No. 86-87

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ANTHONY SALERNO AND VINCENT CAFARO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

RICHARD EMERY
MARTIN GUGGENHEIM
New York Civil Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 382-0557

WILLIAM J. GENEGO*
DENNIS E. CURTIS
JUDITH RESNICK
University of Southern California Law Center
University Park
Los Angeles, CA 90089-0071
(213) 743-7385

* *Counsel of Record*

ALVIN BRONSTEIN
DAVID GOLDSTEIN
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

JOAN HOWARTH
MARK ROSENBAUM
PAUL HOFFMAN
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

QUESTION PRESENTED

Whether section 3142 of the Bail Reform Act of 1984, 18 U.S.C. § 3142 (Supp.II 1984), which authorizes the pretrial preventive detention of indicted individuals solely on the ground of dangerousness, violates the rights secured by the Fifth and Eighth Amendments of the United States Constitution.

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INTEREST OF THE AMICI CURIAE[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the rights secured by the Constitution. Since its inception, the ACLU has participated in litigation to safeguard and to implement the guarantees of the Bill of Rights. The ACLU Foundation of Southern California and the New York Civil Liberties Union are affiliates of the ACLU. The ACLU Foundation of Southern California participated as amicus curiae before the Ninth Circuit in United States v. Walker, No. 86-5274, which raised issues similar to those in the instant case.

[1/] The letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This case presents this Court with two contrasting views of a criminal justice system. Only one, however, is consistent with our Constitution. The Constitution provides that individuals cannot be stripped of their liberties except in particular circumstances, and then, not without basic procedural protections. Section 3142 of the Bail Reform Act of 1984 undermines these fundamental guarantees.

The government contends that it may incarcerate indicted individuals whom it predicts will, in some unspecified way, endanger others and the community. Adoption of such broad governmental power would dispense with the historical and constitutional principle that the government may not incarcerate individuals for unspecified offenses, for offenses not committed or even attempted, or without proof

beyond a reasonable doubt.

The government argues that it is already vested with wide latitude as to how it treats individuals under indictment, and that the fact of indictment by itself gives the government the power to restrict an individual's liberty in ways otherwise limited to individuals convicted of offenses.

The period between indictment and conviction is indeed different in many significant respects from both the period before indictment and the period after completion of a criminal sentence. This does not mean, however, that pretrial detention may be used solely to accomplish what the processes of the criminal justice system are designed to do -- protect the public through the imposition of incarceration. Pretrial detention has its legitimate purposes, each of which directly serves the integrity of the judicial process. Preventive detention is

different -- it seeks to serve only the same public interest in safety served by the criminal justice system itself, but without the constitutional safeguards built into the criminal justice system. It is thus a constitutional subterfuge.

The preventive detention provisions of the Bail Reform Act of 1984 are unconstitutional in several respects. First preventive detention violates the due proces guarantee of the Fifth Amendment by imposing punishment without trial. Incarceration represents the most severe affirmative disability and restraint society may impose upon one of its members, short of death. Even if preventive detention were to be viewed as merely "regulatory" and not punitive, it would unconstitutionally imping upon a vital liberty interest to a substantial degree without compelling justification.

Second, even were it held that

preventive detention does not constitute unconstitutional punishment and that the liberty interest at stake is outweighed by the government's goals, the statutorily established procedures are insufficient to ensure accurate and fair decisionmaking. Given the enormity of the personal interest at stake -- liberty in its most basic sense -- and the unusually high risk of error, the Act's minimal procedural requirements and its acceptance of reliance upon government proffers and hearsay are wholly inadequate.

Third, the Act unconstitutionally relies on a mandatory impermissible presumption. There is no logical connection between the factors that the Act specifies and the presumption it establishes that the individual poses an irremediable risk to the community. This invalid presumption operates to shift to an accused individual the burden of proving the unproveable fact that he or

she will not do anything "dangerous" in the future.

Fourth, the Act is unconstitutionally vague. Nowhere does it indicate what constitutes "dangerousness." It therefore represents a hunting license for the government to incarcerate those who are undefinably "bad," providing no advance warning of what sort of future "badness" a person should avoid and little basis on which any individual might defend himself against the amorphous accusation.

Finally, the Act vitiates the bail provision of the Eighth Amendment. If a person accused of a crime can be held without bail because the government lodges against him or her a further accusation of an offense that has not yet been committed, then that renders meaningless the guarantee of reasonable bail when accused of an offense that <u>has</u> been committed.

It is fundamental to our system that the

government cannot incarcerate people for criminal behavior without proof of guilt beyond a reasonable doubt. If this statute is upheld, the distinction between being accused of a crime and being convicted of a crime will be denigrated, as will the rights of a trial by jury and the presumption of innocence.

ARGUMENT

I. DETENTION OF AN INDIVIDUAL BASED ON THE POSSIBILITY THAT HE OR SHE MAY COMMIT SOME UNKNOWN AND UNSPECIFIED OFFENSE IN THE FUTURE VIOLATES DUE PROCESS.

A. Because The Purpose And Effect of Preventive Detention Is Punishment, Preventive Detention Violates Due Process By Inflicting Punishment Without An Adjudication Of Guilt.

Infliction of punishment without an adjudication of guilt violates due process. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979); Ingraham v. Wright, 430 U.S. 651, 672 n.40, 674 (1977); cf. United States v. Lovett, 328 U.S. 303, 306, 316 (1946). The government therefore argues that incarcerating an individual because the State believes him or her to be nefarious is not punishment, but, rather, constitutes a mere "regulatory" measure. This characterization of preventive detention is not tenable under this Court's prior rulings.

