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

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

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QUESTION PRESENTED

Whether Section 3142(e) of the Bail Reform Act of 1984, which authorizes the pretrial detention of an indicted defendant if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)), is unconstitutional on its face.

II

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Anthony Salerno and Vincent Cafaro.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a), is not yet reported. The opinion of the district court (App., *infra*, 33a-57a) is reported at 631 F. Supp. 1364.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 58a-59a) was entered on July 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3142(e), provides in pertinent part:

> If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

STATEMENT

Respondents Anthony Salerno, the reputed leader of the Genovese organized crime family, and Vincent Cafaro, a reputed "captain" in that organization (see App., *infra*, 3a, 35a), are presently charged with various racketeering offenses and violent crimes. The United States sought pretrial detention of respondents pursuant to Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, which authorizes the detention of a criminal suspect charged with a crime of violence if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)). The district court ordered the detention of respondents based on the government's "overwhelming" evidence that, if released, they would continue to engage in violent criminal behavior (App., *infra*, 47a, 55a). The court of appeals agreed that no condition of release would reasonably assure the safety of other persons and the community (*id.* at 13a). It nevertheless reversed, holding that Section 3142(e)'s authorization of pretrial detention based upon a judicial determination of future dangerous-

ness is facially unconstitutional as a violation of substantive due process (App., *infra*, 15a).

1. The Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, revises the federal law governing pretrial release of criminal suspects. Section 3141 of the Act provides that a judicial officer shall determine whether an arrested person will be released or detained in accordance with the provisions of the Act. 18 U.S.C. (Supp. II) 3141. Section 3142(a) sets forth the available options. See 18 U.S.C. (Supp. II) 3142(a). The judicial officer may order that the person be: (1) released on his own recognizance or upon execution of an unsecured bond;[1] (2) released subject to various specified conditions;[2] (3) temporarily detained to permit revocation of a prior release order, deportation or exclusion;[3] or (4) detained pursuant to the provisions of subsection (e). *Ibid.*

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[1] An arrested person qualifies for unsecured release unless "the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. (Supp. II) 3142(b).

[2] A suspect is subject to conditional release if the judicial officer determines that the person does not qualify for release upon his own recognizance or upon execution of an unsecured bond. 18 U.S.C. (Supp. II) 3142(c). Section 3142(c)(1) imposes a mandatory condition that the person refrain from violating federal, state, or local law. 18 U.S.C. (Supp. II) 3142(c)(1). It also describes some of the other monetary and nonmonetary release conditions that may be utilized. 18 U.S.C. (Supp. II) 3142(c)(2). The judicial officer must select "the least restrictive * * * conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community" (*ibid.*).

[3] The judicial officer may detain a person for up to ten days, to allow notice to the proper authorities, if the person

Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." 18 U.S.C. (Supp. II) 3142(e). Upon the government's request, the judicial officer must hold a pretrial detention hearing in cases involving crimes of violence, offenses that may result in a sentence of life imprisonment or death, serious drug-related crimes, and felonies committed by persons who have previously been convicted of other serious crimes. 18 U.S.C. (Supp. II) 3142 (f)(1). In addition, the judicial officer must hold a pretrial detention hearing, in response to a government request or upon his own motion, in cases involving a serious risk that the person will flee or attempt to obstruct justice. 18 U.S.C. (Supp. II) 3142(f)(2).

Section 3142(f) also specifies a series of procedural safeguards that accompany the pretrial detention hearing. The person resisting detention may request the presence of legal counsel at the hearing, may testify and present witnesses on his own behalf, may cross-examine other witnesses who appear at the hearing, and may present evidence by proffer. 18 U.S.C. (Supp. II) 3142(f). A judicial officer's findings that no conditions will reasonably assure the safety of other persons and the community "shall be supported by clear and convincing evidence" (*ibid.*).

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poses a risk of flight or danger to other persons or the community and is (1) on release pending trial or appeal; (2) on probation or parole; or (3) subject to deportation or exclusion under the immigration laws. 18 U.S.C. (Supp. II) 3142(d).

