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UNITED STATES v. SALERNO: THE BAIL REFORM ACT IS HERE TO STAY

INTRODUCTION

The passage of the 1984 Bail Reform Act (the “Act”)
1 fundamentally changed the function of bail in the United States criminal law system
2 by allowing persons accused of criminal offenses to be held without bail if they are found to present a danger to the community.3 Previously, an accused was denied bail only when a fair adjudication could not be otherwise ensured.4 The Act represented a change in society’s attitude towards the concept of bail. An increase in the incidence of crime by persons released on bail pending trial generated fear among the population and this fear served as the impetus for this Act.5

The concept of “preventive detention,”6 as pretrial incarceration is known, is a controversial issue in the United States courts.7 The Act has repeatedly been challenged as unconstitutional under both the excessive bail clause of the eighth amendment8 and the due process clause of the fifth amendment.9 Recently, the Supreme Court addressed these issues in United States v. Salerno10 and held that the Bail Reform Act did not violate either amendment.11

This Note suggests that the Supreme Court did not address all the important factors which should be used to determine the Act’s constitutionality. The Note will demonstrate that upon examination of these factors, the Court should have concluded that the Act was unconstitutional. The Act should have been deemed an impermissible punishment prior to adjudication of the

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2. See infra notes 29-34.
4. See infra note 19.
5. See infra note 30.
6. “’Preventive detention’ has become a catch-phrase for those sections of the Bail Reform Act of 1984 which give judges the authority to incarcerate an accused prior to trial to ‘prevent’ him from committing crimes while out on bail.” Note, As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974, 8 CARDozo L. Rev. 1055, 1056 n.6 (1987) [hereinafter Note, Pretrial Incarceration].
7. See infra note 69.
8. The eighth amendment states: “[e]xcessive bail shall not be required . . . .” U.S. Const. amend. VIII.
9. The fifth amendment states: “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. V.
11. Id. at 2105.
case, and a violation of due process. Finally, this Note will describe the negative impact of the Salerno decision on future preventive detention cases and analyze the abuses Salerno could generate. Stricter guidelines should be set up so as not to allow a person merely “accused” of a crime to be imprisoned for an unreasonable amount of time before trial.

I. BACKGROUND

A. Bail Before The Act

The statutory history of bail began with the passage of the Judiciary Act in 1789. The Judiciary Act guaranteed all persons accused of non-capital crimes the right to be released on bail. Prior to the passage of the 1984 Bail Reform Act, federal law provided for release on bail in all but three circumstances. These three exceptions prohibited persons from being released on bail if: (1) the court believed there was a risk of flight; (2) the court believed there was a risk that the defendant would tamper with witnesses or jurors; or (3) if the person was accused of committing a capital crime. The policy underlying these exceptions was that of preserving the

12. “Where the state seeks to impose punishment without such an adjudication [of guilt], the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.” Ingraham v. Wright, 430 U.S. 651, 672 n.40 (1977). See also Bell v. Wolfish, 441 U.S. 520, 535 (1979) (“[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).


14. “From the passage of the Judiciary Act of 1789 ... federal law has unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail.” Stack v. Boyle, 342 U.S. 1, 4 (1951) (emphasis in original). See also United States v. Melendez-Carrion, 790 F.2d 984, 997 (1986), aff'd, 811 F.2d 780 (2d Cir. 1987) (“First Judiciary Act ... provided a right to bail in all cases except capital offenses ... .”); Ervin, Preventive Detention, A Species of Lydford Law, 52 GEO. WASH. L. REV. 113 (1983) (“This [Judiciary] Act ... secures the right to release on bail before trial to every person charged with a noncapital federal crime”); Comment, Section 3142(e) of the 1984 Bail Reform Act: Rebuttable Presumption or Mandatory Detention?, 35 BUFFALO L. REV. 693, 694 n.7 (1986) [hereinafter Comment, Rebuttable Presumption] (Judiciary Act gives those persons charged with noncapital crimes the right to be released on bail).


integrity of the judicial process, thereby ensuring a just result.\textsuperscript{19} The defendant gained the right of release if the court felt reasonably assured that he would satisfy three conditions. These conditions were that defendant: (a) appear at trial; (b) not influence the jury or tamper with witnesses; and, (c) "submit to sentence if found guilty."\textsuperscript{20} Other pretrial detention was permissible only for the period necessary to take the "administrative steps incident to arrest."\textsuperscript{21}

In 1970, Congress enacted the first preventive detention statute ("D.C. Act").\textsuperscript{22} The D.C. Act applies solely to the District of Columbia. The D.C.

\textsuperscript{19} "[D]enial of bail was perceived as a mechanism for preserving the integrity of the trial process . . . the law required that the goal of a judicial officer in setting bail was to ensure that the defendant would be available for trial and . . . could not improperly influence the outcome of the trial." Comment, Rebuttable Presumption, supra note 14, at 695. See also Stack, 342 U.S. at 4 (in order that the defendant be released on bail, court must be assured that "he will stand trial and submit to sentence if found guilty."); Melendez-Carrion, 790 F.2d at 1002 (measures may be taken to assure defendant appears at trial); Comment, Preventive Detention: Liberty in the Balance, 46 Md. L. Rev. 378, 383 (1987) [hereinafter Comment, Liberty in the Balance] ("Prevention of flight and protection of witnesses and jurors . . . do not serve to protect the safety of the general community . . . [but] ensures that the trial society demands will be a fair one.").

\textsuperscript{20} Stack, 342 U.S. at 4. This rationale is apparent with respect to the first two exceptions because there will not be a fair trial if the accused is not present or if the jurors and witnesses have been threatened or bribed. Persons accused of capital crimes were denied bail because they were an extreme flight risk. A person released on bail with the knowledge that if he appears in court, he will face the possibility of a death sentence or life imprisonment, may reevaluate his options before entering the court room. State v. Konigsberg, 33 N.J. 367, 369, 164 A.2d 740, 743 (1960) (citing United States v. Williams, 30 N.J. 105, 125, 152 A.2d 9, 19 (1959)). The denial of bail for capital offenses was not an expression of the colonists' intent to detain all defendants presumed dangerous to the community. Melendez-Carrion, 790 F.2d at 998. "The underlying motive for denying bail in the prescribed type of capital offenses is to assure the accused's presence at trial." Konigsberg, 743 A.2d at 743 (quoted in Melendez-Carrion, 790 F.2d at 997).

The first two exceptions [capital crimes and risk of flight] were, in fact, closely related. Capital defendants were not refused bail on the ground that, if released, they were likely to endanger the safety of the community. Historically, many offenses that carried the death penalty were not dangerous to the community at large. The majority of courts and commentators have suggested that capital defendants were simply thought more likely to flee in order to avoid prosecution . . . . In essence, the capital defendant exception was a corollary of the second exception; capital defendants were deemed per se likely to flee.

Comment, Liberty in the Balance, supra note 19, at 382-83 n.39. See also Edwards, 430 A.2d at 1326 n.6 (persons accused of capital crimes historically were denied bail because they were not likely to appear at trial when faced with a possible death penalty sentence).

\textsuperscript{21} Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (for any longer detention probable cause hearing is required). "There is, of course, a de minimis level of imposition with which the Constitution is not concerned." Ingraham at 430 U.S. 674 (1976) (emphasis in original) (liberty interests are implicated when a child is punished appreciably for misconduct).

\textsuperscript{22} D.C. Code Ann. §§ 23-1321 to -1332 (1981). This was the first preventive detention statute to apply to competent adults. Cf. Schall v. Martin, 467 U.S. 253 (1984) (juveniles held in detention to protect against harm to themselves and the community); Addington v. Texas,
Act allows for pretrial detention upon a court’s finding that the defendant presents a danger to the community. The purpose of the D.C. Act is to reduce violent crimes and eliminate hypocrisy in the bail process which is the result of judges setting bail artificially high, thereby effectively detaining an accused. Although this Act represents only the second major change in bail law since 1789, it has had little impact because it is seldom used by the courts. Nonetheless, the D.C. Act provided the model for the Act.