This Court has used a variety of approaches to determine whether a particular government action is regulatory or punitive. Compare, e.g., Lovett, 328 U.S. at 315-16 (statute that results in certain individuals being permanently prohibited from government service inflicts punishment because of its effect and its similarity to traditional punishment, notwithstanding description of act as compensatory and fiscal in nature), with Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (statute in question was punitive because of "the objective manifestations of congressional purpose").

These tests require consideration of both the purpose and effect of a measure, and the purpose that Congress itself assigns to a statutory provision is not controlling. See id. at 169-84; Regan v. Wald, 468 U.S. 222, 237 (1984). "[E]ven a clear legislative

classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." Trop v. Dulles, 356 U.S. 86, 95 (1958); see also Lovett, 328 U.S. at 315-16. Thus, although Congress stated that preventive detention under section 3142 was not intended to promote the traditional aims of punishment such as retribution or deterrence, it was well aware that the constitutionality of preventive detention would surely be challenged; its statement of "intent" cannot by itself serve as a shield against those challenges.

The determination of whether section 3142 is punitive or regulatory must look beyond congressional statements to objective factors. The relevant factors include:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter

> whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears to be excessive in relation to the alternative purpose assigned."

Mendoza-Martinez, 372 U.S. at 168-69. An examination under these criteria of the preventive detention provisions of the Bail Reform Act demonstrates that the Act is punitive in both purpose and effect:

1. The statute authorizes the most severe "affirmative disability" and "restraint" short of execution -- the total deprivation of freedom. Numerous additional affirmative disabilities and restraints also flow from pretrial detention. For example, association with others is totally controlled, access to reading materials and public information is severely circumscribed, gainful economic activity is prevented, and

consultation with counsel in preparation for trial is restricted. These disablities may continue for months while the defendant awaits a trial.

2. The sanction only "comes into play" upon a finding of scienter. First, detention under section 3142 necessarily imputes to the detained defendant intent to harm the community in the future. Second, to the extent that both the present cause for arrest and prior criminal acts are predicates for detention under the Act, 18 U.S.C. § 3142(e), scienter is an implicit trigger of the sanction.

3. The primary purpose of pretrial detention is to promote objectives traditionally associated with punishment in the criminal justice system. The purpose of preventive detention is incapacitation -- preventing an individual from committing a crime in the future by depriving that

individual of liberty. See United States v. Brown, 381 U.S. 437, 458 (1965). Incapacitation is recognized as a key element of punishment and sentencing in current federal sentencing legislation. See 18 U.S.C. § 3553(a)(2)(C) (Supp. II 1984). Detention under section 3142 also serves the goal of deterrence, a traditional purpose of punishment, by warning potential offenders that they can be imprisoned even before they have been given a trial. The statute also furthers the most punitive of sentencing goals -- retribution -- by employing a presumption in favor of the sanction when there is probable cause that the person has committed a specified offense. 18 U.S.C. § 3142(e).

Although preventive detention contains elements of a "regulatory" measure since it is forward looking and is intended to protect the community from future harm, cf. Schall v.

Martin, 467 U.S. 253, 269 (1984), this does not render it non-punitive. Measures can be both regulatory and punitive; in fact, all punishment based on an incapacitative rationale is also forward looking and intended to protect the community from future harm. It is in that sense "regulatory" -- but that does not make it any less punitive.

The regulatory elements of preventive detention do not and cannot disguise its punitive effect and purpose. Nor does the mere fact that Congress calls a punitive measure regulatory make it so. Jailing a person because the state thinks him or her dangerous constitutes punishment, pure and simple. Because preventive detention is imposed without a formal adjudication of guilt, it deprives the accused of his or her liberty and violates the due process clause of the Fifth Amendment.

B. Preventive Detention On Grounds Of General Dangerousness Is Inconsistent With The Traditional Rationale For Pretrail Detention: Protection Of The Integrity Of The Judicial Process.

In order to justify preventive detention under section 3142, the government incorrectly asserts that the traditional circumstances for legitimate pretrial detention of a competent adult defendant -- likelihood of flight, including the inability to make bail, and demonstrated threat to a participant in the judicial process -- are not qualitatively different from preventive detention based upon dangerousness.

The traditional examples of pretrial detention, however, each have as their unifying purpose and principle the protection and preservation of the integrity of the judicial process. Thus, if the likelihood of flight of a defendant is demonstrated, detention may be warranted; similarly, if

bail is set to deter flight, then detention for failure to post bail may also be justified; if witnesses, jurors, or other trial participants are actually threatened by a defendant, detention, again, may be necessary. Society's right to determine the guilt or innocence of the accused, and the interest of both society and defendants in the integrity and fairness of the criminal justice system, therefore, sometimes justify extraordinary measures, including a deprivation of liberty.[2/]

But this principle does not apply to preventive detention on the basis of a generalized allegation of dangerousness. The

[2/] Analogously, this Court's cases granting absolute immunity from damage liability to the participants in this process demonstrate the recognized paramount interest in preserving the integrity of our justice system. See, e.g., Briscoe v. Lahue, 460 U.S. 325 (1983) (witness immunity); Stump v. Sparkman, 435 U.S.349 (1978); (judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity).

necessity of preserving the adjudicative process, which is triggered by an indictment, is irrelevant to the government's assertion that it may protect the general public from individuals who have been merely indicted and not adjudged guilty. In attempting to protect the public under section 3142, Congress short-circuited the very purpose of the criminal justice system: protection of the public from those who may cause it harm. By substituting preventive detention for criminal adjudication, section 3142 denies due process.

