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,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Respondent Salerno offers three arguments in support of the court of appeals' decision.[1] First, he con-

[1] Respondent Cafaro has not filed a separate brief. Since the petition was granted, there have been several developments pertinent to this case. On November 19, 1986, Salerno was convicted in an unrelated extortion case and is presently awaiting sentencing. The district court in that case has not yet committed Salerno to the custody of the Attorney General. Thus, Salerno remains under pretrial detention in the present case, and the validity of that detention continues to present a live controversy. On October 8, 1986, Cafaro was temporarily released for medical treatment. Because he is still

tends that the pretrial detention provisions of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, impermissibly inflict punishment prior to an adjudication of guilt (Resp. Br. 5-15). Second, he argues that the government may never, under any circumstances, curtail the pretrial liberty of a criminal defendant to prevent him from committing crimes prior to trial (*id.* at 15-33). Third, he asserts that even if the government could detain a potentially dangerous criminal defendant prior to trial, the Bail Reform Act is so defective procedurally that it must be struck down in its entirety (*id.* at 33-50).

1. The pretrial detention provisions of the Bail Reform Act do not result in an unconstitutional form of punishment. This Court has repeatedly recognized that the government may detain a criminal defendant for non-punitive regulatory purposes. See, *e.g.*, *Schall* v. *Martin*, 467 U.S. 253, 269 (1984) ("pretrial detention may serve legitimate regulatory purposes"); *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979) ("if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment' " (footnote omitted)); *Moyer* v. *Peabody*, 212 U.S. 78, 84-85 (1909) ("Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power."); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) ("Detention is a usual feature of every case of arrest on a criminal charge,

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subject to the pretrial detention order, Cafaro's case also continues to present a live controversy. The government recently returned a superseding indictment against Salerno and Cafaro in the present case, and the trial is presently scheduled to begin on March 30, 1987.

even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense."). Notably, the court of appeals in this case refused to base its decision on a finding that the Bail Reform Act is punitive. The court concluded instead that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure" (Pet. App. 14a).[2]

As Salerno recognizes, the crucial question is " 'whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.' " *Schall*, 467 U.S. at 269 (quoting *Wolfish*, 441 U.S. at

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[2] Furthermore, Judge Newman noted in *United States* v. *Melendez-Carrion*, 790 F.2d 984, 999-1000 (2d Cir. 1986), that the legislative history of the Bail Reform Act makes it clear that Congress intended pretrial detention to serve a regulatory rather than a punitive purpose. See also *id.* at 1007 (Feinberg, J., concurring); *id.* at 1014 (Timbers, J., dissenting). Every other court that has addressed the issue has concluded that the pretrial detention provisions are regulatory and not punitive. See *United States* v. *Zannino*, 798 F.2d 544, 547-548 (1st Cir. 1986); *United States* v. *Perry*, 788 F.2d 100, 109 (3d Cir. 1986), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States* v. *Portes*, 786 F.2d 758, 767 (7th Cir. 1985); *United States* v. *Maull*, 773 F.2d 1479, 1485 (8th Cir. 1985) (en banc); *United States* v. *Jessup*, 757 F.2d 378, 385 (1st Cir. 1985); *United States* v. *Freitas*, 602 F. Supp. 1283, 1290-1291 (N.D. Cal. 1985); *United States* v. *Kouyoumdjian*, 601 F. Supp. 1506, 1511 (C.D. Cal. 1985); *United States* v. *Hazzard*, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984). The "punishment" argument was raised by the defendants and implicitly rejected in *United States* v. *Simpkins*, 801 F.2d 520 (D.C. Cir. 1986) (Table) (per curiam; opinion to be filed), and in *United States* v. *Walker*, 805 F.2d 1042 (9th Cir. 1986) (Table) (per curiam; opinion to be filed). See also *United States* v. *Edwards*, 430 A.2d 1321, 1332-1333 (D.C. App. 1980) (en banc), cert. denied, 455 U.S. 1022 (1982).