441 U.S. 418 (1979) (mentally ill persons who are unable to take care of themselves can be civilly committed). See generally United States v. Korematsu, 323 U.S. 214 (1944) (Japanese and descendants detained as threat to United States).


26. The Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (codified at 18 U.S.C. §§ 3141-51 (1982) (repealed 1984)), was the first major change to the system of bail. This change, however, was not directed towards the dangerousness of the accused, but towards assuring that “all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.” H.R. REP. No. 1541, 89th Cong., 2d Sess. 3, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS (89 Stat.) 2295. This change did not make any additions or deletions to the three traditional categories in which bail was denied. In contrast, the D.C. Act placed no restriction on a judge’s use of money as a pretense for detention. Alschuler, Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process, 85 MICH. L. REV. 510, 512 n.4 (1986).

27. See H.R. REP. No. 1419, 94th Cong., 2d Sess. 4 (1976) (in the first five years of enactment, the statute was only invoked an average of once a month); Ervin, supra note 14, at 116 (“[D]etention statute is rarely invoked in the courts of the District of Columbia”). But see 1984 S. REP., supra note 23, at 8-9, 22, 1984 CODE CONG. & ADMIN. NEWS at 3190-91, 3205, which states that the use of the D.C. Act has recently been expanded because the lower courts have repeatedly held its provisions constitutional and because “prosecutors are learning to use it more efficiently and effectively.” Id. at 9, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3191.

28. The D.C. Act and Edwards, 430 A.2d at 1321, both provided support for the 1984 Act. Note, Pretrial Incarceration, supra note 6, at 1075. In Edwards, the appellate court upheld the D.C. Act’s constitutionality. The accused was charged with armed rape and was denied bail prior to trial because he was found to be a danger to the community. The court dismissed Edwards’ claim that the D.C. Act was unconstitutional on both fifth amendment due process and eighth amendment excessive bail grounds. The court relied on its finding that there is a compelling state interest in protecting the public from injury. See 1984 S. REP., supra note 23, at 8-9, 22, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3190-91, 3205; Comment, Rebuttable Presumption, supra note 14, at 702.
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B. 1984 Bail Reform Act

1. Purpose of the Act

The purpose of the Act was two-fold. First, the legislature designed the Act to address the problem of increasing criminal activity by persons on pretrial release, thereby responding to society's concern about the growing number of persons in this category committing crimes. The second purpose of the Act was to eliminate high bail as a pretense for detention. Before the Act, judges set bail for dangerous criminals at amounts they could not pay under the pretense that the defendants presented a high risk of flight. In actuality, the judges set high bail to detain the defendants based on their propensity for criminal activity. In sum, the Act represented a fundamental change in the law of bail on a widespread national level and reflected a

30. The change in law was said to reflect "the deep public concern ... about the growing problem of crimes committed by persons on release" and the recognition that:
there is 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. It is with respect to this limited group of offenders that the courts must
be given the power to deny release pending trial.
United States v. Leon, 766 F.2d 77, 80 (8th Cir. 1985) (quoting 1984 S. Rep., supra note 23, at 6-7, 1984 U.S. Code Cong. & Admin. News at 3188-89. See also Comment, Rebuttable Presumption, supra note 14, at 693 ("Bail Reform Act ... [is a] response to a perceived growth in the problem of criminal activity by persons on pretrial release"). See generally Korematsu, 323 U.S. at 218 (purpose of holding Japanese Americans in detention camps was to ensure national security by protecting against espionage and sabotage).
32. 18 U.S.C. § 3142(c)(2) explicitly states "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." This was the reaction to the concern that severe financial conditions were being used indirectly to detain dangerous defendants. "The Committee concluded that by providing both a workable pretrial detention statute and restrictions on the use of financial condition of release, this problem could be effectively addressed." 1984 S. Rep., supra note 23, at 9, 1984 U.S. Code Cong. & Admin. News at 3192. However, "concern about the potential for such abuse does exist. Consequently, the use of the conditions of release set out in sections ... [3142(c)(1)(B)(xi) and (c)(1)(B)(xiv)] is specifically limited to the purpose of assuring the appearance of the defendant." Id. at 15-16, 1984 U.S. Code Cong. & Admin. News at 3198-99.
33. Section 3142 of the new Bail Reform Act dramatically changes prior law by including 'the nature and seriousness of the danger to the community that would be posed by the persons release' as a factor to be considered in determining conditions of pretrial release, and by authorizing detention pending trial where '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.' United States v. Chimurenga, 760 F.2d 400, 403 (2d Cir. 1985) (quoting 18 U.S.C. 3142(e), (g)(4)). See, e.g., United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1983); Leon, 766 F.2d at 80; Natalini, Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984, 134 U. Pa. L. Rev. 225 (1985).
major change in Americans' attitudes toward the function of bail in the criminal justice system.\textsuperscript{34}

2. The provisions of the Act

The judicial officer who presides at the defendant's first court appearance, most often a magistrate, has the authority to release the defendant pending trial if a detention hearing or detention itself is not warranted.\textsuperscript{35} Personal recognizance and the non-surety bond are the most lenient release conditions.\textsuperscript{36} However, if the magistrate feels that these conditions are inadequate he may condition the non-surety bond with a list of restrictive conditions, which may include the posting of cash. In the alternative, he may require the defendant to post a surety bond.\textsuperscript{37} The surety bond is required only if the magistrate feels that the defendant will flee the jurisdiction, notwithstanding the other measures and conditions.\textsuperscript{38}

The purpose of conditioning release on the accused's ability to provide cash or a surety bond, is specifically limited to guaranteeing the appearance of the defendant at trial.\textsuperscript{39} The provision which allows for the conditioning of release upon satisfaction of a financial requirement is an attempt to accomplish the second purpose of the Act, to eliminate high bail as a pretense for detention, thereby ending the problem of judges requiring excessive bonds under the pretense of risk of flight.\textsuperscript{40}

If a person is accused of committing a crime in certain categories,\textsuperscript{41} and the prosecutor moves for a detention hearing, the judicial officer must

\begin{footnotes}
\item[34] Grave public danger is said to result from what they may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act . . . ., it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excess and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

Williamson v. United States, 184 F.2d 280, 282-83 (2d Cir. 1950) (bail pending appeal).

\item[36] § 3142(a)(1).
\item[37] § 3142(c)(1)(B)(i-xiii).
\item[38] § 3142(c)(1).
\item[39] United States v. Jessup, 757 F.2d 378, 380 (1st Cir. 1985) ("High money bail cannot be used as a device to keep a defendant in custody before trial.").

\item[40] This provision should not be interpreted to mean that an accused who is unable to post a bond gets an automatic release. "The statute does not require that a defendant be able to post the bail 'readily.'" United States v. Szott, 768 F.2d 159, 160 (7th Cir. 1985).

\item[41] The categories are:
- (A) a crime of violence [statutorily defined in § 3156(4)];
- (B) an offense for which maximum penalty is life imprisonment or death;
- (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act . . . ., the Controlled Substances Import and Export Act . . . .;
- (D) any felony if the person has been convicted of two or more offenses [from prescribed categories] . . . .