C. Even If Preventive Detention Is Regulatory And Non-Punitive, Section 3142 Violates Due Process Because Individual Liberty Interests Outweigh The Government Interests.

Even if one assumes, arguendo, that preventive detention authorized by section 3142 is a regulatory measure, it is still subject to scrutiny under the due process

clause of the Fifth Amendment. See Schall v. Martin, 467 U.S. at 264-66. In Schall, this Court determined that a legislative provision permitting the detention of juveniles for up to 17 days without a formal adjudication of guilt was a regulatory provision. But as Schall illustrates, due process, even for "regulatory" provisions, requires a determination of the substantiality of the government's interest in relation to the interests of the individual. Id. at 265.

This Court in Schall expressly found that New York's legitimate limited purpose was to provide the child with a controlled environment and to separate him or her from improper influences pending the speedy disposition of the case. Id. at 264, 270. The Court adopted the New York Court of Appeals' justification for detaining juveniles before trial as "protecting the juvenile from his or her own folly." Id. at

265 (citing People ex rel. Wayburn v. Schupf, 385 N.Y.S.2d 518, 520-21 (1976)).[3/] This Court also observed that juveniles in New York are not considered criminally responsible for their conduct and that the juvenile court is charged not with finding guilt or innocence, but rather with determining and pursuing the needs and best interests of the child. 467 U.S. at 257 n.4.

Not only did the Schall Court emphasize the state's interest in protecting children, it recognized that a juvenile's liberty interest is substantially weaker than an adult's, since "juveniles, unlike adults, are

[3/] The Court quoted at length from the New York Court of Appeals' decision in Wayburn: "For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles." 465 U.S. at 265-66 n.15 (quoting 385 N.Y.S.2d at 520-21).

always in some kind of custody." Id. at 265 (citing Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982)).

Finally, in Schall, the conditions of confinement were significantly different than they are here. All juveniles detained in New York are entitled to trial within, at most, seventeen days or, in many cases, six days. 467 U.S. at 270. Individuals detained under the Bail Reform Act however, may be incarcerated not only for weeks, but for

months.[4] In addition, confinement under the New York provision in Schall is significantly less restrictive than pretrial incarceration of an adult. Id. at 271.

Detention of those who lack the capacity to be fully accountable and responsible for their actions, such as children or mental incompetents, is a traditionally valid exercise of state power. See, e.g., id. at 265; Minnesota ex rel. Pearson v. Probate

[4] For example, in United States v. Accetturo, 623 F. Supp. 746 (D.N.J. 1985), remanded for further proceedings, 783 F.2d 382 (3d Cir. 1986), the district court noted that "the reality of detention here will mean incarceration of presumptively innocent individuals for approximately ten months." 623 F. Supp. at 762. See also United States v. Melendez-Carrion, 790 F.2d 984, at 1005 (Feinberg, C.J., concurring) (at time of opinion, defendants had been preventively detained more than seven months); United States v. Walker, supra (bi-weekly custody reports of Central District of California, made pursuant to Fed. R. Crim. P. 46(g), indicated that 41 pretrial detainees had been in custody for more than four months, eight individuals for more than six months, and two individuals had been in pretrial detention for more than one year) (District Court Supplemental Memorandum Opinion, Appendix of Amicus Curiae, Exhibit B). In operation, the Speedy Trial Act, 18 U.S.C. § 3161, has not worked to preclude prolonged detention.

Court, 309 U.S. 270 (1940); Jacobson v. Massachusetts, 197 U.S. 11 (1905). It does not embrace the much broader use of power over competent adults asserted by the government in this case.

Preventive detention of adults under the Court's reasoning in Schall can be upheld only upon a conclusion that the government's interest in preventing future crimes outweighs the interest of competent adults in freedom from prolonged detention. But, if the government's interests were understood to outweigh an adult's liberty interests, the government could incarcerate any person -- indicted or not -- based on the possibility that he or she might commit some unspecified dangerous act in the future. As Judge Newman wrote in Melendez-Carrion:

> It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because

> they were thought likely to commit crimes in the future. Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished whenever doing so is a rational means of regulating to promote even a substantial government interest.

790 F.2d at 1000-01.

That preventive detention under section 3142 comes into operation only after an individual has been arrested and charged with the commission of a crime does not save the statute. For even convicted defendants who have completed service of their sentences may not, consistent with due process, continue to be confined beyond the term of their sentences.

