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

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

Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions and Charters:

Statutes and Rules:

Articles and Treatises:

Miscellaneous:

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 4,500 lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and

procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional right to bail as provided by the Eighth Amendment. The NACDL is very concerned about any decision that would undermine this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The NACDL has obtained the consent of all parties to the filing of this brief: Solicitor General Charles Fried on behalf of petitioner, the United States of America; Anthony M. Cardinale

on behalf of respondent Anthony Salerno; Steven K. Frankel on behalf of respondent Vincent Cafaro. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The analysis of the Eighth Amendment contained herein is based on recent historical research which has never been considered by any court. That research demonstrates that at the time of the enactment of the Eighth Amendment, the Framers intended it to safeguard a substantive right to bail, guaranteeing pretrial release to all but those accused of capital offenses. Although the right to bail was guaranteed as early as 1682 in the Pennsylvania Frame of Government, it was still in its incipient stage when the Bill of Rights was passed. At that time only two

states guaranteed a right to bail in their constitutions. However, every state that entered the Union after 1789, with the exception of West Virginia and Hawaii, guaranteed a right to bail in its constitution. Moreover, during the nineteenth century, five of the original eleven states without a right to bail added explicit right to bail provisions in their bills of rights. With little variation these provisions all tracked the language of the Pennsylvania Frame of Government that "all prisoners shall be bailable by sufficient sureties unless for capital offenses, where the proof is evident or the presumption great." Finally, for nearly 150 years the right to bail has been viewed as a necessary feature of a criminal justice system which guarantees the accused the right to a fair trial. Because the

right to bail is crucial to the ability of the accused to mount an effective defense, it should not be abandoned except for the most compelling of reasons. While it may be necessary to dispense with this right where there exists a threat of imminent flight or danger to specific persons, the general threat to the community that the defendant might continue to engage in criminal activity is too speculative to overcome the defendant's interest in pretrial release.

The role that the Eighth Amendment plays in safeguarding our civil liberties cannot be overstated. From the Alien and Sedition Acts of 1799 to the Indian Removal Act of 1830, from the Palmer Raids of 1920 to the McCarran Act of 1950, our government has demonstrated a capacity for criminalizing conduct

which is now protected. Should this Court hold that the Eighth Amendment does not guarantee a substantive right to bail, that holding will not be limited to only the crimes which are presently listed in Section 3142(e). The right to pretrial release is instrumental in insuring that unconstitutional acts committed by our government do not go unchallenged; it must be preserved.

ARGUMENT

I

THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS INTENDED TO GUARANTEE THE RIGHT TO BAIL TO ALL BUT THOSE PERSONS ACCUSED OF CAPITAL CRIMES, THUS CONGRESS WAS WITHOUT THE AUTHORITY TO GRANT TO THE JUDICIARY THE POWER TO DENY BAIL TO PERSONS ACCUSED OF NON-CAPITAL OFFENSES

Whether the Eighth Amendment to the Constitution of the United States established an absolute right to bail has

been a subject of controversy since at least the mid-1960's. See Foote, "The Coming Constitutional Crises in Bail," 113 U. Pa. L. Rev. 959 (1965); Meyer, "Constitutionality of Pretrial Detention," 60 Geo. L. J. 1139 (1972); Duker, "The Right to Bail: A Historical Inquiry," 42 Alb. L. Rev. 33 (1977); Note, "The Eighth Amendment and the Right to Bail: Historical Perspectives," 82 Colum. L. Rev. 328 (1982); Carbone, "Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail," 34 Syracuse L. Rev. 517 (1983). The language of the Eighth Amendment is itself to blame for this controversy. Its first clause states only that "Excessive bail shall not be required. . . . " As Foote has noted, this language is susceptible to three interpretations:

that where a defendant is entitled to bail under an applicable statute a magistrate must not set bail in an excessive amount; that bail is not to be excessive where bail is found appropriate, but that a court has the authority to deny bail altogether; that defendants have an absolute right to be released on bail. Foote, supra at 969-70.

