No. 86-87

In the

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Question Presented.

Whether Section 3142(e) of the Bail Reform Act of 1984 is facially unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as it permits pretrial detention solely on the ground of future dangerousness or, alternatively, if the statute is found to be facially constitutional, whether and under what circumstances permissible regulatory detention may ripen into impermissible punishment in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Anthony Salerno, pursuant to the request of this Court dated September 11, 1986, hereby responds to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed on July 21, 1986, by the Solicitor General on behalf of the United States.

Opinions Below.

The opinion of the Second Circuit Court of Appeals is reported at 794 F.2d 64 (2d Cir. 1986).

Statement.

Respondent respectfully refers the Court to the statement of facts contained in the opinion of the Second Circuit Court of Appeals, *United States* v. *Salerno*, 794 F.2d 64, 66-68 (2d Cir. 1986) (See Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter "Petition") at 2a-7a).

Argument.

The decision of the Second Circuit in this case, invalidating § 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. § 3142(e) as facially repugnant to the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as it permits pretrial detention solely on the basis of future dangerousness,[1] does indeed, as maintained by petitioner, present an important question of far-reaching constitutional significance. With so much of the petition which so contends, respondent does not take issue. Respondent does, however, contend that the decision of the Second Circuit Court of Appeals was manifestly correct and that every day of continued incarceration does further violence to respondent's rights to due process of law.

> [T]he present detention order does not hinge on risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process. The government conceded at the detention hearing that there was no risk that the defendants would flee and not appear for trial. Not was there any finding by the court that the defendants were likely to tamper with or intimidate witnesses or jurors, or otherwise to jeopardize the trial process. . . .
>
> The 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.

United States v. *Salerno*, 794 F.2d at 71 (See Petition at 14a-15a).

The exhaustive and scholarly opinions of Judge Kearse in this case and of Judge Newman in *United States* v. *Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986), provide eloquent refutation of the government's attempted justification of pretrial detention solely on the ground of purported future dangerousness as a valid regulatory measure:

> The Government contends that section 3142 (e) is to be upheld simply because preventive detention is a rational means of advancing the compelling state interest in public safety. That cannot be the test for determining the constitutionality of preventive detention. The fallacy of using such a test can be readily seen from consideration of preventive detention as applied to persons not arrested for any offense. *It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.* Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulation to promote even a substantial government interest.
>
> Incarcerating dangerous persons not accused of any crime would exceed due process limits not simply for lack of procedural protections. Even if a statute provided that a person could be incarcerated for dangerousness only after a jury was persuaded that his dangerousness had been established beyond

a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due proces, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause*. This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause — indeed, by all of the criminal justice guarantees of the Bill of Rights — is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes*.

. . . As a matter of probabilities, a person lawfully arrested may pose a greater danger than someone not arrested but only suspected of dangerousness, but is very likely less of a risk to the community than many who have been convicted, sentenced, and released from confinement after expiration of their sentences. Just as the Due Process Clause would prohibit incarcerating a person not even accused of a crime in order to prevent his future crimes, it would equally bar preventive detention of a person who has

> been convicted of past crimes and has served his sentence. The Clause must accord similar protection to a person not convicted but only accused of a crime. Moreover, if the arrest is thought to reflect that the person is more deserving of confinement than members of the public not accused of crime, the confinement would offend the procedural component of due process by dispensing with the procedural guarantees of the Fifth and Sixth Amendments that must be observed before past conduct may justify incarceration on grounds of dangerousness.

United States v. *Salerno*, 794 F.2d at 72, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1000-01 (emphasis added by Court).

> [t]here can be no doubt that an arrest permits some regulatory curtailment of liberty. Even before probable cause has been found by a neutral magistrate, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein* v. *Pugh*, 420 U.S. 103, 113-14 (1975). In addition, a seizure "reasonable" under the Fourth Amendment permits detention until a determination of probable cause by a judicial officer "promptly after arrest." *Id.* at 125. Furthermore, the Constitution's scheme for a system of criminal justice specifies that arrest is to be followed by trial and plainly implies that reasonable steps may be taken to ensure that the trial will take place. Procedures may therefore be used both to secure the defendant's

presence at trial and to prevent the defendant from aborting the trial by intimidating witnesses or physically harming them. . . . Pretrial detention to avoid undue risks of flight or jeopardy to the trial process [is] not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law.

Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future. Detention of a person lawfully arrested for past criminal conduct is less important than preventing a defendant's flight, but because this means of preventing crime conflicts with fundamental principles of our constitutional system of criminal justice, while detention to prevent flight serves the principles of that system by guaranteeing that the defendant will stand trial and, if convicted, face punishment.

Permitting an arrested person thought to be dangerous to remain at liberty unquestionably incurs a risk. The prediction of dangerous conduct, however difficult to make and however unreliable, will undoubtedly be correct in some instances. But all guarantees of liberty entail risks, and under our Constitution those guarantees may not be abolished [on the sole ground that] government prefers that a risk not be taken.

Id. at 73-74, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1001-03.