538). Salerno admits (Resp. Br. 5) that the legislative history of the Bail Reform Act clearly shows that Congress intended the statute to serve a nonpunitive, regulatory purpose. See S. Rep. 98-225, 98th Cong., 1st Sess. 3-25 (1983); 130 Cong. Rec. S938-S947 (daily ed. Feb. 3, 1984).[3] He nevertheless suggests (Resp. Br. 7) that closer inspection reveals "the undeniable transcendence of the punitive substance over the regulatory form."

Salerno proposes (Resp. Br. 8-9) what amounts to a faulty syllogism. He notes that a criminal conviction results in punishment, and that the typical punishment—imprisonment—prevents the convicted defendant from committing future crimes; he then concludes that any attempt to detain a person to prevent him from committing future crimes must therefore be punishment. This argument suffers from at least three basic flaws.

First, as a matter of logic, the fact that a criminal sentence, imposed for the purpose of punishment, results in incapacitation of the convicted defendant does not mean that any attempt to incapacitate a dangerous defendant must be punishment. A court can-

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[3] Salerno suggests that "the true measure of the punitive purpose of § 3142" is found in the floor debates (Resp. Br. 5 n.1). He notes Senator Mitchell's criticism of Senator Thurmond's supposed rhetorical question " 'Do you want to turn a lot of people loose who are guilty?' " (130 Cong. Rec. S944 (daily ed. Feb. 3, 1984)). That quotation is doubly misleading. First, Senator Mitchell himself agreed that preventive detention serves a legitimate regulatory purpose (*id.* at S939) and joined 83 other senators in voting in favor of the Bail Reform Act (*id.* at S947). Second, Senator Mitchell misquoted Senator Thurmond. Senator Thurmond actually asked, "what do we want to do, turn a dangerous man or a potential fugitive loose?" (*id.* at S941).

not ascribe a punitive purpose to a particular restraint simply because a similar restraint is also incident to criminal punishment. See *Wolfish*, 441 U.S. at 538-539. The proper question, instead, is whether a court can reasonably find a valid regulatory purpose that supports the restraint (*id.* at 539).

Second, as a matter of experience, the measures imposed after a conviction of crime need not be (and rarely are) imposed exclusively for punitive purposes. While criminal sentences are usually designed to advance the basic punitive objectives of retribution and deterrence (see, *e.g.*, *Wolfish*, 441 U.S. at 539 n.20), they frequently also serve purposes that are plainly regulatory, such as providing an offender with basic health care and literacy skills or preventing a convicted defendant from fleeing or committing further crimes. See Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401 (1958). Thus, it is hardly surprising that pretrial detention, imposed for regulatory purposes, may share certain of the regulatory features of a criminal sentence.

Third, as a matter of precedent, Salerno's basic argument is inconsistent with *Schall*, which treated New York's pretrial detention statute as regulatory, despite its similarity to a criminal sanction. See 467 U.S. at 300-302 (Marshall, J., dissenting). If pretrial detention to prevent crime must necessarily be equated with punishment, then New York's statute could not have survived this Court's scrutiny.

Salerno attempts to distinguish this case from *Schall* on various grounds, none of which is convincing. In the present case, as in *Schall*, "[t]here is no indication in the statute itself that the preventive detention is used or intended as a punishment"

(467 U.S. at 269). In this regard, *Schall* noted that "the detention is strictly limited in time" (*ibid.*). The New York statute required a probable cause hearing within three days after the juvenile's initial appearance, and it limited subsequent detention to an additional 14 days. The Bail Reform Act also contains limits on the length of detention. It generally requires a detention hearing within five days after the defendant's initial appearance (18 U.S.C. (Supp. II) 3142(f)), and it limits subsequent detention according to the restrictions imposed by the Speedy Trial Act, 18 U.S.C. (& Supp. II) 3161 *et seq.* See S. Rep. 98-225, 98th Cong., 1st Sess. 22 n.63 (1983). Contrary to Salerno's suggestion, one cannot ascribe a punitive intent to Congress's choice to utilize more flexible, but still restrictive, time limitations.[4]