The dispute as to the intent of the Eighth Amendment has, until very recently, centered on the common law origins of bail. See Note, supra, Carbone, supra. We believe that this is a critical error of scholarship. As the following discussion will demonstrate, while the right to bail was not considered absolute in England, the Eighth Amendment was perceived at the time of its enactment, and for over a century

and a half thereafter, as guaranteeing to all those accused of non-capital offenses the right to be released on bail pending trial.

Later in this brief we will see why the Eighth Amendment must be perceived today as conferring a substantive right to bail. We will show that the Eighth Amendment's true role in the Constitution is to insure in peace time a method of preventing our democratic form of government from becoming despotic; it is no less than a fourth check in the checks and balances of our constitutional form of government.

A. The Origin of Bail

The system of bail, as it is known in the United States, is a direct descendent of a procedure employed in medieval England over a thousand years

ago. Then, as today, the local representative of the government, the sheriff, was responsible for the custody of prisoners awaiting trial. Because prison conditions were primitive and because prisoners would sometimes have to wait years for a traveling judge to hear their cases, sheriffs would frequently relinguish prisoners into the custody of a surety, usually a friend or relative of the accused, until trial. R. Goldfarb, Ransom--A Critique of the American Bail System 23-24 (1965).

By the Thirteenth Century, the abuse of this discretion had become widespread. Sheriffs would extort money from individuals who were entitled to be released on lesser bonds and would accept bribes from those who were not entitled to bail at all. In response to these abuses the First Statute of

Westminster, 3 Edw. 1, c. 15 (1275) was passed. It attempted to circumscribe the discretion of the sheriffs by delineating which offenses were bailable and which were not. Duker, supra at 45-46, Foote, supra, at 973; Meyer, supra at 1155.

In the Seventeenth Century the Crown found a way to circumvent the Statute of Westminster by ordering the arrest of individuals on unspecified charges. Without knowing the offense for which the person was accused, magistrates could not determine whether the person was entitled to bail. The Petition of Right, 3 Car. 1, c. 1 (1628) was intended to remedy this. It guaranteed Englishmen the right to notice of the charges against them. See Duker, supra at 58-66; Foote, supra at 966-67; Meyer, supra at 1180-85.

The Petition of Right, however, was ignored when it was in the interest of the King to do so. Failure of the Crown to obey the mandate of this legislation led in 1679 to the enactment of the Habeas Corpus Act, 31 Car. 2, c. 2 (1679). This Act established a mechanism of insuring executive compliance with the Petition of Right by requiring that persons arrested be brought before a magistrate. King James II however found a way to circumvent even this act. Judges subservient to the Crown would set prohibitively high bail, effectively preventing the release of prisoners thought to be a threat to the state. When James was overthrown, Parliament enacted the English Bill of Rights which stated in clause 10 "[T]hat excessive bail ought not to be required. . . " 1 W. and M., C. 36, Sec. 10 (1689). See

Duker, supra at 65-66; Foote, supra at 967; Meyer, supra at 1189-90.

There are two possible interpretations which can be drawn from the development of bail at common law. Duker and Meyer contend that in England bail was always a creature of statute; that it was never intended to be a substantive right. Duker points to the early colonial charters to argue that when the Colonists came to America they carried with them this principle, limiting the right to bail to specific offenses as did the Statute of Westminster. Duker, supra at 77-82. Moreover Meyer disputes Foote's contention that the Petition of Right was intended to establish an entitlement to bail. According to Meyer, the Petition of Right established the principle that the accused was entitled to notice of

the charges against him, a principle later embodied in the Sixth Amendment. Meyer, supra at 1190. That it arose in the context of an application for bail is, for Meyer, irrelevant. Meyer, supra, 1182.

This analysis however fails to consider the fact that each of these Acts, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights was the result of political repression. The Petition of Right of 1628 was forced upon King Charles following his imprisonment of five knights after they refused to make him a loan. Daniel's Case, 3 How. St. Tr. 1 (1627). The Habeas Corpus Act was forced upon Charles II following the arrest and imprisonment of Jenkes for inciting a riot. Although entitled to bail, no magistrate would set it.

Jenkes' Case, 6 How. St. Tr. 1189, 1208 (1676). The excessive bail clause was a response to the widespread practice of setting excessively high bonds for political opponents during the period immediately preceeding the Glorious Revolution. Foote, supra at 967.