The government argues that regulatory detention is the norm, rather than the exception. The government claims that, in

its wisdom, it has the power to detain individuals identified as "dangerous" and that, as a consequence, it need not and should not have the burdens of establishing guilt beyond a reasonable doubt before doing so. The government's casual citation to Korematsu v. United States, 323 U.S. 214 (1944), as suitable precedent for preventive detention exposes the bankruptcy of the claim.5/

II. PRETRIAL DETENTION VIOLATES PROCEDURAL DUE PROCESS UNDER THE FIFTH AMENDMENT

Assuming, arguendo, that the government's interest in preventive detention outweighs an individual's interest in

5/ In 1984, a writ of coram nobis was granted to vacate the conviction of Fred Korematsu. See Korematsu v. United States, 584 F.Supp. 1406 (N.D. Cal. 1984). The government agreed that the conviction should be vacated. 584 F.Supp. at 1410. The Korematsu decision relied on here by the government has been officially proclaimed to be a "setback to fundamental American principles." Presidential Proclamation 4417, Feb 25, 1976.

freedom, because preventive detention deprives one of liberty the statute is necessarily subject to scrutiny under the procedural due process guarantees of the Fifth Amendment. See Mathews v. Eldridge, 424 U.S. 319 (1975). As this Court has explained, procedural due process is a flexible concept that "calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The determination of what process is due in any given situation depends upon an analysis of the three factors identified by the Court in Mathews: (1) the private interest at stake; (2) the risk of an erroneous decision and the probable value of additional procedures; and (3) the governmental interest at stake and the administrative burden, including the financial cost, that additional procedures would entail. Mathews, 424 U.S. at 335.

This Court, and not Congress, decides the adequacy of the process provided. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985).

A. This Case Implicates The Most Important Individual Interests, Presents An Unusually High Risk Of Error, And Involves A Relatively Light Burden On Government.

1. The liberty interest of the individual

The first Mathews factor is the private interest involved. The private interest at stake here is enormous: The interest in being free of the complete deprivation of liberty through imprisonment. "The value of protecting our liberty from deprivation by the State without due process of law is priceless." Lassiter v. Dep't of Social Services, 452 U.S. 18, 60 (1981) (Stevens, J., dissenting). This deprivation of liberty includes the total restriction not only of physical freedom, but also of freedoms

attendant thereto -- including the freedom to associate with others, the ability to pursue gainful economic activity, sufficient access to counsel, and to prepare one's defense.[6/]

2. The exceptionally high risk of error

The second factor to be considered is the risk of error. An erroneous deprivation

[6/] Preventive detention thereby also implicates the Sixth Amendment right to counsel. While the statute provides that a person preventively detained is to have access to counsel and may apply for release in the custody of the United States Marshall to assist in his or her defense, 18 U.S.C. § 3142(i), a defendant who is detained is less able to assist in the preparation of his or her defense than is a person free on bail. Studies have established that defendants who are incarcerated pending trial are more likely to be convicted than those at liberty to prepare for trial. Ares, Rankin and Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole, 37 N.Y.U. L. Rev. 67, 84-86 (1963). For example, the pretrial detention facilities for the Central District of California are located at the Federal Correctional Institution at Terminal Island in San Pedro, California, approximately 30 miles from the federal courthouse. As a result, whenever one of the Walker defendants sought to consult with his attorney, the attorney had to travel a significant distance, severely constraining contact and coordination between the accused and counsel.

of liberty occurs whenever bail is denied a defendant who would not have committed a crime had he or she been released on appropriate conditions of bail. The frequency with which errors occur cannot be known precisely, but we do know that, under the statute, error rates will be high. Notwithstanding extensive reseach efforts, it is generally agreed that our ability to identify who, in the future, will commit a crime is very limited. The procedures in section 3142 for making this determination are not rationally related to the type of prediction to be made.

As a task force of the American Psychological Association concluded in 1978:

> the validity of psychological predictions of dangerous behavior, at least in the sentencing and release situations we are considering, is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments.

American Psychological Association, Report of the Task Force on the Role of Psychology in the Criminal Justice System, 1978 Am. Psychologist 1110. A Harvard study conducted in 1971 found that no accurate method could be devised to determine which defendants would commit crimes while on bail. Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.L. L. Rev. 300, 342-47, 369 (1971) (hereinafter "Preventive Detention"). A National Bureau of Standards study completed in 1970 also could find no reliable predictors of future dangerousness. See Compilation and Use of Criminal Court Data in Relation to Pre-trial Release of Defendants: Pilot Study, National Bureau of Standards Technical Note 535 (1970), discussed in Ervin, Foreword: Preventive Detention -- A Step Backward for Criminal Justice, 6 Harv. C.R.-C.L. L. Rev. 291, 293-95 (1971) (hereinafter "Ervin"); see

also Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 144 (1970) (Statement of Professor Hans Zeisel) (hereinafter "Zeisel Statement").

Over the past twenty years, sentencing and parole systems based upon the use of predictive measures have come into use. See, e.g., 28 C.F.R § 2.20 (1986) (U.S. Parole Commission "Salient Factor Score"). These predictive systems depend upon the use of available data to identify groups of convicted individuals that are more likely than others to commit crimes in the future.

For example, the United States Parole Commission uses a series of factors, such as the prior record of convictions and of incarcerations, heroin or other addiction, age, and the commission of crimes while on parole or probation. Id. Despite employment of the expertise currently available, the

predictive power of these systems is such that the Parole Commission's guidelines are accurate in predicting recidivism in less than 50% of the cases. See Hoffman, Screening for Risk: A Revised Salient Factor Score (SFS 81), 11 J. Crim. Just. 539 (1983).

The criteria employed in the Bail Reform Act to invoke preventive detention do not respond to these problems of inaccurate decisionmaking. It may be that as a statistical proposition the greater the number of criminal offenses a person has actually committed in the past, the greater the likelihood that he or she will commit another crime in the future. See Monahan, Predicting Violent Behavior 104-05 (1981). However, the criteria used by section 3142 to permit preventive detention -- that a person has been charged with committing a certain type of crime -- provides no basis for concluding that this defendant, rather than

any other, is more likely to commit a new crime if released. Nor does the fact that a defendant has been charged with a particular type of crime bear any verifiable relation to the conclusion that the defendant will commit some unspecified crime while awaiting trial on that charge.