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[4] The legislative history indicates that Congress adopted the Speedy Trial Act time limits not as "a clear manifestation of punitive intent" (Resp. Br. 9-10 n.6) but rather to provide a measure of flexibility in response to the difficulties in bringing large-scale drug trafficking cases and other complex cases to trial within 60 days. See 130 Cong. Rec. S941-S945 (daily ed. Feb. 3, 1984). Salerno argues (Resp. Br. 9-10 n.6) that the time limits imposed by the Speedy Trial Act are largely illusory, selectively citing exceptional cases that have resulted in unusually long delays. Those unrepresentative cases cannot support a facial challenge to the constitutionality of the Bail Reform Act. Indeed, the courts have uniformly recognized that a defendant may *not* be detained indefinitely, and that constitutional challenges to the length of pretrial detention in particular cases must be determined in light of the facts of each individual case. See, *e.g.*, Pet. App. 30a-32a (Feinberg, J., dissenting); *United States* v. *Zannino*, 798 F.2d 544, 548 (1st Cir. 1986) (per curiam); *United States* v. *Accetturo*, 783 F.2d 382, 387-388 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758, 768 & n.14 (7th Cir. 1986). Salerno

Schall also observed that the conditions of confinement imposed by the New York statute "appear to reflect the regulatory purposes relied upon by the State" (467 U.S. at 270), noting that the juvenile detainee was generally kept apart from adult criminals (*ibid.*). The Bail Reform Act contains an analogous limitation, requiring that pretrial detainees be placed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal" (18 U.S.C. (Supp. II) 3142(i)(2)). Contrary to Salerno's assertions, one cannot infer a punitive intent from the mere fact that there may be qualitative differences between New York's juvenile facilities and the detention facilities in which Salerno is being held.[5]

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also cites a statistic (Resp. Br. 9-10 n.6) that 307 defendants were detained for more than 151 days in 1985. That figure (even if it is assumed to be numerically correct) apparently includes both defendants who were ordered detained and those who were granted conditional release but were unable to meet the specified bail conditions. Among those detained by order, only a fraction would have been detained on the ground of dangerousness. (The Justice Department's informal statistics for fiscal year 1986 indicate that roughly 47% of Bail Reform Act detention orders are based on risk of flight alone, 38% are based on both risk of flight and danger to the community, and only 15% are based solely on danger to the community.) Thus, the number of persons detained solely on the grounds of dangerousness for more than 151 days appears to be quite small.

[5] There is no support in the record for Salerno's contentions that pretrial detainees are generally subjected to "onerous" conditions of confinement (Resp. Br. 11) or that "the segregation of pretrial detainees from sentenced prisoners has generally led to harsher rather than more benign conditions of confinement" (*id.* at 11 n.7). The fact that pretrial detention interferes with the detainee's "understandable desire to live as comfortably as possible and with as little restraint as pos-

The regulatory purpose of the Bail Reform Act is also supported by factors not present in the New York statute at issue in *Schall*. The Act provides that pretrial detention may be employed only as a last resort, when "the judicial officer finds that no condition or combination of conditions will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)). In addition, the Act specifically requires the judicial officer to consider the personal characteristics of the defendant and the nature and seriousness of the danger that would be posed by his release (18 U.S.C. (Supp. II) 3142(g)). The Act thus expressly instructs courts to apply the pretrial detention provisions in a non-punitive manner, which provides additional checks against its possible application for punitive purposes. In sum, both the purposes of the Bail Reform Act and its specific provisions refute Salerno's assertion that the pretrial detention provisions are punitive in nature and therefore cannot be applied in the absence of a criminal conviction.