Section 3142(g) specifies the factors that a judicial officer shall take into account in considering whether to detain a criminal suspect. See 18 U. S.C. (Supp. II) 3142(g). These factors include the nature and seriousness of the charges, the weight of the evidence against the suspect, the history and characteristics of that person, and the nature and seriousness of the danger to any person or the community that would be posed by his release (*ibid.*). Finally, Section 3142(i) specifies the required contents of a detention order. See 18 U.S.C. (Supp. II) 3142(i). The order must include written findings of fact and a statement of reasons for the detention, it must provide that the person detained be separated to the extent practicable from persons awaiting or serving sentences, and it must direct that the person be afforded a reasonable opportunity for private consultation with his lawyer and be made available for necessary court appearances (*ibid.*).

2. On March 20, 1986, a federal grand jury returned a 29-count indictment charging respondents and 13 other members and associates of the Genovese organized crime family with various crimes, including conspiracy and substantive racketeering offenses (18 U.S.C. 1962(c) and (d)); 16 counts of mail fraud (18 U.S.C. 1341) in connection with a construction industry bid-rigging scheme; wire fraud (18 U.S.C. 1343) in connection with the election of Roy L. Williams as General President of the International Brotherhood of Teamsters; seven counts of extortion (18 U.S.C. 1951) from a New York area food company; and the operation of illegal numbers and bookmaking businesses (18 U.S.C. 1955). See App., *infra*, 2a-3a, 35a-36a. The racketeering counts of the indictment allege 35 specific racketeering

acts, including two separate murder conspiracies (*id.* at 2a-3a).

Respondents were arrested and arraigned on March 21, 1986. The United States immediately moved for pretrial detention pursuant to 18 U.S.C. (Supp. II) 3142(e), and the district court (Walker, J.) held an evidentiary hearing in accordance with 18 U.S.C. (Supp. II) 3142(f). The government submitted evidence demonstrating that respondents have engaged in a continuing course of illegal and violent activity and that no conditions of release would prevent respondents from resuming those activities during the pendency of their trial. The government provided a detailed proffer of anticipated testimony from trial witnesses and evidence obtained through electronic surveillance to demonstrate that respondents posed a continuing danger to the community that justified pretrial detention. See App., *infra*, 2a-4a, 34a-45a.

For example, the government disclosed in its proffer that Jimmy Fratianno, a federal witness, would testify that he attended a meeting with high-ranking members of the Genovese family at which respondent Salerno and others agreed to place a "contract" for the murder of John Spencer Ullo, a California organized crime figure (App., *infra*, 37a-38a).[4] The government also disclosed that Angelo Lonardo, another federal witness who is the former "underboss" of the Cleveland organized crime family and a life-long friend of Salerno, would testify that Salerno participated in the decision to murder John Simone, a Philadelphia organized crime figure, and the separate decision to murder Danny Greene and John Nardi,

[4] This murder conspiracy ultimately failed because Ullo learned of the plan and killed the person who had been dispatched to fulfill the contract (App., *infra*, 38a).

two Cleveland organized crime figures (*id.* at 38a-39a).[5] In addition, the government disclosed evidence obtained through electronic surveillance demonstrating that Salerno and Cafaro routinely used violence to maintain control over the Genovese family's gambling, loansharking, and labor union activities (*id.* at 39a-44a).

In response, Salerno offered testimony from character witnesses and challenged the credibility of the government witnesses. Cafaro offered no evidence and contended that the electronic surveillance evidence revealed, at most, only "tough talk." App., *infra*, 44a-45a.

The district court, characterizing the evidence as "overwhelming" (App., *infra*, 47a, 55a), found that the government had established by clear and convincing evidence that "Salerno is the head, or 'Boss,' of an organization engaged in extortion, loansharking, illegal gambling, and murder" (*id.* at 47a-48a) and that "Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future" (*id.* at 55a). The court concluded (*id.* at 56a-57a):

> 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 [the criminal

[5] Simone's body was found on a roadside in Staten Island, shot three times in the head (App., *infra*, 38a-39a). The plot to kill Greene and Nardi contemplated their murder in New York. However, they ultimately died in car bombings in Cleveland (*id.* at 39a).