§ 3142(f)(1)(A-D)].
conduct the hearing.\textsuperscript{42} The defendant has the right to counsel during this hearing.\textsuperscript{43} In addition, the defendant may testify, present evidence in his favor and cross examine the state's witnesses.\textsuperscript{44} If the prosecution proves by clear and convincing evidence that the accused is a danger to the community he may be held without bail, pending trial.\textsuperscript{45} Moreover, in certain cases, there is a rebuttable presumption of dangerousness which the defendant must overcome.\textsuperscript{46} The judicial officer makes his decision regarding detention by considering all of the information presented.\textsuperscript{47} The judicial officer must then prepare a written report containing his findings of fact and the reasons behind his decision to detain, if such a decision is made.\textsuperscript{48} The defendant is then permitted to seek immediate appellate review of the judicial officer's decision.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{42} There is no hearing if the prosecutor fails to move for one. 18 U.S.C. § 3142(f). The prosecutor or judicial officer may also move for a detention hearing if there is risk of flight or risk that the accused will obstruct justice. § 3142(f)(2)(A-B). This provision incorporates in the statute the situations in which bail has been traditionally denied.
\item \textsuperscript{43} The Act requires that the detention hearing be held at the time the accused first appears in front of the judicial officer. However, one of the parties may ask for a continuance. The defendant may ask for up to five days, and the prosecution may ask for up to three days. The judicial officer has the discretion to extend these periods if "good cause" is shown. § 3142(f). There is no definition of what a demonstration of good cause entails.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} § 3142(e). The categories in which a rebuttable presumption arises are as follows:
\begin{itemize}
\item In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—
\begin{itemize}
\item (1) the person has been convicted of a federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;
\item (2) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and
\item (3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.
\end{itemize}
\end{itemize}
\item \textsuperscript{47} If it applies to the case, the presumption creates a "strong probability . . . that no form of conditional release will be adequate" and the accused must be detained unless he meets the burden of producing some evidence in rebuttal. \textit{Jessup}, 757 F.2d at 382 (quoting 1984 S. Rep., \textit{supra} note 23, at 19, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3202).
\item \textsuperscript{48} Id. It if applies to the case, the presumption creates a "strong probability . . . that no form of conditional release will be adequate" and the accused must be detained unless he meets the burden of producing some evidence in rebuttal. \textit{Jessup}, 757 F.2d at 382 (quoting 1984 S. Rep., \textit{supra} note 23, at 19, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3202).
\item \textsuperscript{49} The list of factors to consider are:
\begin{itemize}
\item (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
\item (2) the weight of the evidence against the person;
\item (3) the history and characteristics of the person; and
\item (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release . . . .
\end{itemize}
\end{itemize}
The Bail Reform Act lacks a maximum time limit for detention, a feature of the D.C. Act. The D.C. Act specifically provides for a 60 day limit with one good cause extension of 30 days. A detainee, therefore, cannot be held before trial for more than three months. Congress, when enacting the Act, intended the maximum length of the detention to be governed by the Speedy Trial Act of 1974, which requires that criminal trials begin within 90 days of indictment. However, the provisions of the Speedy Trial Act allow for a variety of continuances which could cause the period of confinement to exceed 90 days.

II. THE PUNISHMENT-REGULATION CONTROVERSY

The primary objection of those opposed to preventive detention is that it constitutes impermissible punishment before adjudication, in violation of the fifth amendment. Therefore, one who challenges a preventive detention statute as violative of the fifth amendment, must first establish that the period of detention is punitive and not regulatory. The test to determine whether a legislative enactment is regulatory or punitive was promulgated 22 years before passage of the Bail Reform Act in the case of Kennedy v. Mendoza-Martinez. The Kennedy Court held that the test should apply

52. 18 U.S.C. § 3164(b) (1982).
54. See supra note 12.
55. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court looked at whether § 401(j) of the Nationality Act of 1940, 58 Stat. 746 (amended in 1944), and § 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163 (codified at 8 U.S.C. § 1481(a)(10)) which impose forfeiture of citizenship for "remaining outside of the jurisdiction of the United States, in time of war or national emergency for the purpose of evading or avoiding training and service in the nation's armed forces," id., are unconstitutional as impermissible punishment before adjudication. "It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the Constitutional requirements of due process." Id. at 164-65. The Court held that the statutes were unconstitutional as punishment in that they did not provide adequate procedural safeguards. The Kennedy Court promulgated the following test to determine whether the legislation was regulatory or punitive in absence of a clear punitive intent:

[1] the sanction involves an affirmative disability or restraint,
[2] . . . it has historically been regarded as a punishment,
[3] . . . it comes into play only on a finding of scienter,
[4] . . . its operation will promote the traditional aims of punishment-retribution
only when the punitive nature of the legislative enactment is not apparent. If
the purpose of the statute is not clearly punitive, the *Kennedy* test should
then be used to determine the statute’s classification. Courts have used
various interpretations of this test since it was established.56

The *Kennedy* test was subsequently abbreviated by the Supreme Court in
*Bell v. Wolfish*.57 At issue in *Bell* were certain conditions of confinement in
a federally operated custodial facility.58 In *Bell*, the Court discussed the
entire test but then proceeded, in dicta, to apply only two of the factors.59
The Court applied its version of the test to conclude that various prison
conditions which the detainees were subjected to, such as double-bunking
and strip-searching, were regulatory.60

In *United States v. Edwards*,61 the District of Columbia Court of Appeals
applied the *Kennedy* test to determine the constitutionality of the District of
Columbia pretrial detention statute. Under the D.C. Act, a person arrested
for certain offenses could be held for up to 60 days pending trial.62 The
court discussed several factors of the test in a cursory fashion, and then
focused on the one factor which the court determined was critical to its
analysis.63 That critical factor was whether the legislature contemplated an

and deterrence,
[5] . . . the behavior to which it applies is already a crime,
[6] . . . an alternative purpose to which it may rationally be connected is assignable
for it, and
[7] . . . it appears excessive in relation to the alternative purpose assigned are all
relevant to the inquiry, and may often point in differing directions.
Absence conclusive evidence of congressional intent as to the penal nature of a
statute, these factors must be considered in relation to the statute on its face.
*Id.* at 168-69 (citations omitted). The *Kennedy* Court did not actually apply the test because it
found that the legislative history clearly showed that the statute had a punitive intent. “The
objective manifestations of congressional purpose indicate conclusively that the provisions in
question can only be interpreted as punitive.” *Id.* at 169.
56. See infra notes 57-68.
57. 441 U.S. 520 (1978). A condensed version of the test was more recently used in United
violate defendant’s due process rights).
58. 441 U.S. at 527.
59. The *Bell* Court’s analysis was that:
[A]bsent a showing of an expressed intent to punish on the part of the detention
facility official, that determination [whether the punishment is regulatory] will turn
on ‘whether an alternative purpose to which [the restriction] may rationally be
connected is assignable for it and whether it appears excessive in relation to the
alternate purpose assigned [to it].’
*Id.* at 1333.
60. 441 U.S. at 538 (quoting *Kennedy*, 372 U.S. at 168-69).
61. 441 U.S. at 540.
63. *Id.* at 1323 (citing D.C. CODE ANN. 23-1322 (1973)).
64. The Court determined that preventive detention did not further the traditional aims of
punishment, deterrence, retribution or rehabilitation. The Court also determined that preventive
detention was an affirmative restraint but found that this was constitutional because detention
without bail for the traditional reasons also causes an affirmative restraint. *Id.* at 1333.
alternative punitive purpose when establishing the D.C. Act. The Edwards court concluded that the sole purpose of the D.C. Act was to prevent the recurrence of dangerous acts by the defendant while out on bail. The court determined that this purpose was regulatory and therefore upheld the D.C. Act.

In Schall v. Martin, a case involving a preventive detention statute aimed at juveniles, the Supreme Court first determined that the New York statute’s express intent was not to punish. The court relied on the statute’s strict time limit of 17 days for detention and humane conditions of confinement to reach this conclusion. The court then used the abbreviated version of the Kennedy test to determine that the statute was regulatory, and therefore, constitutional.