What Duker and Meyer failed to appreciate was that each of these provisions was not merely a procedural amendment to the Statute of Westminster; rather they were the response of common men to decades of judicial and executive abuse of power. Each was in its own time a specific remedy to specific abuses; the English Bill of Rights was but the culmination of this process.

B. Bail in Colonial America

Probably the most significant development , one which has been for the most part ignored in the literature, was

the emergence in colonial constitutions and charters of specific provisions guaranteeing the right to bail in all but capital cases. See Note, supra at 351. If, as Duker and Meyer maintain, bail was never considered to be anything more than a creature of statute, one would expect state constitutions to either ignore the question of bail or go no further than the English Bill of Rights in prohibiting excessive bail. But something far more remarkable occurred.

In 1682, Pennsylvania provided in its Frame of Government "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great." Reprinted in 5 F. Thorpe, The Federal and State Constitutions, Colonial Charters and Other

Organic Law, 3061 (1906). When Delaware became a colony in 1702 it adopted the Pennsylvania Frame of Government, including this provision. Thorpe, supra at 557-58. With independence the State of Pennsylvania reincorporated this provision in its constitution, Pa. Const. ch. ii, Sec. 28 (1776), Thorpe, supra at 3089, and in 1776 North Carolina adopted an identical guarantee, N.C. Const. art. X (1776), Thorpe, supra at 2793. In 1777 Vermont added a similar provision to its constitution, Vt. Const. ch. II, Sec. 25 (1777). And in 1787 the Continental Congress provided in the Northwest Ordinance that "[a]ll persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great." Northwest Territory Ordinance of 1787, art. II, 1 Stat. 13. Two years

later Congress provided an explicit right bail in the first judiciary act: "And upon all arrests in criminal cases, bail shall be admitted except where the punishment may be death. . . " Judiciary Act of 1789, ch. 20, Sec. 33, 1 Stat. 73, 91.

While only two of the original thirteen states included an explicit right to bail in their constitutions, every state that entered the Union after 1789, with the exception of West Virginia and Hawaii, guaranteed a right to bail in its constitution. During the Nineteenth Century, five of the original eleven states without a right to bail added explicit right to bail provisions in their bills of rights. With little variation these provisions all tracked the language of the Pennsylvania Frame of Government, "all prisoners shall be

bailable by sufficient sureties unless for capital offenses, where the proof is evident or the presumption great." Note, supra at 351.

Critics of a substantive right to bail have no explanation for the recognition of such a right in state constitutions admitted prior to and following the enactment of the Bill of Rights. That such a guarantee would have been a significant departure from the common law is further evidence that the Eighth Amendment was itself intended to safeguard this right.

C. Bail as an American Institution

That the sole purpose of bail is to insure the presence of the accused for trial is well established. In Ex parte Milburn, 34 U.S. (9 Pet.) 704 (1835) Justice Story noted:

> A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for the offense.

Id. at 710. Justice Story's observation was endorsed by Justice Bradley in United States v. Ryder, 110 U.S. 729, 736 (1884): "the object of bail in criminal cases is to secure the appearance of the principal before the Court for the purpose of public justice." This principle was based on the theory "that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment. . . " Hudson v. Parker, 156 U.S. 277, 285 (1895). Reviewing the cases interpreting the

purpose of bail, Duker concluded that bail was always perceived as a device to insure the presence of the accused, not to prevent the commission of crime. Duker, supra, at 68-69.

Duker's conclusion is supported by overwhelming historical evidence. Those who have argued to the contrary rely on the fact that the Colonists granted their courts the discretion to deny bail to persons accused of capital crimes. See Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 Va. L. Rev. 1223, 1230 (1969); Hruska, "Preventive Detention: The Constitution and Congress," 3 Creighton L. Rev. 36, 47 (1970); Meyer supra at 1162-63. But as Judge Newman pointed out in United States v. Melendez-Carrion, 790 F.2d 984, 998 (2d Cir. 1986), a number of crimes

considered capital offenses in early America were clearly of no danger to anyone. For instance, in Colonial Massachusetts, a child over sixteen who disobeyed his parents faced the possibility if a death sentence, while a person accused of arson, burglary, or robbery would not. See Note, supra at 348-349. Similarly, both larceny and counterfeiting were made capital offenses by the Federal Crimes Act of 1790, Ch. 9, 1 Stat. 12. Obviously it was the danger of flight and not the danger to the community which allowed judges to deny bail to those accused of these offenses.