This conclusion is supported by the National Bureau of Standards study. The researchers found that the rate at which criminal defendants committed new offenses upon release was virtually unaffected by the type of crime with which they had been charged. See Zeisel Statement, supra. Indeed, the rate of commission of new offenses while on release was greater for those who had been charged with misdemeanor offenses than for those who had been charged with felony offenses. Id. at 146.

Any group of pretrial detainees incarcerated on grounds of "dangerousness"

will inevitably, even if the best predictive tools are used, contain a large proportion of "false positives" -- persons incarcerated who would not have committed crimes while on pretrial release. The consequences of these errors are grave, and more troubling than similar errors in using such predictions to lengthen the incarceration of persons already convicted.

First, a pretrial finding of "dangerousness" imports a stigma of guilt, a stigma that remains even if the defendant is acquitted. Second, once an individual is convicted of criminal behavior, there are multiple, overlapping rationales for incarceration: Even if we are wrong about the need to incapacitate, imprisonment may be justified on other bases such as deterrence and punishment. In contrast, pretrial detention under the statute rests solely on the assessment of dangerousness; if that

decision is in error, no other reason justifies detention. Thus erroneous findings of dangerousness are particularly harmful, and they will occur frequently.

3. The government interests and burdens

The third Mathews factor is the government interest at stake. First, the government has an interest in the prevention of future crime and the consequent protection of the community. The relative importance of this interest varies with the type of harm to the safety of the community that is at issue. The interest in preventing illegal discharge of toxic waste, for example, is different from the interest in preventing the shoplifting of a pack of cigarettes.

But the statute abandons traditional mechanisms of deterrence and in so doing makes no distinction between the types of crime that a person might commit upon release

pending trial. It fails even to specify what dangers are a prerequisite to incarceration. Thus, the weighing of the government's interest must reflect the fact that its interest will vary widely depending upon the type of conduct or crime that might be committed.

Congress specifically intended that preventive detention apply only to a small group of defendants who pose a substantial risk to the community. S. Rep. No. 225, 98th Cong., 1st Sess. 6-7 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3189. As written, however, section 3142 is not so narrowly focused. Indeed, as the facts of some of the cases brought under that section make plain, the range of offenders and offenses that fall within its scope is exceedingly broad.

Pretrial detention is sought in a range of cases, most of which do not involve well-

known defendants or allegations of organized crime. Under section 3142, the government has requested preventive detention in more than 1000 cases. See Showdown Is Likely on New Bail Law, Nat'l L. J., July 28, 1986, at 3. The three cases that the Ninth Circuit considered in United States v. Walker, Nos. 86-5262, 86-5274, 86-5772 (9th Cir. Oct. 27, 1986) (issuing order, opinion to follow),[7] its most recent review of the Bail Reform Act, are illustrative of the run-of-the-mill cases in which preventive detention is requested.

As in Salerno, all three of the Walker

[7] In Walker, the Ninth Circuit reversed the decision of the district court that agreed with the Second Circuit opinions in Salerno and in United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986), that § 3142(e) is unconstitutional. The Ninth Circuit opinion has not yet been published; the order is at Appendix, Exhibit A. The district court's original and supplementary memorandum in Walker is at Appendix, Exhibit B. The Magistrate's Orders of Detention for the defendants in Walker are among the examples of detention orders provided in Appendix, Exhibit C.

defendants were incarcerated solely on the grounds of future dangerousness; none was found to pose a risk of flight. In all three of these cases, the Act permitted detention of ordinary criminal defendants. Further, in these cases, the decision to detain was made by a magistrate who simply checked boxes on a form. See Appendix, Exhibit C.

Second, the government shares the interest of defendants in ensuring the most reliable results possible. The government has an interest only in detaining those persons who would in fact commit a new crime if released on bail. Indeed, the government has an interest in preventing unnecessary, expensive incarceration of nondangerous defendants. The 1971 Harvard study analyzed crimes committed while on bail, and found the incidence of pretrial crime to be low (9.6%) and lower still for serious offenses (5.2%), Preventive Detention, supra, at 342-47, while

the National Bureau of Standards found the incidence of pretrial crime to be low -- 17% when felony and misdemeanor arrests were counted, only 5% when arrests for serious felonies were included. Ervin, supra, at 293-95.

Third, the government is concerned with the administrative burden and the cost of the decisionmaking procedures. However, because preventive detention should be utilized in a relatively small number of cases, the administrative burden and cost of additional procedural safeguards would likely be small. See 1984 U.S. Code Cong. & Ad. News 3182, 3189.

B. Given the Competing Interests, Section 3142 Provides Inadequate Process.

The government is wrong in asserting that, given the interests at stake, the

procedures are adequate.[8] A defendant is foreclosed from challenging in any way the reliability of the finding by the grand jury of past criminal conduct;[9] a defendant must defend against the vague allegation that he poses a risk to the "safety of the community"; and the government may (and usually does) present its evidence not only through hearsay, but through a proffer from the government's attorney without any live

[8] The government's position exemplifies the current trend to dismiss trials and full adjudications as unnecessary luxuries. See Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494 (1985). Whatever the merits of alternative dispute procedures, the trend toward truncated process has no place in criminal justice, where the most significant decisions -- from the perspective of both the state and the individual -- are made.