2. Salerno's second argument is that due process forbids the regulatory detention of competent adult citizens under any circumstances (Resp. Br. 15-33). Salerno contends that the Due Process Clause creates an insurmountable "constitutional wall" (*id.* at 16) that forbids the government from detaining potentially dangerous persons except as a consequence of criminal conviction. To permit the detention of competent adults other than as a consequence of criminal

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sible during confinement does not convert the conditions or restrictions of detention into 'punishment.'" *Wolfish*, 441 U.S. at 537.

conviction, he claims, "would eradicate a heretofore sacrosanct line" (*id.* at 4; see also *id.* at 14).

Although Salerno repeatedly invokes the constitutional rights of "competent adults" and "competent adult citizens," [6] the Due Process Clause does not accord special privileges to that class, while denying those privileges to the mentally or emotionally impaired, minors, and aliens.[7] The reason that Salerno has focused on the class of competent adult citizens is readily apparent. This Court has already decided that the Constitution does not prohibit the government from employing regulatory detention in the case of the mentally impaired (*Addington* v. *Texas*, 441 U.S. 418, 426 (1979)), juveniles (*Schall* v. *Martin*, 467 U.S. at 281), and aliens (*Wong Wing* v. *United States*, 163 U.S. at 235). Salerno's identification of a special class of "competent adult citizens" is simply an attempt to avoid the force of those precedents.

Salerno can point to no decision of this Court declaring that competent adult citizens enjoy absolute freedom from regulatory detention. And he is forced to concede (Resp. Br. 22, 27-31) that this Court already has recognized that competent adult citizens may be detained for regulatory purposes in a variety of special circumstances, such as during times of war (*Korematsu* v. *United States*, 323 U.S. 214 (1944))

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[6] Resp. Br. 1, 2, 3, 4, 5, 8 n.4, 11, 14 & n.10, 15, 25, 26, 28, 32, 33, 34.

[7] Notably, this Court's decisions have shown special concern for according equal protection to children (*e.g.*, *Plyler* v. *Doe*, 457 U.S. 202 (1982)), the mentally and emotionally handicapped (*e.g.*, *City of Cleburne* v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985)), and aliens (*e.g.*, *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948)).

or civil insurrection (*Moyer* v. *Peabody*, 212 U.S. 78), to protect the public from contagious disease (*Compagnie Francaise de Navigation a Vapeur* v. *Louisiana State Board of Health*, 186 U.S. 380, 387 (1902)), to complete proceedings incident to arrest (*Gerstein* v. *Pugh*, 420 U.S. 103, 113-114 (1975)), to assure a defendant's appearance at trial (*Bell* v. *Wolfish*, 441 U.S. at 534), and to protect witnesses from harm (*Carbo* v. *United States*, 82 S. Ct. 662 (1962) (Douglas, Circuit Justice)). Salerno attempts (Resp. Br. 23-32) to distinguish those cases on their facts. But the labored nature of the effort to gerrymander the case law to accord with his "sacrosanct line" provides compelling evidence that no such line exists.

Salerno's rejection of any balancing of governmental and individual interests is incompatible with the concept of substantive 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, 542 (1961) (Harlan, J., dissenting)).

The Court's approach to substantive due process review of legislative action has been characterized both by restraint and by the rejection of broad constitutional absolutes of the sort that Salerno has proposed. The limits on substantive due process "come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " *Moore*, 431 U.S. at 503 (footnote omitted) (quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 501

(1965) (Harlan, J., concurring in judgment)); see, *e.g.*, *Ingraham* v. *Wright*, 430 U.S. 651, 675 (1977); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring); *Lochner* v. *New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). " 'No formula could serve as a substitute, in this area, for judgment and restraint.' " *Moore*, 431 U.S. at 501 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)). See, *e.g.*, *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), slip op. 8; *Regents of the University of Michigan* v. *Ewing*, No. 84-1273 (Dec. 12, 1985), slip op. 1 (Powell, J., concurring); cf. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 222 (1953) (Jackson, J., dissenting).[8]