The role of the Eighth Amendment in the defendant's ability to obtain a fair trial was explained by Chief Justice Vinson in Stack v. Boyle, 342 U.S. 1 (1951). According to Justice Vinson:

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 156 U.S. 277, 285 (1895). Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Id. at 4.

Justice Jackson, in a concurring opinion joined in by Justice Frankfurter, wrote:

> Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.

342 U.S. at 7-8.

Critics of Stack have sought to distinguish the decision, arguing that the question before the Court was excessive bail, not the denial of bail. This distinction however ignores the reasoning of the justices, reasoning

which unquestionably applies to the entitlement to bail itself.

The government has cited dicta from this Court's decision in Carlson v. Landon, 342 U.S. 524, 545 (1951), for the proposition that the Eighth Amendment does not circumscribe the power of Congress to define the classes of cases in which bail is to be allowed. In Carlson, Congress granted to the Attorney General the power to order the detention of alien communists pending deportation proceedings. Under this statute the sole criterion for detention was membership in the communist party. It was not necessary for the alien to be charged with a crime, nor was it necessary for the alien to be considered a threat to the community or a risk of flight. If Carlson is not limited to alien deportation cases, then

our government has the power to order the detention of any person for any reason without offending the Eighth Amendment.

D. The Government's Argument

The government has craftily avoided the due process objections raised by Judge Newman in United States v. Melendez-Carrion, 790 F.2d at 1000, and repeated herein. United States v. Salerno, 794 F.2d 64, 72 (2d Cir. 1986). The government argues that the reason why persons are not confined beyond the length of their sentence is because "society has made the judgment that after a period of incarceration, those persons no longer pose an unacceptable risk of endangering the community." (Br. at 24). Moreover, the fact that detention is only permitted where an individual is charged with an

offense is sufficiently "reasonable" to satisfy due process even if detention of persons not charged with an offense would not be so reasonable. (Br. at 22).

The government's argument is tautological. That society has chosen not to incarcerate persons beyond the term of their sentence is not a reason why society could not choose to do so. The fact that Section 3142(e) comes into play only where an individual has been charged with an offense does not mean that a statute not so limited would be unconstitutional. It is easy enough to conceive of a regulatory measure intended to prevent future crimes where a prima facie case of guilt was established at trial but the jury nevertheless acquitted:

> If after considering the facts and circumstances presented at trial the court concludes that substantial evidence was presented demonstrating

> the defendant's commission of the offense and if the court concludes that the defendant remains a continuing threat to the community, the court may order the defendant detained at a behavior modification center as designated by the Attorney General until such time as the defendant is certified safe.

18 U.S.C. Sec. 3626 (2004).

Clearly, the interests promoted by the Eighth Amendment, in particular the ability of the accused to mount an effective defense, are not any less important simply because the government has characterized a defendant as a threat to the community. The government's argument, that these concerns are overridden by the state's interest in seeing that defendants do not commit more crimes while on bond, does not withstand close scrutiny. The attractiveness of the government's argument is derived from an equation that assumes a high degree of reliability in a court's

determination that a particular accused will commit a crime while on bond. As the testimony presented to Congress demonstrated, it is nearly impossible to predict which defendants will commit crimes while on pretrial release. Moreover, the percentage of those engaging in such conduct is often quite small. Testimony of Don M. Gottfredson, Dean, School of Criminal Justice, Rutgers University, Newark, N. J. , Bail Reform Act: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 98th Cong., 1st and 2d Sess. 55-56 (1984)(finding rearrest rates of from 5% to 20%); Malcolm Freeley, Professor, University of Wisconsin, Madison, Wisconsin, Id. at 119; D. Alan Henry, Director, Pretrial

Services Resource Center, Id. at 168-169; Ira Glasser, Director, American Civil Liberties Union, Id. at 238-241.