[9] This is true even though a grand jury indictment may be based on evidence that would be constitutionally inadmissible at trial and may also be based on hearsay allegations, presented by the government attorney seeking an indictment. See United States v. Calandra, 414 U.S. 338 (1974).

testimony at all.[10]

In addition, while procedures and analyses used in the parole setting yield predictions of future dangerousness that, at least, approach the rather unsatisfactory level of 50% accuracy, not even these methods are used to improve decisionmaking under section 3142.

Finally, although the statute provides for the taking of testimony and cross-examination of "witnesses who appear at the hearing," 18 U.S.C. § 3142(f), the government may proceed by proffer. Thus, the cross-examination right is illusory. Again, the case law reflects that such proffers are

[10] Indeed, in the Walker case, the government asserted that pretrial detention of defendant Rivas was warranted because he had committed other bank robberies. The government did not present this allegation through testimony but instead did so through a proffer by its attorney. As a result, defendant Rivas was completely deprived of any ability to test the reliability of the allegation that he had committed such acts.

commonplace and that the use of proffers and of hearsay evidence precludes the application of some of the procedural safeguards written into the Act. See, e.g., United States v. Delker, 757 F.2d 1390, 1396 (3rd Cir. 1985) ("discretion lies with the district court to accept evidence by live testimony or proffer"); see also United States v. Acevido-Ramos, 755 F.2d 203, 206 (1st Cir. 1985) (hearsay evidence may be used to sustain a decision of preventive detention). Far from becoming "mini trials," as the court in Delker feared, 757 F.2d at 1396, decisions to incarcerate for "dangerousness" are made quickly, in a pro forma manner, and often on the basis of a proffer of very limited

facts.[11] See Appendix, Exhibits B and C.

The paramount significance of the private interests at stake, together with the high potential for erroneous deprivations and the nature of the government's interests, require that procedural protections in addition to those set forth in the statute be provided before individuals can be detained on the grounds of dangerousness. Adequate protection would require, at a minimum, that defendants be able to contest the validity of the allegations of past criminal conduct that gave rise to the invocation of section 3142; that defendants be given notice of the conduct, crime, or type of crime that it is suspected they will commit if released, so that they might have a meaningful opportunity

[11] The Justice Department's instructions to its attorneys state that the government should attempt to use only hearsay or a proffer in all cases. See U.S. Dept. of Justice, Executive Office for United States Attorneys, Analysis of the Constitutionality of Pretrial Detention, 11.

to rebut such a claim; that any information relied upon by the government to seek pretrial detention, such as allegations of additional criminal conduct, be presented through witnesses with first-hand knowledge of such information; and that such witnesses and information be subject to full cross-examination.

The lack of specific criteria is exacerbated by the perfunctory hearing procedures commonly utilized in applying the vague standards of the statute. For example, in United States v. Walker, supra, the Magistrate's order of detention for each of the three defendants consisted only of a completed form, denominated "CR 94, 5/86." See Appendix, Exhibit C. The form tracks the language of the Bail Reform Act and provides spaces for checkmarks to indicate that the court has fulfilled its responsibilities under the Act. The form provides only four

and one-half lines for a statement of the reasons why the "defendant poses a risk to the safety of other persons or the community."

In these cases the Magistrate's "written findings of fact" -- required by section 3142(i) -- amounted to six words for Robert Walker, six words for Duon Walker, and thirteen words for Santiago Cortes Rivas. In United States v. Hoyos, No. 86-1269-H-B (C.D. Cal. Sept. 30, 1986), the magistrate used the same form to order the defendant detained on grounds of dangerousness simply by writing the words "the presumption" in the blank space on the form. See Appendix, Exhibit C. The use of such forms is commonplace. See United States v. Kouyoumdjian, 601 F. Supp. 1506, 1507 (C.D. Cal. 1985).

The paucity of meaningful procedural protections compels the conclusion that

section 3142 violates procedural due process. This Court should either strike down section 3142 or order that substantial additional procedural protections, as outlined above, accompany the detention determination.

III. PREVENTIVE DETENTION UNDER SECTION 3142 VIOLATES THE DUE PROCESS CLAUSE BECAUSE THE STATUTE CONTAINS AN IMPERMISSIBLE PRESUMPTION.

Under the Act, whenever a person is charged with an offense punishable by ten or more years of imprisonment under the Controlled Substances Act, 21 U.S.C. §§ 801 et seq. (1982), or the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951 et seq. (1982), or is charged with committing an offense while armed, 18 U.S.C. § 924(c) (1982), and if the judge or magistrate finds probable cause to believe that the person

committed such an offense,[12] "it shall be presumed that no condition or combination of conditions will reasonably assure . . . the safety of the community." 18 U.S.C. § 3142(e)(3).

Although the presumption is rebuttable, if a defendant charged with one of the enumerated offenses fails to overcome it, the presumption itself is grounds for detention. In fact, magistrates have found dangerousness solely on the basis of "the presumption." See, e.g., Appendix, Exhibit C, United States v. Hoyos, No. 86-1269-M-B (C.D. Cal. Sept. 30, 1986).

Presumptions are governed by the due process clause and are valid only if "it can be said with substantial assurance that the presumed fact is more likely than not to flow

[12] The judicial officer need not make a finding of probable cause if an indictment has been returned. See United States v. Dominguez, 783 F.2d 702, 706 n.7 (7th Cir. 1986).

from the proved fact on which it is made to depend". Leary v. United States, 395 U.S. 6, 36 (1969); see Turner v. United States, 396 U.S. 398 (1970); United States v. Romano, 382 U.S. 136 (1965); Tot v. United States, 319 U.S. 463, 467 (1943).