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[8] Salerno maintains (Resp. Br. 17-19) that pretrial detention based on perceived dangerousness is foreign to American jurisprudence and therefore unconstitutional. His reading of history and his conclusion, however, are both mistaken. As we explained in our opening brief (Br. 28 n.14), both federal and state courts have traditionally been empowered to restrain dangerous persons through the common law remedy of "holding to security of the peace." See 4 W. Blackstone, *Commentaries* *248-252. Moreover, although the English authorities do not shed much light on the matter, there is some indication that by the 18th century, bail was being denied in criminal cases in part for reasons of public safety. See A. Highmore, *Digest of the Doctrine of Bail* vii (1783) (bail may be denied so that "the safety of the people should be preserved against the lawless depredations of attrocious offenders"). And as we noted in our opening brief (Br. 30-33), before the 1984 Act the federal courts regularly detained dangerous persons through the sub rosa practice of setting unattainably high financial conditions for release. See, *e.g.*, H.R. Rep. 91-907, 91st Cong., 2d Sess. 83-85 (1970). Thus, it is simply inaccurate to state that pretrial detention is foreign to American law. In any event, pretrial detention certainly is not "a

A broad, absolutist approach of the sort Salerno proposes is no more appropriate when the focus of the substantive due process challenge is a restraint on liberty. Due process recognizes the "necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. at 112. The inquiry in this case is therefore not amenable to categorical or rhetorical answers of the sort that Salerno offers. Instead, it requires a determination whether the limited imposition on individual liberty resulting from the Bail Reform Act can be justified by the importance of the objective of community safety and the adequacy of the Act's procedural safeguards.[9]

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grotesque anomaly unknown in civilized societies" (Resp. Br. 13). Many of the world's most respected democracies, including France, Great Britain, and West Germany, employ pretrial detention to prevent defendants from committing crimes while awaiting trial. Note, *Preventive Detention: A Comparison of European and United States Measures*, 4 N.Y.U.J. Int'l L. & Pol. 289, 292-303 (1971). The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, specifically authorizes pretrial detention of an individual "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so" (art. 5(c), 213 U.N.T.S. 226).

[9] At one point Salerno seems to concede his own per se argument. He notes (Resp. Br. 49-50) that concern for community safety has led to a requirement that a defendant give assurance of his good behavior; if the defendant violates the terms of that assurance, he can then be restrained. But unless that restraint requires a full dress criminal trial and conviction, Salerno has, in effect, acknowledged the legitimacy of pretrial detention at least for defendants who have violated the terms of their conditional release.

Salerno suggests (Resp. Br. 16-17, 32-33) that judicial approval of the pretrial detention provisions at issue here will supplant familiar elements of the present criminal justice system. That contention rests upon a mischaracterization of the Bail Reform Act. Under the Act, the criminal trial remains the "main event" (*Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) in the criminal justice system. The Act's pretrial detention provisions are narrowly tailored to address a specific problem, ancillary to and arising from the event: the documented practice of criminal defendants committing crimes while awaiting trial. Detention to prevent the commission of crimes pending trial—like detention to assure the defendant's appearance at trial and the safety of witnesses—is an adjunct of the criminal adjudication that experience has proved is sometimes necessary to secure the ultimate goals of justice. The criminal charges and their due resolution are the initiating and sustaining cause of the detention.[10]

A statute containing sweeping provisions for incarcerating persons thought to be "dangerous"—without

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[10] This explains why Salerno's discussion of the constitutional difficulties in detaining a dangerous person after acquittal on a technicality or after completion of a sentence is beside the point. In neither case would detention be ancillary to a pending criminal prosecution. Notably, no congressman, to our knowledge, has ever proposed a general regime permitting preventive detention in the absence of pending criminal charges. We find it highly improbable that Congress would ever attempt such genuinely troubling legislation. Legislation authorizing the preventive detention of an individual in the absence of pending criminal charges might conceivably be permissible (see, *e.g.*, *Korematsu* v. *United States*, *supra*; *Moyer* v. *Peabody*, *supra*), but it would require a most extraordinary justification.

any resort to the criminal justice system—would obviously raise serious constitutional difficulties. We are confident that Congress would not enact, and this Court would not tolerate, a statutory scheme that displaced the criminal justice system and replaced it with a "dangerousness" system in which any person found to be dangerous, after a civil or administrative proceeding, could be imprisoned. But a scheme embodying such a conception does not even remotely correspond to the conception or effect of the Bail Reform Act. The provisions of the Act in issue here are ancillary to the criminal justice system, not a device for displacing it.