III. CASES SINCE THE ACT

The constitutionality of the 1984 Bail Reform Act has been repeatedly challenged in the courts. The two principal arguments advanced are that it violates the excessive bail clause of the eighth amendment and the due
process clause of the fifth amendment. A majority of lower courts have upheld the constitutionality of the Act against challenges based on these arguments.

A. Per Se Constitutional

In United States v. Portes, the Seventh Circuit specifically addressed both constitutional issues. In Portes, the defendant was indicted as part of a drug trafficking network. The magistrate found that the crime fell under the rebuttable presumption provision of the Act. Under this provision, it was presumed the defendant would be a danger to the community, and because the defendant offered no evidence to rebut this presumption, he could be detained.

In his defense, the defendant first argued that the eighth amendment created a constitutional right to bail. The court, relying on prior case law, held that there was no such right, and therefore, the Act did not violate the eighth amendment. The defendant next claimed that the Bail Reform Act violated his fifth amendment due process rights. He first asserted that the Act permitted punishment prior to adjudication of guilt. The court, relying on United States v. Edwards, held that there was no such violation.

In Edwards, the District of Columbia Court of Appeals looked to the legislative history of the statute to determine the purpose behind the D.C. Act. In Edwards, the court concluded that the purpose of the D.C. Act
was to protect the community and that this was a legitimate regulatory purpose. The court held that the D.C. Act's purpose of protecting the community from dangerous criminals was incorporated into the legislative history of the Act. Therefore, the Court found applicable the Edwards determination that the D.C. Act was regulatory and not punitive in nature.

The defendant also contended that the procedures of the Act infringed on his liberty interest. The court relied on prior decisions to conclude that the procedural safeguards in the Act were adequate to insulate against erroneous and unnecessary deprivation. Finally, the defendant claimed that the potential length of detention was impermissible under the due process clause. The court found this argument was premature because there had not yet been an extended period of detention. The court concluded that because no valid argument challenging the constitutionality of the Act existed, the conviction should be upheld.

Other courts have utilized a similar analysis to reach the same conclusion. In United States v. Perry, the defendant was charged with conspiracy to possess heroin, a crime that falls under the rebuttable presumption provision.
of the Act. The court relied on Carlson v. Landon, to conclude that the eighth amendment does not create an absolute right to bail.

In United States v. Hazzard, the court discussed two of the three due process issues discussed in Portes. In Hazzard, the defendant was charged with abducting, kidnapping and transporting the victim across the state line for the purpose of sexual activity. The defendant argued that the Act violated his fifth amendment due process rights because it constituted punishment before adjudication. In addition, the defendant claimed that the community's safety interest is never greater than the detainee's liberty interest. As in Portes, the Hazzard court found neither of the arguments persuasive.

B. Unconstitutional As Applied

Some courts have also held that although the Bail Reform Act is facially constitutional, it violates the fifth amendment as applied in a particular case. A fifth amendment violation can occur in cases where the application of the Act results in long or indeterminate pretrial detention. This situation often arises in complex cases where "good cause" continuances under the Speedy Trial Act are necessary. One such case is United States v. Theron, in which the Tenth Circuit held that because the defendant would have been detained between 10 and 14 months before the trial, the detention constituted punishment. The court gave an order to release the defendant on bail to

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88. Id. at 103.
89. 342 U.S. 524 (1952).
90. 430 A.2d at 1332.
92. Id. at 1451. The court first held that the government's interest was not just legitimate, but compelling enough to outweigh the individual's liberty interest. Id. at 1450-51. It then used a standard from Schall v. Martin, 467 U.S. 253 (1984) to determine that the detention was not punishment:

Absent a showing of an express intent to punish on the part of the State, that determination [whether it is punishment or regulation] generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'

Id. at 269 (quoting Kennedy, 372 U.S. at 168-69). Using this standard, the Perry court held that the legislative history did not show that a purpose of the statute was to punish. 598 F. Supp. at 1451.

93. See infra note 97.
94. In United States v. Theron, 782 F.2d 1510 (10th Cir. 1986), the court stated "at some point a pretrial detainee denied bail must be tried or released. Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly." Id. at 1516.
97. 782 F.2d 1510 (10th Cir. 1986).
98. Id. at 1516. The court further relied on the fact that the detainee himself had taken no steps to delay trial. Id.
prevent any further violation of due process.\textsuperscript{99} The court in \textit{United States v. LoFranco} used a similar analysis.\textsuperscript{100} In that case the defendant was detained under the Bail Reform Act for six months before trial. The district court held that because of the complex nature of the case, the Act did not place any real limit on the length of detention.\textsuperscript{101} While courts have varied in their determination of the length of time which violates the defendant’s due process rights,\textsuperscript{102} these cases indicate that the Speedy Trial Act does not always ensure protection of the detainee’s due process rights.

\section*{C. The Second Circuit}

The Second Circuit has deviated from the majority of other courts in holding the Act unconstitutional per se.\textsuperscript{103} First, in \textit{United States v. Melendez-Carrion},\textsuperscript{104} the court held that an eight month detention period, based on preventing future criminal activity, violated due process.\textsuperscript{105} The court, however, could not agree as to whether a shorter period of detention would make the incarceration constitutional.\textsuperscript{106} Judge Newman, writing for the court, argued that pretrial detention based on a defendant’s potential for dangerous conduct was not a constitutional regulatory measure but impermissible punishment in violation of due process.\textsuperscript{107} Judge Feinberg’s concurrence agreed that the Act was unconstitutional as applied in this case, but only as to the length of time of the defendant’s detention.\textsuperscript{108}

Subsequently, the Second Circuit addressed this issue again.\textsuperscript{109} In \textit{United States v. Salerno}, the majority of the court agreed that the Act violated due process regardless of the time period.\textsuperscript{110} The Court concluded that detention was only constitutional for the traditional purpose of protecting the judicial process.\textsuperscript{111} The Supreme Court subsequently granted certiorari and examined the constitutionality of the Bail Reform Act.\textsuperscript{112}

\begin{thebibliography}{9}
\bibitem{99} Id.
\bibitem{101} Id. at 1326.
\bibitem{102} Compare United States v. Zannino, 798 F.2d 544 (1st Cir. 1986) (sixteen month pretrial detention not unconstitutional when case is delayed on defendant’s insistence) and United States v. Accetturo, 783 F.2d 382 (3d Cir. 1986) (six month pretrial detention not unconstitutional) with United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986) (eight month pretrial detention period unconstitutional) and United States v. Gonzales-Claudio, 806 F.2d 334 (2d Cir. 1986) (fourteen month detention unconstitutional when trial would not be concluded until approximately 26 months after detention began).
\bibitem{103} See supra notes 72-97 and accompanying text.
\bibitem{104} 790 F.2d 984 (2d Cir. 1986).
\bibitem{105} Id. at 1004.
\bibitem{106} Id. at 1005 (Feinberg, C.J., concurring).
\bibitem{107} Id. at 1004.
\bibitem{108} Id. at 1005 (Feinberg, C.J., concurring).
\bibitem{109} United States v. Salerno, 794 F.2d 64 (2d Cir. 1986).
\bibitem{110} Id. at 74-75.
\bibitem{111} Id. at 71.
\bibitem{112} 107 S. Ct. 397 (1986). See also United States v. Romano, 799 F.2d 17 (2d Cir. 1986).
\end{thebibliography}
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IV. UNITED STATES v. SALERNO

A. The Facts

Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, on a 26 count indictment. The indictment charged them with offenses including mail and wire fraud, criminal gambling violations, and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The violations of the RICO Act included fraud, extortion, gambling and conspiracy to commit murder.113