> enterprise's] 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.
>
> Thus, after carefully considering all the factors enumerated in 18 U.S.C. section 3142(g), this court finds that the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions of release of these defendants will reasonably assure the safety of any other person or of the community.

The court entered an order detaining respondents.[6]

Respondents sought reconsideration of the detention decision, which the district court (Lowe, J.) denied (App., *infra*, 6a-7a). They then sought review from the court of appeals. That court first rejected Salerno's argument that the government had provided insufficient notice of its intent to use wiretap evidence, holding that Salerno lacked standing to seek suppression of that evidence (*id.* at 9a-12a). The court further concluded (*id.* at 13a) that the evidence proffered by the government "amply supported the court's findings that the government had proven by clear and convincing evidence that Salerno 'is a danger to the community as the 'Boss' of an organization that uses force, violence, and threats of

[6] The district court issued a detention order on March 28, 1986. However, that order was not entered on the court's criminal docket. See App., *infra*, 8a. The district court later issued a virtually identical order on April 2, 1986, which was entered on the court's docket on April 7, 1986 (*ibid.*). That order, which the court of appeals treated as the relevant decision (*ibid.*), is reproduced in the appendix to this petition (*id.* at 33a-57a).

force and violence to further its illegal operations,' [quoting *id.* at 48a], and that Cafaro 'has directed violent acts and is ready, willing and able to direct violent acts in the future' [quoting *id.* at 55a]." The court nonetheless reversed the district court's detention decision, concluding that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (*id.* at 14a).

The court agreed that a judicial officer may order pretrial detention in response to "risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process" (App., *infra*, 14a). It stated, however, that "[t]he sole bases for the detention order in this case are the findings that the defendants would, if released, carry on 'business as usual' notwithstanding any release conditions, and that business as usual involves threats and crimes of violence" (*id.* at 15a). The court concluded that detention for the purpose of protecting community safety is "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" (*ibid.*). The court reasoned that, under the Due Process Clause, " 'incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.' " *Id.* at 17a (emphasis in original omitted) (quoting Judge Newman's separate opinion in *United States* v. *Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986)). The court stated that "[e]ven the risk of some serious crime, such as destruction of an airliner * * * must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by in-

carceration simply because untested evidence indicates probable cause to believe that he has committed one crime and is a risk to commit another one" (App., *infra*, 20a).

Chief Judge Feinberg dissented (App., *infra*, 23a-32a). 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" (*id.* at 29a). He relied, in part, on this Court's holding in *Schall* v. *Martin*, 467 U.S. 253 (1984), that pretrial detention of juveniles based on their perceived danger to the community is compatible with due process (App., *infra*, 24a-25a), observing that the societal interest in protecting the public from violent crime "does not vary in strength with the age of the person to be detained" and that, "[i]f anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses" (*id.* at 25a).

Judge Feinberg added that while "[d]ue process also dictates that the government not pursue its goals through 'conduct that shocks the conscience' " (App., *infra*, 26a, quoting *Rochin* v. *California*, 342 U.S. 165, 172 (1952)), "[t]here is nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement" (App., *infra*, 26a). He also concluded that the statutory pretrial detention provisions, as applied in this case, are consistent with due process (*id.* at 29a-32a).

REASONS FOR GRANTING THE PETITION

This case presents a question of great importance to the administration of the criminal law. The court of appeals' holding that the recently enacted pretrial detention provisions of the Bail Reform Act are facially unconstitutional directly frustrates Congress's attempt to protect the public from "a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons." S. Rep. 98-225, 98th Cong., 1st Sess. 6-7 (1983). The court of appeals' decision conflicts with the decisions of other courts of appeals and reflects a dramatic—and erroneous—expansion of the concept of substantive due process. This Court's review is plainly warranted.