There is no rational connection here between the established fact (probable cause to believe a defendant committed a drug offense punishable by more than ten years, or an offense while armed) and the presumed fact (that the defendant poses a future danger to the safety of the community that no condition or combination of conditions can prevent). As discussed in Part II, supra, current knowledge does not enable us to determine, with any significant degree of certainty, who will commit a crime in the future. See, e.g., Monahan, supra, at 27-28; Hoffman, supra, passim.

It is irrational to presume that someone

charged with committing one of the offenses enumerated in section 3142(e) is more likely to pose a danger to the safety of the community than someone charged with a different offense. This is particularly true given the extraordinarily broad group of offenders and conduct encompassed by the offenses enumerated in section 3142(e). For example, a person with no prior criminal record who is alleged to have participated, however incidentally, in a marijuana conspiracy is presumed dangerous under the statute. 21 U.S.C. §§ 841, 846 (1982); see, e.g., United States v. Walker, supra.

This Court has stated that the law may use predictions. See Schall, 467 U.S. at 278 ("from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct"). However, to say that the use of predictions is, in theory, legally permissible is not to

say that section 3142 of the Bail Reform Act is in fact based upon supportable predictions. The Bail Reform Act does not require the use, even marginally, of the predictive tools employed by sentencing and parole guidelines -- or any other recognized, if only minimally successful, method for predicting dangerousness. Rather, the Act permits the indiscriminate labeling of individuals as dangerous and authorizes their detention before trial.

The statutory presumption is also invalid because its effect is to switch the burden of production and persuasion from the prosecution to the defendant, thereby obviating the "clear and convincing" standard of section 3142(f). The presumption is mandatory: "[I]t shall be presumed that no condition. . . ." 18 U.S.C. § 3142(e) (emphasis added). Such mandatory presumptions are unconstitutional under

Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307, 308-313 (1985) (presumption unconstitutional although accompanied by explicit reminder that it was rebuttable).[13/] While these cases address the issue of presumptions in the context of criminal cases under a "beyond a reasonable doubt" evidentiary standard, the due process analysis of these opinions is appropriately applied where, as here, the issue to be determined results in deprivation of the cherished interest in liberty.

But perhaps the most damaging -- and damning -- aspect of the application of the presumption under this statute is that it places on the defendant the onus of proving what is impossible to prove: that he or she will do nothing objectionable in the

13/ Compare County Court of Ulster County v. Allen, 422 U.S. 140 (1979) (lower standard of review when a presumption is permissive rather than mandatory).

future. Under our system of law, an individual cannot be convicted either on the basis of thoughts or intentions without any actus reus, or on the basis of status, Robinson v. California, 370 U.S. 660 (1962). Thus, it would be a startlingly novel doctrine to hold that because an individual is among a certain group of people who might engage in harmful conduct in the future, he or she too is dangerous and therefore may be incarcerated. This not only works a dramatic reversal in our constitutional presumption that an individual stands innocent until proven guilty -- it works an awe-inspiring metaphysical transmogrification so that now an individual can stand punishable for an offense before it has even been contemplated.

IV. THE STATUTE IS UNCONSTITUTIONALLY VAGUE.

Statutes that work a deprivation of liberty must provide fair notice of what conduct is proscribed and must provide clear

criteria so that the enforcement of the statute will not be arbitrary or discriminatory. See, e.g., United States v. Reese, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). Accordingly, this Court has not hesitated to strike down laws that fail to meet this fundamental guarantee of fairness. See, e.g., Kolender v. Lawson, 461 U.S. 352 (1983); Colautti v. Franklin, 439 U.S. 379 (1979); Smith v. Goguen, 415 U.S. 566 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); see generally Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). As this Court has stated, "A criminal statute must be sufficiently

definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).

Section 3142 provides no such concrete delineations. Rather, the statute is fatally vague, thereby offending the first "essential of due process." Connolly v. General Construction Co., 269 U.S. 385, 391 (1926). The section relies on the amorphous pronouncement that preventive detention should be ordered when no conditions of release will "reasonably assure the safety of any other person" or the "safety of the community." 18 U.S.C. § 3142(e).

The statute provides no other criteria and no guidance for applying the "safety" standard. The statute even fails to identify or to define what should be considered a

danger to the "safety of the community." The statute does not provide any criteria or direction to courts to determine whether the supposed danger exists. Moreover, the statute does not indicate what aspects of an individual's or of the community's "safety" are to be safeguarded. Although section 3142(g) enumerates factors to be considered, these factors either relate to the other grounds for detention or fail to provide meaningful explication. See, e.g., 18 U.S.C. § 3142(g)(4) ("nature and seriousness of danger").

Not only does the statute fail to indicate what type of offenses courts are to consider as jeopardizing the safety of the community, the judicial officer need not even conclude that the person is likely to commit any criminal offense. Thus, the statute utterly fails to "guide the judge in its application." Boyce Motor Lines, 342 U.S. at

340. Further, the vagueness of the statute fails to give the accused individual any notice of what he or she must rebut or establish to avoid being detained. Under the statute, defendant and counsel do not know how to prepare to defend against the charge of jeopardizing the "safety of the community." Essentially, they must prove that the defendant will not do anything "dangerous" in the future.