At the arraignment, the government moved to detain the defendants under section 3142(e) of the Bail Reform Act.114 The government argued that no condition of release would assure the safety of the community. The government presented evidence that Salerno was the boss of a crime family of which Cafaro was a member, and that they used violent methods to obtain their illegal objectives. In addition, witnesses testified that Salerno took part in two murder conspiracies. Salerno offered character witnesses in his favor and a letter from his doctor stating that he was in ill health. Cafaro did not put on any evidence. The district court granted the motion to detain on the grounds that the government had shown by clear and convincing evidence that detention was necessary.115

On appeal, the defendants argued that the Bail Reform Act was unconstitutional because it allowed persons to be detained based on the likelihood that they would commit future crimes and thus violated due process.116 The Second Circuit held that the Act violated due process,117 relying largely on the opinion of Judge Newman in Melendez-Carrion.118 In Salerno, however, the majority agreed that the Act was unconstitutional without regard to the duration of the detention.119 The court reasoned that the purpose of the criminal law system was to incarcerate persons for their actual criminal behavior and not their potential for criminal acts. The court reasoned that due process does not permit "total deprivation of liberty" as a method to protect the community from the defendant's likelihood of committing future crimes. Neither the government's interest in public safety nor the Act's

112. 107 S. Ct. 397 (1986). See also United States v. Romano, 799 F.2d 17 (2d Cir. 1986).
113. Id. at 2099.
114. Id.
117. Id. at 74-75. See supra notes 104-07 and accompanying text.
118. 790 F.2d 984 (1986). See supra notes 99-103 and accompanying text.
119. 794 F.2d at 74.
procedural safeguards was found to be sufficient to justify detention.\textsuperscript{120} The court also held that, even assuming the Bail Reform Act was regulatory, the only valid purpose for pretrial detention was to ensure that there was a fair trial on the merits. The Court stated that otherwise detention could be imposed only be taken as "administrative steps incident to arrest."\textsuperscript{121} The United States Supreme Court granted the government's petition for certiorari to address a conflict among the circuits regarding the validity of the Act.\textsuperscript{122}

\textbf{B. The Salerno Court's Holding}

The Supreme Court was faced with two issues on appeal. The first was whether the Act was facially invalid under the due process clause of the fifth amendment.\textsuperscript{123} The second issue was whether the Act was unconstitutional on its face under the excessive bail clause of the eighth amendment.\textsuperscript{124} The Court held that the Bail Reform Act did not violate either the eighth or the fifth amendment.

\textbf{C. The Majority's Opinion}

Chief Justice Rehnquist's majority opinion\textsuperscript{125} first addressed defendants' argument that the Act constituted impermissible punishment in violation of the defendants' substantive due process rights. The Court looked to the legislative history of the Act to determine if Congress's intent in designing the Act was to punish and expressly concluded that it was not.\textsuperscript{126} Because the Act was not expressly punitive, the Court appropriately applied a portion of the test promulgated in \textit{Kennedy v. Mendoza-Martinez} to determine whether the restriction was implicitly regulatory or punitive in nature.\textsuperscript{127} The \textit{Kennedy} test's first requirement is that the statute embody a non-punitive purpose.\textsuperscript{128} This requirement was satisfied during the prior examination of the legislature's intent because the alternate purpose asserted was that of regulation.\textsuperscript{129} The Court then applied the second part of the test, whether the incidents of detention were excessive in relation to the Act's goals, and focused on procedural safeguards of the statute.\textsuperscript{130} More specifically, the Court examined the circumstances under which a defendant could be de-

\textsuperscript{120} {\textit{Id.}} at 74 (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).
\textsuperscript{121} {\textit{Id.}} at 71-72.
\textsuperscript{122} United States v. Salerno, 107 S. Ct. 397 (1986).
\textsuperscript{123} 107 S. Ct. at 2100-01.
\textsuperscript{124} {\textit{Id.}}.
\textsuperscript{125} Rehnquist, C.J., joined by Blackmun, White, O'Connor, Scalia, and Powell, JJ.
\textsuperscript{126} {\textit{Id.}} at 2101.
\textsuperscript{127} 372 U.S. 144 (1963). The \textit{Salerno} Court applied only the latter half of the test, the condensed version first stated in \textit{Bell}, 441 U.S. 520 (1979). The \textit{Bell} court reduced the test to the final two of the seven factors. See \textit{supra} note 59.
\textsuperscript{128} \textit{Kennedy}, 372 U.S. at 168.
\textsuperscript{129} 107 S. Ct. at 2101.
\textsuperscript{130} {\textit{Id.}}
tained, the timeliness of the detention hearing, the possible maximum length of detention, and the conditions of confinement.\textsuperscript{131} After examining these elements of the Bail Reform Act, the Court concluded that the Act was regulatory and, therefore, not in violation of the due process clause.\textsuperscript{132}

The Court next considered the defendants’ argument that the government’s interest was insufficient to justify preventive detention. The Court conceded that there is a general rule that persons may not be detained prior to adjudication but noted that historically, many exceptions existed.\textsuperscript{133} The Court determined that a balancing test, similar to that used in the exception cases, should be used.\textsuperscript{134} This test balanced the importance of the government’s interest in preventing crime with the individual’s interest in liberty.\textsuperscript{135} Although the Court found the individual’s liberty interest to be compelling, it concluded that the individual’s interest was outweighed by society’s strong interest in crime prevention.\textsuperscript{136} The Court held that because only the most dangerous criminals were covered under this Act, and the procedural safeguards insured against extensive and unnecessary detention, the impact of the Act was sufficiently narrow.\textsuperscript{137}

Lastly, the Court disposed of the defendants’ argument that the procedures of the Act rendered it facially invalid.\textsuperscript{138} The Court held that the Bail Reform Act withstood this constitutional challenge.\textsuperscript{139} The Court noted that the Act’s procedural safeguards exceeded those found constitutional in similar situations.\textsuperscript{140}

The Supreme Court then addressed the defendants’ contention that the Bail Reform Act violated the eighth amendment. The court of appeals did not address this issue because it found that the Act violated due process.\textsuperscript{141}

\begin{thebibliography}{99}
\bibitem{131} Id. at 2101-02.
\bibitem{132} Id. at 2102.
\bibitem{133} Id. "Such a 'general rule' may freely be conceded, but we think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel." Id. The Court cited various categories as exceptions to this general rule including aliens, mental incompetents, juveniles, and actions taken during time of war or national emergency. Id. See, e.g., Schall v. Martin, 467 U.S. 253 (1984) (juveniles who pose a danger to themselves or community); Addington v. Texas, 441 U.S. 418 (1979) (mentally incompetent persons who may pose a danger to community); Jackson v. Indiana, 406 U.S. 715, 731-39 (1972) (persons accused of dangerous crimes who have become incompetent to stand trial); Carlson v. Landon, 342 U.S. 524 (1952) (pre-deportation proceeding detention of potentially dangerous resident aliens); Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) (detention of person without probable cause during insurrection).
\bibitem{134} 107 S. Ct. at 2102.
\bibitem{135} Id.
\bibitem{136} Id. at 2103.
\bibitem{137} Id. at 2102-03.
\bibitem{138} Id. at 2103.
\bibitem{139} Id. at 2104.
\bibitem{140} Id. at 2104. The Court found that procedural safeguards inherent in both limited post-arrest detention and juvenile settings were lesser than those incident to the Bail Reform Act, but not constitutionally infirm.
\bibitem{141} Id.
\end{thebibliography}
The defendants claimed that denial of bail can only be allowed to fulfill “the sole purpose of bail—to ensure integrity of the judicial process.” They relied on *Stack v. Boyle*, to support their claims. In *Stack*, the defendants argued that the amount of bail set was unreasonable and should be reduced. The *Stack* Court noted the limited function of bail—that of assuring the presence of the defendant at trial—and determined that bail set at an amount higher than needed to assure the defendant’s presence was excessive under the eight amendment. The *Stack* Court, therefore, concluded that there was a right to freedom from detention before trial. The *Salerno* Court, however, rejected the defendants’ arguments on two grounds. First, it held that *Stack* should be read narrowly and limited to the question of whether the amount of bail itself was excessive, not whether bail was required at all. Secondly, the Court looked to the text of the eighth amendment itself and concluded that it does not explicitly limit bail to questions of flight. The only limitation it found was that the conditions of release must not be excessive when balanced with the gravity of the crime with which the defendant was charged. Therefore, the Court concluded that when the government establishes a compelling justification for detaining a defendant, the eighth amendment does not mandate release on bail.