1. Congress enacted the pretrial detention provisions of the Bail Reform Act in response to public concern, echoed by the President, the Chief Justice, and the American Bar Association, over the "alarming problem of crimes committed by persons on release" (S. Rep. 98-225, *supra*, at 3, 5-6). The Senate Committee on the Judiciary, which held extensive hearings on the matter (*id.* at 5 n.4), 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" (*id.* at 6).

The Committee recognized that pretrial raises constitutional questions (S. Rep. 98-225, *supra*, at 7-8), but it ultimately determined, based on its own constitutional analysis and the experience gained under

the preventive detention provisions of the District of Columbia Code (D.C. Code Ann. § 23-1322 (1981 & Supp. 1985)) that "pretrial detention is not *per se* unconstitutional" (S. Rep. 98-225, *supra*, at 8). It concluded that "pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released" (*id.* at 10).[7]

The Committee formulated the preventive detention provisions with care, observing that, while pretrial detention is not per se unconstitutional, "a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect" (S. Rep. 98-225, *supra*, at 8). The Committee stated that "[t]he pretrial detention provisions of this section have been carefully drafted with these concerns in mind" (*ibid.*). The elaborate procedural safeguards embodied in Section 3142 (see, *e.g.*, pages 3-5, *supra*) reflect those efforts.

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[7] The Committee acknowledged evidence that courts had historically detained dangerous defendants through the imposition of extremely high monetary conditions (S. Rep. 98-225, *supra*, at 10-11). Criticizing that practice, the Committee stated (*id.* at 11):

> Providing statutory authority to conduct a hearing focusing 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. * * * The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well.

Thus, Congress gave extensive consideration to the use of preventive detention and attempted to strike a balance between the government's compelling interest in protecting the public from crime and the defendant's interest in retaining his freedom prior to trial. The court of appeals' blanket conclusion that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (App., *infra*, 14a) completely sweeps aside Congress's effort to accommodate these important competing interests. The court's determination that this significant and carefully considered federal statute is facially unconstitutional has broad national implications that plainly justify this Court's review.

The court of appeals' decision not only strikes down an important Act of Congress, it also conflicts with the decisions of at least two other courts of appeals. Both the Third Circuit and the Seventh Circuit have rejected due process challenges to the Bail Reform Act's preventive detention provisions. See *United States* v. *Perry*, 788 F.2d 100 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1985); *United States* v. *Accetturo*, 783 F.2d 382 (3d Cir. 1986). See also *United States* v. *Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc) (upholding the District of Columbia's preventive detention statute), cert. denied, 455 U.S. 1022 (1982). This Court's review is necessary to resolve the conflict.[8]

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[8] On May 2, 1986, the Second Circuit reversed a district court's detention order on due process grounds in a case that produced three separate—and inconsistent—opinions from the panel. *United States* v. *Melendez-Carrion*, *supra*. The government petitioned for rehearing with a suggestion for rehearing en banc. On June 20, 1986, the court of appeals denied that request without opinion. Thus, it appears that the Second Circuit is unwilling to address this issue en banc.

2. On the merits, we submit that the court of appeals erred in concluding that the Bail Reform Act's preventive detention provisions violate the principles of substantive due process.

The due process inquiry begins from the fundamental premise that federal statutes enjoy a presumption of validity.[9] Deference to legislative judgment is particularly appropriate in a case such as this one, where Congress has identified and considered potential due process objections and has carefully drafted the legislation to satisfy constitutional requirements. Cf. *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13-14.

Even in the absence of the deference due to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government" (*Walters*, slip op. 13), this Court's decisions demonstrate that preventive detention, subject to appropriate procedural protections, comports with due process. The commands of due process reflect " 'the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.' " *Moore* v. *City of East Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion) (quoting *Poe* v. *Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)).

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[9] It is, of course, "by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation" * * *.' " *Exxon* v. *Governor of Maryland*, 437 U.S. 117, 124 (1978) (quoting *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963)). "Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Bowers* v. *Hardwick*, No. 84-140 (June 30, 1986), slip op. 8. See also, *e.g.*, *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion).