Thus the proper equation for this Court to consider is one which recognizes that society's interest in protecting itself against further crime is an unknown variable, one which may be large or small in a given case but which is never actually known. Against this unknown stands the accused, who may well be innocent, but whose ability to prove his innocence will depend on whether or not he can secure his release before trial.

E. Hard Cases

In his dissent in this case, Judge Feinberg contended that society must have a way of confining those who are so dangerous that their re-release into the general populace is virtually a death sentence on innocent life:

> [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.

United States v. Salerno, 794 F.2d at 77. But the courts have always found a way to incapacitate the rabidly dangerous, usually by setting excessive bail. Carbone, supra at 546-47.

In the imperfect world in which we live there will always be people with whom our social and political institutions are incapable of dealing effectively. Traditionally we have dealt with such people by making exceptions to the general rules which are designed to safeguard our liberties. While the violation of a constitutional right should not be undertaken lightly, the fact that the Eighth Amendment has

had to be ignored on some occasions is no reason to abandon it.

II

THE EIGHTH AMENDMENT IS A FOURTH CHECK IN THE CHECKS AND BALANCES OF OUR CONSTITUTIONAL FORM OF GOVERNMENT, PROTECTING THE INDIVIDUAL FROM UNCONSTITUTIONAL ABUSES OF POWER

As the government's argument has so eloquently shown, due process has never been a very effective champion of our civil liberties. Due process allowed the internment of hundreds of thousands of innocent American citizens whose only crime was being of Japanese descent. Korematsu v. United States, 323 U.S. 214 (1944). Due process allowed the commitment of untold thousands of Americans deemed insane though they posed neither a threat to themselves nor anyone else. O'Conner v. Donaldson, 422 U.S.

563 (1975). Due process has even permitted the incarceration of persons who could not post peace bonds despite the fact that they had been acquitted of any crimes. Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A.2d 272, 273 (1952)(citing data indicating that during the previous ten years 478 men, after acquittal on criminal charges, were compelled to serve an aggregate of over 600 years in prison for default on bonds totalling $613,200).

History has judged each of these examples as mistakes, if not worse, yet they are relied upon by the government to support its argument that pretrial detention is constitutional. What these examples actually demonstrate is that where human liberty is balanced against the felt needs of the time, our government has demonstrated a remarkable capacity for making the wrong choice.

It may be that we should not judge too harshly those who have had to make tough decisions during times of war. For that reason President Roosevelt's internment of the Japanese during the Second World War and President Lincoln's suspension of habeas corpus during the Civil War may be forgiven. But the exercise of such powers in times of peace must not be excused. For the exercise of such powers in times of peace threatens all our liberties. As Associate Judge Mack stated in his dissent in United States v. Edwards, 430 A.2d 1321, 1363 (D.C. 1981)(en banc), cert. denied, 455 U.S. 1022 (1982):

> Ironically enough, my concern is not with the constitutional rights of Marvin L. Edwards, who has entered pleas of guilty in both cases, and who is no longer being held under the detention statute he challenges. My concern is with MY constitutional rights for I, like millions of Americans have lived, for a time at least, believing that

> the United States Constitution prohibited my punishment for a crime until such time as I have been found guilty of committing that crime.

We need look no further than our own shores, our own history to see the kinds of abuses of power which the Eighth Amendment serves to prevent. In 1798 Congress, dominated by the Federalist supporters of President John Adams, passed the Alien and Sedition Acts. These Acts made it an offense to speak or write against the President or Congress "with the intent to defame" or bring "into contempt or disrepute." These Acts, directed against Jefferson and his supporters, were not mere words. They resulted in the imprisonment of Vermont Congressman Matthew Lyon for calling Adams a democracy-hating aristocrat, the imprisonment of Anthony Haswell for denouncing Lyon's prosecution, and David Brown for organizing a

protest demonstration, 3 P. Smith, The Shaping of America, 268, 281 (1980); S. Morison, The Oxford History of the American People, 353-54 (1965); C. Goodell, Political Prisoners in America, 36 (1973). Obviously these Acts were motivated soley for partisan political reasons and criminalized conduct which we recognize today as protected.