**D. The Dissents**

Justice Marshall, joined by Justice Brennan, dissented. He asserted that the Bail Reform Act was unconstitutional. Justice Marshall separated his analysis into four parts. In the first section, Justice Marshall contended that the Court did not have the jurisdiction to hear the case. In the second section, the dissent examined the majority’s due process and excessive bail arguments. Justice Marshall concluded that the majority erred when it essentially held that the only due process right protectable in this scenario was the right to be free from punishment. Justice Marshall also accused the majority of simply relabeling punishment as regulation in order to eliminate the controversy.

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142. *Id.*
143. 342 U.S. 1 (1951).
144. *Id.* at 5.
145. *Id.* at 6.
146. 107 S. Ct. at 2104.
147. "Nothing in the text of the Bail Clause limits permissible government considerations solely to questions of flight." *Id.* at 2105.
148. *Id.* at 2105.
149. *Id.* at 2106-07 (Marshall, J., dissenting). In the first section, the dissent argued that the majority used *Salerno* as a "test" case, because it felt that the issue was important, when in reality it had no jurisdiction to hear the case. At the time the case actually came before the Court, Salerno had been convicted and sentenced and Cafaro had been released on a recognizance bond because he had agreed to become a government witness. The dissent argued that this rendered the case moot. If certiorari was originally granted when there was jurisdiction, under article III of the United States Constitution which requires a live case or controversy, it must be denied when there is no longer a controversy.
150. *Id.* at 2108.
The dissent also found fault with the majority's analysis of the eighth amendment argument. First, the dissent argued that there was no practical difference between excessive bail and a total denial of bail under the Act. Justice Marshall stated that based on the majority's equation of the two, there is no real need for the Bail Reform Act. Secondly, after interpreting the Court's opinion to suggest that the excessive bail clause may only refer to the judiciary, Justice Marshall firmly stated that statutes are subject to the constitution and those statutes which allow what is constitutionally forbidden cannot be upheld. If Congress cannot establish a sufficiently compelling justification, the constitution prohibits Congress from enacting the statute.

In its third section, the dissent analyzed the concept of "presumption of innocence" in an historical context and argued that this presumption is "implicit in the concept of ordered liberty" and "established beyond legislative contravention of the Due Process Clause." Justice Marshall strongly disagreed with the majority's apparent use of an indictment to create a special class of persons. He argued that the indictment cannot be used as evidence to permit detention, when it would be unconstitutional to detain the defendant after he was acquitted. The indictment can only be used as evidence that there will be a trial, and therefore, the only valid purpose for detention under an indictment is to ensure that the trial takes place. Justice Marshall found that this analysis was consistent with the traditional justification for denying bail, that of ensuring the integrity of the judicial process.

Finally, the dissent criticized the coercive power of the authority which would be granted to the government under the Bail Reform Act. The government would have the option to detain because of the defendant's apparent dangerousness, but then to release the defendant when it suits its goals. Justice Marshall believed that this practice had the potential for abuse. He stated that preserving constitutional values is vital, and that although protecting society from danger is an important goal, society has always paid a cost in upholding constitutional principles.

Justice Stevens also wrote a dissent although he saw no need for such a broad statement as Justice Marshall's. Justice Stevens' dissent agreed that
the majority's use of an indictment to create a special class of persons was wrong. His dissent also stated that the majority's decision undermines established fundamental principles.160

V. ANALYSIS

The Supreme Court in Salerno used the Kennedy test to classify preventive detention as regulatory in nature.161 Applying this analysis, the Court held that the Act did not violate due process because regulation is permissible prior to adjudication, whereas punishment is not.162 The Kennedy test is designed to be applied in the absence of an express legislative intent to punish.163 The Court was correct in its decision to apply the test, because punitive intent was admittedly absent from the legislative history of the Bail Reform Act. However, in reaching its conclusion to uphold the Act, the Supreme Court did not apply this test correctly.

The Court applied the condensed version of the test from Bell v. Wolfish.164 However, the Court should have used the entire Kennedy test. The true Kennedy test more accurately balances all the important considerations which should be weighed in reaching a conclusion regarding the constitutionality of restrictions on bail.

The Bell version of the test should not be given great weight for two reasons. First, in Bell, any discussion of the test was merely dicta. The Court did not need to, and in fact did not, apply this test to reach its holding. Second, the Bell Court was vague as to what standard should be used, and it appeared to contradict itself. In Bell, the court first stated that all the factors in Kennedy should be used as guideposts in reaching a decision. The Court then isolated two of the factors to be used in the determination and left out five of the "guideposts."165 For these two reasons, the Bell version of the Kennedy test should not dictate how the test should be applied. A better balance can be achieved by using the complete list of factors described in Kennedy. If the complete Kennedy test is applied to the Bail Reform Act, the inevitable conclusion is that the Act should be classified as punitive in nature.

160. Justice Stevens was also uneasy about the jurisdictional basis of this decision. Id. at 2113.

161. Id. at 2101.

162. Id. Punishment before trial violates the due process clause because the clause requires that a person accused of a crime be permitted to prove his innocence in a court of law before he is held liable for his actions. See Bell, 441 U.S. at 535 n.16. See also United States v. Brown, 381 U.S. 437 (1965) (unconstitutional to punish by legislative enactment prior to adjudication); Tribe, supra note 24, at 389 (cannot condemn man for committing a crime when commission has not been proved beyond a reasonable doubt).

163. "Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." Kennedy, 372 U.S. at 169.

164. 441 U.S. 520, 538 (1979).

165. Id. These two "guideposts" make up the condensed version of the test.
A. Factors Used In The Court's Analysis

1. Legislative history factor

In applying the *Kennedy* test, the Court first looked to the purpose of pretrial detention.\(^{166}\) If the Act had a purpose other than regulation, it could not stand. The Court correctly looked to the intent of the legislature to make this determination. The Court concluded that legislative history indicated that Congress did not design the Act with the intent to impose punitive sanctions on dangerous individuals.\(^{167}\) It held that the Bail Reform Act, therefore, had no alternate purpose and was clearly regulatory in nature. Although it was proper for the Court to look to the legislative intent, the legislature in this case never made its own determination of whether the pretrial detention mandated by the Act was punitive or regulatory. The Court's strong reliance on this incomplete "legislative determination," therefore, is a major weakness in the Court's analysis. The legislature merely deferred to a previous Supreme Court case, *Bell v. Wolfish*, to support its determination that preventive detention was regulatory;\(^{168}\) nothing else in the legislative history supports this conclusion. Congress, however, read this case out of context. *Bell* did not analyze pretrial detention as it applied to dangerousness, but rather, the Court evaluated the role of pretrial detention in ensuring the promotion of justice.\(^{169}\)

In *Bell*, the Supreme Court examined the constitutionality of several restrictions imposed on persons in jail, whether already convicted, or detained before trial without bail for the traditional reason of ensuring the integrity of the judicial process.\(^{170}\) The Court did not address the constitutionality of the detention itself, because these were situations in which detention was traditionally allowed. The Court applied the *Kennedy* test to prison conditions and concluded that those particular conditions did not amount to punishment for either the convicted prisoners or the pretrial detainees.\(^{171}\) The Court applied the test to each condition a prisoner was subjected to while being detained.\(^{172}\) The Court's analysis focused on the restrictions that occur once a defendant has been legitimately detained and evaluated "[the] legitimate interests that stem from [the government's] need to manage the

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\(^{166}\) 107 S. Ct. at 2101.

