisionmaker, but the government’s broad authority to detain enemy combatants during wartime was, for a majority of the court, settled.

To what extent did the broad executive authority upheld in *Hamdi* extend to Padilla, who had been detained not in Afghanistan during open hostilities, but at O’Hare International Airport, in Chicago? For the district judge hearing Padilla’s habeas corpus challenge to his detention – once Padilla re-filed his petition in the right district – the two cases had little in common. Congress had authorized the President to use all “necessary and appropriate force.” But Padilla’s

alleged terrorist plans were thwarted at the time of his arrest. There were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing. Also at the Government’s disposal was the material witness warrant. [S]ince [Padilla’s] alleged terrorist plans were thwarted when he was arrested on the material witness warrant, the Court finds that the President’s subsequent decision to detain [Padilla] as an enemy combatant was neither

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<sup>165</sup>*Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

<sup>166</sup>124 S. Ct. 2633 (2004).

<sup>167</sup>See *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (holding that United States courts have jurisdiction to consider challenges to legality of detentions of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay).

<sup>168</sup>115 Stat. 224.

<sup>169</sup>124 S Ct. 2640.

<sup>170</sup>124 S. Ct. at 2679 (Thomas, J., dissenting).

<sup>171</sup>*Id.* at 1660 (Souter, J., concurring).

necessary nor appropriate.<sup>172</sup>

The district court went on to note: “Simply stated, this is a law enforcement matter, not a military matter.”<sup>173</sup>

There is a neatness to District Judge’s Henry F. Floyd’s approach to Padilla’s detention: For American citizens in the U.S., at least, the normal rules apply. They give the government ample authority to detain charged defendants and material grand jury witnesses, and no further authority is available or needed. Yet the neatness is illusory. Regardless of the credence one gives to the government’s claims about Padilla, it hardly (and sadly) does not strain reality to think that there will be people in the United States, even citizens,<sup>174</sup> whom the government suspects of planning catastrophic terrorist attacks, but against whom the government lacks the ability to bring criminal charges, even ones ostensibly unrelated to terrorism. Material witness warrants can often provide a basis to detain a witness pending his appearance before a grand jury or at trial, but it far from clear that their use purely as detention devices should be condoned. And even if detention were possible, other questions would remain: Is the government bound to get the testimony immediately? If it is, it is bound to let the witness go thereafter, even though he still poses threat?

So what about Judge Feinberg’s terrorist bomber? Is it so clear that our only recourse for stopping him is the criminal justice system? In that system, we take risks that we generally accept, even embrace. Perfectly effective 24-hour surveillance occurs only on television program. Yet if the bad guy whom we do not quite have the goods on commits a crime, however heinous, while we are trying to gather admissible proof of his intentions, we sigh and say “That is the price we pay for a free society.” With the new scale of the threat, the risk calculus may be changing. During oral argument in the Fourth Circuit after the government appealed Judge Floyd’s decision, the Solicitor General asserted that, like Afghanistan, the United States was now “a battlefield.”<sup>175</sup> Anyone who walked around Lower Manhattan in the weeks after September 11, 2001, or the Madrid train station after March 11, 2004, or the London Underground after July 7, 2005, might well agree. Moreover, even a skeptic or critic on this score might fairly recognize that at *some* point, the classification *would* be apt and might ask whether courts are competent to do the line-drawing.

It is far too early to predict how the law will develop in this area. Yet is not too early to see

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<sup>172</sup>Padilla v. Hanft, 2005 U.S. Dist. LEXIS 2921 (D.S.C. Feb. 28, 2005).

<sup>173</sup>Id.

<sup>174</sup>See Glenn Frankel, Four Britons Tied to London Blasts, Wash. Post, July 12, 2005, at A1.

<sup>175</sup>Tom Jackson, U.S. a Battlefield, Solicitor General Tells Judges, Wash. Post., July 20, 2005, at A9.

how, by cutting imprisonment loose from its criminal law moorings, *United States v. Salerno* has played a pivotal role in turning what many thought to be a bedrock constitutional right into a matter of legislative or even executive policy. Even one who embraces the recognition of the state's fundamental power to protect its citizens from harm can be unsettled by this new world of few certainties.