Another example of repression is illustrated by our government's treatment of the American Indian. The Indian Removal Act of 1830 was the first legistrative departure from the United States policy of respecting the rights of American Indians. It authorized the wholesale removal of tribes from their territory to western prairie land. The Act authorized President Andrew Jackson to exchange prairie land for the more desirable Indian territory within the

state borders in the Southeast. By the mid-1830's, rapid settlement of the land east of the Mississippi made it clear that the government would not tolerate the presence of even peaceful Indians. Although the Act provided only for the negotiation of treaties, it was used to justify the forceful removal of Indians to gain compliance. Many northern tribes complied with removal and resettlement to western lands but southeastern tribes (the Five Civilized Tribes) resisted. Many of these Indians had homes, representative government, children in missionary schools, and trades. Under the auspices of the Removal Act of 1830, some 100,000 tribesman were forced to march westward under United States military coercion. Up to 25% of these Indians, many in manacles, perished while en route. In

the years that followed, Congress passed nearly a dozen acts that made it possible to detain Indians as virtual prisoners on their own reservations. W. Brandon, The Last Americans, 272 (1974); 6 New Encyclopedia Britannica 290 (15th Ed. 1986).

Such acts of repression have continued into the 20th Century. When President Woodrow Wilson took America into the First World War he silenced all opposition to his policies with the Espionage and Sedition Acts. These laws punished by up to twenty years in prison persons who uttered "disloyal or abusive" language about the government, the flag or the uniform. Over 1500 prosecutions were instituted under these laws. One film maker was sent to jail for ten years for making a film on the American Revolution because it was

feared it might encourage anti-British sentiment, a Vermont minister was sentenced to fifteen years imprisonment for citing Jesus as an authority for pacifism, and South Dakota farmers were sent to jail for petitioning for a referendum on the war. 2 S. Morison, H. Commager, W. Leuchtenburg, The Growth of the American Republic, 384 (7th Ed. 1980); Goodell, supra at 57-60. After the war, Attorney General A. Mitchell Palmer ordered J. Edgar Hoover to conduct raids in thirty cities against suspected radicals. These raids resulted in the arrest of over 4,000 persons, some of whom were held incommunicado for weeks. Morison, supra at 410; Goodell, supra at 82-83. One of those later added to Hoover's list of suspected subversives was a lawyer named Felix Frankfurter. F. Donner, The Age of Surveillance, 147n. (1980).

After the Second World War the threat of Communist subversion loomed again, resulting in the passage of the McCarran-Nixon Internal Security Act of 1950. This Act, passed over Truman's veto, permitted the internment in concentration camps of subversives during a time of "national emergency." Morison, supra at 634; D. Caute, The Great Fear, 37-38 (1978). The fear that had swept the country at this time is reflected in the statement made by the federal judge who denied bail to the aliens detained in Carlson v. Landon, 342 U.S. at 550, "I am not going to turn these people loose if they are Communists, any more that I would turn loose a deadly germ in this community." As Justice Black noted in his dissent in Carlson, one of these germs, Mr. Zydok, had lived in the United States for thirty-nine years,

owned his own home, sold $50,000 worth of U.S. war bonds, gave blood to the Red Cross seven times during the war and had sons who served in the American Army during the war. Id. at 549-50. More recently, when over 500,000 people marched on Washington to protest the expansion of the Vietnam War into Cambodia, Attorney General John Mitchell ordered the police to make mass arrests in the name of national security. This action was later held to have been illegal. J. Archer, Police State, 153 (1977).

Although Section 3142(e) is directed at traditional criminal conduct, a decision by this Court upholding the constitutionality of pretrial detention could not be so limited. As we have seen, the government's due process argument would apply

with equal force to permit detention after acquittal, upon completion of a term of imprisonment, and, the government's protestations notwithstanding, even where no crime has yet been charged. Even if these scenarios seem implausible, the history of our nation demonstrates Congress's willingness to denominate as criminal, conduct which at present is considered protected. Sometimes these Acts have been declared unconstitutional, and sometimes not. But the right to release while such Acts are being challenged is a significant safeguard, one which is fundamental to our democratic form of government.

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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