\(^{167}\) *Id.* The Supreme Court relies on 1984 S. Rep., *supra* note 23, at 1, 1984 U.S. Code Cong. & Admin. News at 3191, for the conclusion that the Act is regulatory.


\(^{169}\) 441 U.S. at 536.

\(^{170}\) In *Bell*, decided in 1979, five years prior to the enactment of the Bail Reform Act, the Court did not address the issue of denial of bail based on propensity for dangerousness. *Id.* at 534 n.15.

\(^{171}\) *Id.* at 537.

\(^{172}\) *Id.* at 540.
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facility . . . legitimate operational concerns." The Court specifically stated that it was not attempting to define what governmental interests may justify pretrial detention itself.

Therefore, in Salerno, the Supreme Court should not have relied so heavily on the legislature's finding of regulatory intent. The legislature relied on Bell, but Bell never addressed the issue of whether pretrial detention, for reasons other than to bring the defendant to trial or ensure security of the penal system, was regulatory.

2. Speedy Trial Act factor

The Supreme Court next applied the second factor of the abbreviated Kennedy test, whether the Bail Reform Act is excessive in relation to the regulatory goal it intended to achieve. The Court relied primarily on four factors in its analysis: (1) the arrestee is entitled to a prompt detention hearing; (2) the Act carefully limits the circumstances under which detention may be sought; (3) the conditions of imprisonment appear to reflect regulatory purposes; and (4) the maximum limit of pretrial detention is limited by the Speedy Trial Act. The Court concluded that these four procedural safeguards render the Bail Reform Act a permissible regulation.

The Court, however, erred in relying on the Speedy Trial Act as a procedural safeguard to conclude that the Act is regulatory in nature. Assuming that the Act is otherwise a permissible regulation, the use of the Speedy Trial Act as the maximum time limit for preventive detention renders the Act unconstitutional. The Speedy Trial Act as a maximum time limit for detention is analogous to having no time limit at all. The Speedy Trial Act's time limit provisions are "illusory" because the catch-all "excludable delay" provision offsets the seemingly strict time limit. This creates a de facto jail sentence and causes the Act to become impermissible

173. Id. "It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective . . . ." Id.

174. Id. "We, therefore, have no occasion to consider whether any other government objectives may constitutionally justify pretrial detention." Id. at 534 n.15.

175. 107 S. Ct. at 2101.


177. 107 S. Ct. at 2102.

178. This Note assumes that detention may be regulatory for purposes of analysis of the Speedy Trial Act's time limit provision.

179. [The Speedy Trial Act's] requirement of trial within 90 days for persons who have been detained has turned out to be illusory, in large part because the provision covering detainees also incorporates . . . the periods of excludable time enumerated in Section 3161(h) in computing the 90-day time limitation. As a result, detention can continue while all of the 18 different circumstances enumerated in section 3161(h) give rise to excludable delay.

United States v. Accetturo, 783 F.2d 382, 394-95 (3d Cir. 1986) (Sloviter, J., dissenting) (citations omitted).
punishment before adjudication which violates due process. Although the initial purpose behind the detention may be regulatory, it does not always remain so as the length of the detention increases. Because it is impossible to draw a line after which the duration of detention becomes unconstitutional, the Act should be stricken as invalid per se, not merely on a case by case basis.

The Bail Reform Act is very different than the preventive detention statutes upheld in Schall v. Martin and United States v. Edwards, because it uses the Speedy Trial Act as a maximum time limit. In Schall, a case in which juveniles were detained under a statute similar to the Bail Reform Act, the maximum time period for detention was 17 days. The Supreme Court upheld this statute, relying in part on the added factor that children have a lesser liberty interest than adults because they are always in some type of custodial situation until the age of emancipation. In Edwards, there was a strictly enforced maximum time limit of 90 days which included an initial 60 day detention with one 30 day extension for good cause shown.

Congress intended the time limit provisions of the Speedy Trial Act of 1974 to serve as the maximum length of detention for pretrial detainees under the Bail Reform Act. Several members of Congress expressed concern about setting a time limit for detention before trial. Two concerns were that the time limit would not be sufficient to prepare for complex trials, and that the time period of detention could become lengthy or even indefinite. Congress apparently felt that using the Speedy Trial Act would prevent these problems. The Speedy Trial Act's escape clause alleviated congressional fears that there would not be enough time to prepare complex cases. Congress did not foresee, however, that this escape clause would be abused, causing cases to be continued for longer periods of time than it

180. See supra note 146 and accompanying text.
181. See supra notes 89-97 and accompanying text.
182. United States v. LoFranco, 620 F. Supp. 1324 (N.D.N.Y. 1985). "There is a danger of a violation of due process in any detention without bail. But there is no clear line beyond which detention without bail becomes unconstitutional, because it is impossible to predict whether or on what charges a defendant will be convicted." Id. at 1325.
185. N.Y. JUD. LAW § 320.5(3)(b) (McKinney 1983).
186. 467 U.S. at 265.
ever anticipated. The section 3161(h)(8)(A) "ends of justice" exclusion of the Speedy Trial Act, which acts as a catchall, is especially disturbing because courts have generally interpreted it as a sufficient basis to justify delay.191

Generally, the periods of these "ends of justice" continuances are excludable from the 90 day time limit in which the defendant must be brought to trial. Courts are lenient in allowing the date of trial to be extended for good cause shown192 and have granted these types of continuances for a wide variety of reasons.193

One example of this leniency occurred when the Tenth Circuit granted a victim of assault a continuance to pursue his political campaign without interference in United States v. Guerro.194 In Guerro, the defendant threw eggs at a presidential candidate during a political rally and was convicted of assault. The trial court granted a 45 day continuance to allow the candidate to finish his presidential campaign. The defendant argued on appeal that the trial court failed to comply with the Speedy Trial Act. The court held that the reasons for continuance outweighed the interests of the defendant, and the continuance was properly excluded from the 90 day time limit.195

In United States v. Henderson,196 the Ninth Circuit did not even reach the issue of whether the delay granted was reasonable. The court instead held that delays excludable from the Speedy Trial Act time limit calculation are automatic.197 Therefore, the court excluded 720 of 786 days of pretrial detention, and dismissed the defendant's claim that there was a violation of the Speedy Trial Act.198

191. Note, Pretrial Incarceration, supra note 6, at 1068. This catch-all exclusion reads:
   Any period of delay resulting from a continuance granted by any judge on his own
   motion or at the request of the defendant or his counsel or at the request of the
   attorney for the Government, if the judge granted such continuance on the basis
   of his findings that the ends of justice served by taking such action outweigh the
   best interest of the public and the defendant in a speedy trial.
192. See infra notes 185-91 and accompanying text.
193. Courts continually justify delay because of confusion with the rules. See United States
   v. Didier, 542 F.2d 1182, 1185 (2nd Cir. 1976); United States v. Drummond, 511 F.2d 1049,
   1053-54 (2d Cir.), cert. denied, 423 U.S. 844 (1975); United States v. Roemer, 514 F.2d 1377,
   1381-82 (2d Cir. 1975). See also United States v. Henry, 698 F.2d 1172-73 (11th Cir. 1983).
   There, the duration of continuances was held excludable from the court's computation of the
   70 day period. The defendant argued that the government's failure to comply with pretrial
   discovery deadlines forced him to either proceed to trial unprepared or to move for continuance.
195. The court held that the victim's interests were compelling because the right to campaign
   for a political office is protected by the Constitution. Id. at 867.
196. 746 F.2d 619 (9th Cir. 1985), aff'd, 106 S. Ct. 1871 (1986).
197. Id. at 622. The court interpreted the language in section 3161(h)(1)(f) which excludes:
   "delay resulting from any pretrial motion," as an automatic exclusion which, therefore, did
   not require the district court to determine whether or not the delay was reasonable. Id. See
Furthermore, as a particular trial becomes more complex, the time needed to prepare increases, as do the continuances. This situation is aggravated by the lenient attitude of the courts to grant continuances because they are aware of the problems in case preparation. All the above exceptions allow lengthy trial delays, but do not designate a time when these delays may be considered violative of the detainee's due process rights.