Because of its limited ancillary role in the criminal justice system, the Bail Reform Act does not, as Salerno suggests, threaten the "right of every competent adult citizen of this country to liberty" (Resp. Br. 4). Beyond the limitation inherent in permitting detention only in the course of an ongoing criminal proceeding, Congress carefully restricted the pretrial detention provisions to a narrow class of particularly dangerous criminal defendants who satisfy specific statutory criteria. See S. Rep. 98-225, 98th Cong., 1st Sess. 6 (1983). The pretrial detention provisions are applicable only to defendants who are charged with (a) a crime of violence; (b) an offense that may result in a sentence of life imprisonment or death; (c) certain serious drug-related crimes; or (d) a felony, if the defendant has previously been convicted of two or more serious crimes. 18 U.S.C. (Supp. II) 3142(f)(1). In addition, the government must demonstrate, through clear and convincing evidence (18 U.S.C. (Supp. II) 3141(f)), that the defendant is so dangerous that "no condition or combination of conditions will reasonably assure * * *

the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)).[11]

Salerno concedes (Resp. Br. 21-22) that the government may detain a criminal defendant (even a competent adult citizen) to prevent him from fleeing or tampering with witnesses. He suggests, however, that detention is permissible only where "the judicial process itself will be thwarted" (Resp. Br. 22). As we note in our opening brief (Br. 24-25), this distinction is both artificial and unreasonable. Salerno fails to explain, except by rhetorical ipse dixit (Resp. Br. 8 n.4, 14, 15, 29, 32-33) why regulatory detention may be employed to protect the judicial process, but not, under any circumstances, to protect the people whom the process serves.

The Bail Reform Act breaks new ground only in its attempt to deal with the problem of pretrial crime candidly and responsibly. Pretrial detention to prevent crime, like detention to assure presence at trial and to prevent tampering with witnesses, is a necessary and reasonable response to the inevitable delays that accompany a fair adjudication of criminal charges. If it were possible to try a criminal case immediately upon the filing of charges, or if it were possible to keep account of and control a defendant pending trial, there would be no need for pretrial detention. But as crime has increased, both in volume and seriousness, as society has become more mobile, anonymous, and vulnerable to criminal depredations, and as criminal procedure has grown more complex,

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[11] Respondent suggests (Br. 35 n.28) that the courts, in applying the Bail Reform Act's statutory criteria, have engaged in "grotesque distortions" of the statute's limiting language. That claim, even if it were true, could not support an attack on the facial validity of the statute.

that ideal has become increasingly unattainable. Practical realities accordingly require pretrial detention in certain limited circumstances, including those cases where clear and convincing evidence shows that pretrial release would pose a grievous threat to the public safety and the government is moving with dispatch toward a final determination of the criminal charges.[12]

At bottom, Salerno fails to confront the grim realities of pretrial crime. He apparently believes, like the court of appeals (Pet. App. 20a), that society must release criminal defendants, no matter how grave the threat to community safety, and must simply accept the resulting risks. He gives no answer to Judge Feinberg's all too real hypothetical case (Pet. App. 28a) of an avowed (and perhaps suicidal) terrorist whose will is bent upon public mayhem, except to assure us that release conditions and surveillance "will permit the government to intervene * * * without awaiting the actual happening of the feared