The vagaries of section 3142 place it well within the ambit of the kinds of enactments this Court has held invalid. Indeed, the failure of the statute is precisely the same as that of vagrancy laws consistently struck down by this Court: The impermissible goal of preventing future crimes based on general descriptions and predictions of behavior. See, e.g., Papachristou, 405 U.S. at 169 ("future criminality, however, is the common

justification for the presence of vagrancy statutes"); see also Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 625 (1955).

V. PREVENTIVE DETENTION VIOLATES THE EIGHTH AMENDMENT RIGHT TO BAIL

The Eighth Amendment protects an individual charged with a crime from imprisonment except when necessary to ensure his or her presence in court. See Stack v. Boyle, 342 U.S. 1 (1951); see also Hunt v. Roth, 648 F.2d 1148, 1164-65 (8th Cir. 1981) (eighth amendment implies right to bail), vacated as moot sub nom. Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam).

The preventive detention sections of the 1984 Bail Reform Act depart from this Court's conclusion that there is a "traditional right to freedom before conviction." Stack v. Boyle, 342 U.S. at 4. Entirely ignoring this Eighth Amendment jurisprudence, the

government attempts to make much of the fact that the constitutional right to bail, like other constitutional rights, is not absolute.

One exception to the right to bail has long been recognized: A criminal defendant may be detained if the government can establish that there is a likelihood that, if released, the defendant will not appear for trial and will thereby prevent the court from determining innocence or guilt. See United States v. Winsor, 785 F.2d 755 (9th Cir. 1986). This exception stems from the purpose of bail -- to assure that a person will remain subject to the power and authority of the judicial process. See Ex Parte Milburn, 34 U.S. (9 Pet.) 704, 709 (1830). Thus, the courts and most commentators have concluded

that risk of flight alone is the historical explanation of the Eighth Amendment's exclusion of bail in capital cases. See Melendez-Carrion, 790 F.2d at 997-98; United States v. Edwards, 430 A.2d 1321, 1326 n.6 (D.C. App. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 743, (1960); Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 1223, 1230 (1969). Similarly, bail may be denied when there is substantial and specific evidence that the accused will undermine the system of justice by threatening or harming jurors or witnesses. See Melendez-Carrion, 790 F.2d at 1002.

In short, while the protection against incarceration without bail is not absolute, a compelling, constitutionally acceptable rationale must exist to deny an individual his liberty under the Eighth Amendment. This

reflects the overarching purpose and design of the entire Bill of Rights -- that the Government may not restrict important individual liberties absent certain vital and carefully circumscribed rationale. Nowhere is the protection of liberty more important -- nor was it of more concern to the Framers -- than in the confrontation between the State and the individual when the State attempts to deprive the individual of his or her life or physical freedom. The Framers recognized that the panoply of protections against government deprivation of liberty contained in the Bill of Rights would be rendered nugatory if a defendant could be detained on the basis of mere suspicions or predictions.

Thus, the Eighth Amendment's bail guarantee must be seen as part of the Framers' broader concern, deeply rooted in English and Colonial experience, that no

individual be physically detained and restrained by the state except under compelling circumstances. See id. at 997-98 (discussing historical roots of Eighth Amendment). The Eighth Amendment would itself be rendered nugatory were the government given the additional power to hold and incarcerate individuals because of allegations and suspicions -- especially allegations and suspicions of acts that the accused has not yet attempted, or even thought of, and which the individual's accusers need not articulate.

The Framers would have rebelled at such an assertion in 1787. While in our age, two hundred years later, the conventional wisdom is that there are no absolutes, still we cannot accept the Orwellian logic that there is no anomoly in an exception that swallows the rule. Section 3142 imposes punishment not for one's criminal acts, but for one's

status or alleged "tendencies" -- for being a "bad person" -- and thus constitutes an end run around the fundamental guarantees protecting citizens against governmental whim and oppression.

CONCLUSION

Under vague and formless criteria, the preventive detention provisions of section 3142 authorize the incarceration -- for an unspecified and indeterminate amount of time -- of individuals charged but not convicted of any crime. Implicitly, the statute authorizes judges and magistrates to decide that some members of our society are guilty of being "bad people." Judges and magistrates may order detention to incapacitate these "bad" defendants for months on end, and in some cases, for years.

Ours is a system committed to fairness, to restraints on government action, to protection of individual liberty. If one

stands back from the semantics of characterizing preventive detention as "regulation" or as "punishment," and looks at the issue itself, one grasps the harsh and frightening reality of what section 3142 attempts to legitimate: government detention and incarceration of individuals not convicted of any crime. Preventive detention undermines our understanding of what distinguishes the United States from many other countries in this world; this Court should not validate such a result.

Respectfully submitted,

JOAN HOWARTH
MARK ROSENBAUM
PAUL HOFFMAN
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

WILLIAM J. GENEGO*
DENNIS E. CURTIS
JUDITH RESNICK
USC Law Center
University Park
Los Angeles, CA 90089
(213) 743-7385
* Counsel of Record

ALVIN BRONSTEIN
DAVID GOLDSTEIN
American Civil
Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

RICHARD EMERY
MARTIN GUGGENHEIM
New York Civil
Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 382-0557

Counsel for Amici Curiae

Counsel acknowledge with appreciation the assistance of:

Michael Fitzgerald
(admission to the bar pending)
O'Donnell & Gordon
601 West Fifth Street
Los Angeles, CA 90017

Eric Schnurer (law graduate)
American Civil Liberties Union Foundation