See also *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937) (due process recognizes rights "implicit in the concept of ordered liberty"). In the criminal context, this balance, like the balance struck by the Fourth Amendment, "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975).

"The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) (quoting *De Veau* v. *Braisted*, 363 U.S. 144, 155 (1960)). And "there is nothing inherently unattainable about a prediction of future criminal conduct" (*Schall*, 467 U.S. at 278-279). Thus, the use of pretrial detention, accompanied by appropriate procedural safeguards, in instances where "no condition or combination of conditions will reasonably assure * * * the safety of * * * the community" (18 U.S.C. (Supp. II) 3142(e)) is neither an "'arbitrary imposition[]'" nor a "'purposeless restraint[]'" (*Moore*, 431 U.S. at 502 (plurality opinion) (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)). Furthermore, the use of pretrial detention to protect the public from an immediate threat of harm certainly does not "shock[] the conscience" (*Rochin* v. *California*, 342 U.S. 165, 172 (1952)). Indeed, this Court has approved the use of preventive detention in closely analogous circumstances.

The court of appeals did not dispute that the government, in administering criminal justice, may impose substantial pretrial restraints on personal liberty. See App., *infra*, 14a-15a. The accommodations between the criminal justice system and a suspect's pretrial liberty are familiar features of the criminal

law.[10] The court of appeals nevertheless concluded that pretrial detention to protect the public from the proven dangers posed by a defendant is per se violative of substantive due process (*id.* at 15a-17a). That conclusion, which rejects any balancing of governmental and personal interests, conflicts with the approach consistently employed by this Court in analyzing statutory restraints on liberty challenged on substantive due process grounds.

In *Schall* v. *Martin*, *supra*, this Court rejected a due process challenge to New York's juvenile preventive detention statute, stating that the law "serves the legitimate state objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime" (467 U.S. at 274). Similarly, in *Greenwood* v. *United States*, 350 U.S. 366 (1956), this Court upheld the constitutionality of a federal statute authorizing pretrial detention of a potentially dangerous mentally incompetent defendant, stating that "the legislation authorizing commitment in the context of this case, involve[s] an assertion of authority, duly guarded, auxiliary to incontestable national power" (*id.* at 375). In *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953), this Court permitted the indefinite detention of a potentially dangerous resident alien upon his

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[10] See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979) (a judicial officer may detain a suspect to ensure his appearance at trial); *Gerstein*, 420 U.S. at 113-114 (police officer's assessment of probable cause provides legal justification for arrest and "a brief period of detention to take the administrative steps incident to arrest"); *United States* v. *Gotti*, No. 86-1230 (2d Cir. June 25, 1986), slip op. 4336-4337 (a court may detain a defendant to prevent him from intimidating witnesses).

return from a foreign country until an exclusion hearing could be held (*id.* at 215-216). Justice Jackson, dissenting in part, rejected the notion that "the concept of due process [is] so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered" (*id.* at 223). Likewise, in *Carlson* v. *Landon*, 342 U.S. 524 (1952), this Court upheld the detention of a potential dangerous deportable alien prior to his deportation hearing.

As these cases demonstrate, the use of pretrial detention to protect the public from particularly dangerous persons does not offend the "concept of ordered liberty" (*Palko*, 302 U.S. at 325) or values "rooted in this Nation's history and tradition" (*Moore*, 431 U.S. at 503 (footnote omitted) (plurality opinion)).[11] Pretrial detention may be used to protect the public as well as the judicial process. Indeed, the court of appeals' contrary conclusion (App., *infra*, 14a-15a) would lead to strikingly anomalous results. A court could detain the mentally incompetent—but not the intentionally vicious—dangerous defendant. It could detain an alleged street criminal who threatens a judge, juror, or witnesses, but it would have to release a suspected terrorist who threatens the President, a congressman, or the public at large. Neither the sense nor the history of this Court's substantive due process jurisprudence compels these incongruous results.

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[11] Notably, the Bail Reform Act provides far more procedural due process protections than any of the detention statutes involved in the cases cited above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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