While the Second Circuit may have been the first court to invalidate this provision of the act as facially unconstitutional on due process grounds, it is also the first court to have engaged in a searching and comprehensive examination of the issue. *See, e.g., United States* v. *Perry*, 788 F.2d 100, 112-113 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758, 767 (7th Cir. 1985). Moreover, a growing majority of courts which have considered the issue have suggested that prolonged detention may fall afoul of the due process clause, the quality of the incarceration changing at some point in the continuum from permissible regulation to impermissible punishment. *See, e.g., United States* v. *Zannino*, No. 86-1597 (1st Cir. 8/15/86); *United States* v. *Accetturo*, 783 F.2d 382, 387-88 (3d Cir. 1986); *id.* at 392-96 (Sloviter, J. dissenting); *United States* v. *Portes*, 786 F.2d at 768; *United States* v. *Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986); *United States* v. *Colombo*, 777 F.2d 96, 100-01 & n.2 (2d Cir. 1985); *United States* v. *Lo-Franco*, 620 F.Supp. 1324, 1326 (N.D.N.Y. 1985), appeal dismissed sub nom. *United States* v. *Cheeseman*, 783 F.2d 38 (2d Cir. 1986). *Cf. United States* v. *Salerno*, 794 F.2d at 78-79 (Feinberg, C.J., dissenting); *United States* v. *Melendez-Carrion*, 790 F.2d at 1005-09 (Feinberg, C.J., concurring). As persuasively asserted by Chief Judge Feinberg in this case:

> The government's powers of preventive detention in a given case are not limitless. Every other appellate court that has examined the lawfulness of this practice under the Bail Reform Act has indicated that pretrial detention to prevent future crimes may be invalid if unduly prolonged. *Portes*, supra, 786 F.2d at 768 & n.14; *Accetturo*, supra, 783 F.2d at 388; see also *United States* v. *Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986); cf. *United States* v. *Edwards*, supra, 430 A.2d at 1333 (stressing 60-day

time limit of D.C. preventive detention scheme determined to be constitutional). This reflects widespread agreement that the passage of time can tip the scales of the balance mandated by due process.

To put the proposition another way, even legitimate and compelling objectives cannot justify detaining a person indefinitely before trial. At some point in time, the harsh burdens of extended confinement will exceed the bounds of due process. As I stated in my concurring opinion in *Melendez-Carrion*, at 1006-09, lengthy pretrial incarceration can run afoul of the rule that the government may not punish a person not convicted of a crime. *Bell* v. *Wolfish*, 441 U.S. 520, 535-36, 99 S.Ct. 1861, 1871-73, 60 L.Ed.2d 447 (1979). Whether a measure is punitive in nature depends both on whether the action is imposed for the purpose of punishment and whether it is excessive in relation to the legitimate, nonpunitive aims assigned to it. *Schall*, supra, 467 U.S. at 269, 104 S.Ct. at 2412; *Bell* v. *Wolfish*, supra, 441 U.S. at 538-39, 99 S.Ct. at 1873-74.

In *Melendez-Carrion*, Judge Newman and I were willing to assume that Congress did not intend preventive detention under the Bail Reform Act to be a punitive measure. However, the second branch of the due process inquiry demands that confinement before trial not be excessive in relation to the statute's goals. Accordingly, undue prolongation of detention before trial can transform what is initially a valid regulatory measure into punishment prohibited by the Due Process Clause. That is so because the traditional test of distinguishing regulatory from penal measures set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-

> 68, 9 L.Ed. 2d 644 (1963), and reaffirmed in *Bell* v. *Wolfish*, supra, looks to whether a measure "involves an affirmative disability or restraint" and whether "it has historically been regarded as a punishment." Detention before trial undoubtedly imposes a major disability and restraint on the defendant. As I explained in *Melendez-Carrion*, detention for a long period of time founded on a person's danger to the community is also so harsh that it comes to resemble a traditional prison sentence. Since none of the traditionally "regulatory" reasons for jailing a person without trial, such as the defendant's propensity to flee or to tamper with witnesses, justify confinement in such a case, such lengthy detention would historically be seen as a punishment. Accordingly, unduly extended incarceration for general dangerousness of persons never convicted of any crime can cross the line separating a valid regulatory measure from punishment imposed in violation of the Due Process Clause. *Melendez-Carrion*, supra at 1008-09.

United States v. *Salerno*, 794 F.2d at 78. The detention here has now lasted more than six months, more than sufficient passage of time to invoke due process considerations. *See, e.g., United States* v. *Melendez-Carrion*, 790 F.2d at 1008 (Feinberg, C.J., concurring) ("I do not suggest that the due process clause necessarily establishes a bright line regulating all periods of pretrial detention. But I am convinced that the general requirements of due process compel us to draw that line at some point well short of the eight months involved here"); *United States* v. *Theron*, 782 F.2d at 1516 (four months' pretrial detention constituted impermissible punish-

ment); *United States* v. *LoFranco*, 620 F.Supp. at 1326 (six months' pretrial detention violates due process clause). *Cf. United States* v. *Edwards*, 430 A.2d 1321, 1332 (D.C. App. 1981) (in banc), *cert. denied*, 455 U.S. 1022 (1982) (pretrial detention for 60 days on ground of dangerousness poses "particularly close" due process question); 18 U.S.C. § 3164(b) (ninety day limit of Speedy Trial Act). The issue of prolonged detention as impermissible punishment in violation of the due process clause was also presented to the Second Circuit in this case and must also be confronted by this Court should it conclude that the provisions of the Act permitting pretrial detention solely on the ground of dangerousness are not facially invalid.

Conclusion.

Respondent cannot contend that the issues presented in this case are not worthy issues for this Court's review. Respondent does, however, urge in light of his continued detention that this Court act promptly and expeditiously in this matter and, should it determine to grant the petition for a writ of certiorari, that it affirm the decision below.

Respectfully submitted,

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