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[12] Indeed, we believe that Congress's willingness to confront the need for pretrial detention openly and honestly is laudable and long overdue. Prior to the Bail Reform Act, pretrial detention shared the same heritage as plea bargaining; the courts, driven by necessity, employed it through "a *sub rosa* process shrouded in secrecy and deliberately concealed" (*Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977)). Congress has rightly recognized that pretrial detention, like plea bargaining, is a legitimate component in the administration of justice provided that it is applied visibly, candidly, and thereby subject to judicial supervision and control. Cf. *ibid.*; *Santobello* v. *New York*, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement * * * is an essential component of the administration of justice. Properly administered, it is to be encouraged."); Fed. R. Crim. P. 11.

event" (Resp. Br. 50 n.42).[13] We cannot believe that the government, having once thwarted a terrorist's plan, must release him and gamble—upon a wager of human life—that it can interdict him once again. Due process should not prohibit a court from concluding that the stakes are too high to brave that risk.

3. As his final argument, Salerno contends that the Bail Reform Act's procedures are constitutionally inadequate. This argument is plainly insubstantial. Salerno fails to identify any procedural shortcomings that, either singularly or in combination, would justify a facial invalidation of the statute. As our opening brief explains (Br. 35-39), Congress adopted rigorous procedural safeguards governing pretrial detention. Those procedures are plainly "adequate to authorize the pretrial detention of at least some [persons] charged with crimes" (*Schall*, 467 U.S. at 264); the procedures therefore meet the requirement for a finding of facial validity.

As Salerno concedes, "this particular case presents no procedurally based challenges to the act's constitutionality" (Resp. Br. 33-34 n.27). Salerno does not dispute the finding, made by the district court and affirmed by the court of appeals, that the statutory criteria for detention were amply satisfied in his case. Nor does he suggest that any of the alleged procedural shortcomings would have changed the outcome of the detention proceedings. Instead, he contends that the statutory language is vague and subject to overbroad application (*id.* at 34-37), and that

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[13] At the same time, Salerno qualifies his enthusiasm for that alternative by telling us that the imposition of "restrictive release conditions solely upon the ground of anticipated future dangerousness is not itself free from constitutional difficulty" (Resp. Br. 37 n.30).

the statute, as applied, may provide others with inadequate notice and opportunity for confrontation (*id.* at 37-42). We disagree. But in any event, as this Court noted in *Schall* (467 U.S. at 268-269 n.18):

> More fundamentally, this sort of attack must be made on a case-by-case basis. *United States* v. *Raines*, 362 U.S. 17, 21 (1960). The Court will not sift through the entire class to determine whether the statute was constitutionally applied in each case. And, outside the limited First Amendment context, a criminal statute may not be attacked as overbroad. See *New York* v. *Ferber*, 458 U.S. 747 (1982).

Salerno also argues that the Act should require that the defendant be given an opportunity to challenge the grand jury's finding of probable cause (Resp. Br. 42-43) and that his dangerousness be determined by proof beyond a reasonable doubt rather than by clear and convincing evidence (*id.* at 44-46).[14] But once again, Salerno does not contend that these statutory modifications would have made any difference to the outcome of his case.

4. The findings of the two courts below—which Salerno does not challenge—show the respondents to be lethally dangerous, unrestrained by any inhibition of conscience, and consummately shrewd and efficacious. The government has obtained an indictment and is proceeding to trial. The public, in the interim, can justifiably demand protection. It is conceded that

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[14] He adds, however, that "[t]his is not, of course, to suggest that a preventive detention statute incorporating these procedural protections would pass constitutional muster." (Resp. Br. 48).

the government may employ regulatory detention to protect the safety of participants in the trial process. And it is conceded that the government could restrain a person found dangerous by reason of derangement or illness. The Bail Reform Bail Act authorizes the same measure of protection on an interim basis, directly tied to a timely prosecution of persons shown by clear and convincing evidence to be dangerous because their will and self-control are firm and committed to public evil. What respondents and the court below would have us believe is that the Constitution absolutely denies society that protection. This is not a sensible proposition.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1987