Several courts which have decided cases based on the Bail Reform Act have held that the length of pretrial detention violated due process. This is an indication that this situation occurs often enough that the Speedy Trial Act is not an adequate safeguard. Because the Speedy Trial Act does not achieve its purpose of providing speedy trials, the detention provision constitutes punishment because it may not be properly applied. To examine detention on a case by case basis and confine the analysis to the facts does not adequately protect the interests of those detained. After the detainee has been imprisoned for an unconstitutional period, nothing can adequately compensate him for the harm that has been done; safeguards must be developed to prevent the threat of unconstitutional detention before the threat appears.

The Court in Salerno relied on the Speedy Trial Act as a procedural safeguard when applying the second factor of the abbreviated Kennedy test. Therefore, its conclusion should be reversed because the Speedy Trial Act is not an adequate procedural safeguard.

The five "guidepost" factors, discussed below, indicate that the Bail Reform Act is punishment. When combining the five factors that the Court failed to use with a correct application of the two factors that the Salerno Court used, the analysis overwhelmingly indicates that the Act impermissibly allows punishment.

B. Factors The Court Ignores

The first of the five Kennedy "guidepost" factors requires an analysis of whether the sanction involves an affirmative disability or restraint. It is
obvious that detention imposes an affirmative restraint on a detainee. The very nature of detention is to restrict a person's mobility by placing him in a controlled environment. This enables the government to watch over the detainee. In this situation, the defendant is monitored so that he will not be a danger to society during the pretrial stage. In fact, the majority opinion in *Salerno* conceded that the detainee's liberty interest is infringed by pretrial detention.203

The second factor requires an examination of the historical classification of preventive detention.204 Detention of this type for competent persons205 has long been viewed as punishment.206 Convicted prisoners are "detained" when they are sent to the penitentiary. Juvenile delinquents are sent to detention centers when they are found to be "problem children."207 Although these detentions may also serve to rehabilitate, the detention is primarily punitive because those detained committed dangerous crimes.

The third factor to look at is scienter; whether the Act comes into play only on a finding that the accused was aware of his wrongdoing.208 The individual is detained if the government adjudges that he will have a propensity to commit dangerous acts. Thus, the detention must be analogized with sanctions for committing a strict liability offense. Because there has been an increase in strict liability crimes in which knowledge is no longer a prerequisite to culpability,209 the defendant's state of mind is not relevant to a determination of whether preventive detention is punitive or regulatory.

The fourth factor asks whether the application of the Act will achieve the traditional retributive and deterrent goals of punishment.210 The theory of retribution is based on the principle that the rules benefit all of society, and

203. 107 S. Ct. at 2103. "We do not minimize the importance and fundamental nature of this right. But . . . this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to greater needs of society." Id.
205. Incompetents and others such as the criminally insane have generally been treated differently. *See*, e.g., *Addington v. Texas*, 441 U.S. 418 (1979) (mentally incompetent persons who pose a danger to the community may be constitutionally detained); *Jackson v. Indiana*, 406 U.S. 715 (1972) (constitutional detention of persons accused of dangerous crimes who have become incompetent to stand trial). However, dangerous resident aliens have also been an exception, *see* *Wong Wing v. United States*, 163 U.S. 228 (1986) (detention prior to deportation is constitutional); *Carlson v. Landon*, 342 U.S. 524 (1952) (constitutional detention of dangerous resident alien prior to deportation hearing).
206. *Meléndez-Carrion*, 790 F.2d at 998. "The government does not dispute that detention of a competent adult to prevent commission of crime may not be imposed as punishment unless there has been an adjudication of guilt." Id.
207. *Schall*, 467 U.S. at 257-58 n.5.
one who breaches the rule owes a debt to society in the form of punishment.\textsuperscript{211} Imprisonment after a crime is clearly punishment or the paying of the debt. It is difficult, however, to distinguish between imprisonment which is clearly considered punishment and pretrial detention which is characterized as regulatory. The purpose of retribution would appear to be accomplished in both cases. The purpose of deterrence is to discourage the commission of future crimes.\textsuperscript{212} Potential criminals are deterred from committing crimes by the threat of incarceration. Preventive detention increases this deterrence because the threat of permanent, lengthy incarceration is even more severe. Persons prone to commit crimes are discouraged from doing so even when they are convinced that they will not be convicted if apprehended. The rationale behind this theory is that a person who falls into one of the serious crime categories may be imprisoned for a significant amount of time\textsuperscript{213} before trial begins.

Finally, the Supreme Court failed to address the factor of whether the Act actually applies to criminal conduct.\textsuperscript{214} The analysis of this factor turns on what type of behavior the court believes is covered by the Act. If this factor applies to the propensity to commit dangerous acts, this is not itself a crime.\textsuperscript{215} However, if the Act applies to the dangerous behavior itself, it is obviously a crime because it is exactly this type of crime that the Act is intended to prevent. Because the Act is attempting to prevent pretrial crimes and not just pretrial dangerousness, it is logical that the latter interpretation is the correct one, and it applies to criminal behavior.

Analysis of each of these five "guideposts" points toward the determination that pretrial detention is not regulatory. Therefore, the application of the complete test leads to the conclusion that pretrial detention is in the category of punishment. A correct application of the factors from the \textit{Kennedy} test would demonstrate that the Bail Reform Act is not constitutional.

\section*{C. The Court's Balancing Test}

The Supreme Court determined that because the Act was permissible regulation, a balancing test must next be used between the government's interest and that of the detainee to determine which interest is more com-
PELLING. The test balances the government's interest in crime prevention and a safe community with the individual's interest in liberty. The Court held that the government's interest outweighed that of the individual because the former interest was so compelling. However valid this argument may be in other circumstances, it is moot in cases where the action is punishment and not regulation. It is settled that Congress cannot enact a law that makes what is unconstitutional constitutional. Justice Marshall made this point in his dissent, as he too felt that the Act allows impermissible punishment.

Protecting the public from dangerous criminals is a valid governmental interest. Each day, persons who are convicted of crimes are imprisoned, separated by gates and fences from the rest of society both as their punishment and for the protection of society. However, the persons who are being detained under the Bail Reform Act have not yet been convicted of a crime. If a defendant is convicted at trial, the criminal justice system will protect society by locking him away. Until then, the only constitutional action that can be taken is to release him on bail. While there is a possibility that he may commit a crime while out on bail, that is the chance society must take in order to uphold the values of the constitution.

It is well established that the government can constitutionally remand a defendant to custody to ensure that he appear at his trial and when the defendant has been accused of a capital crime. There is a fundamental difference between the traditional reasons for detention and the denial of bail due to the defendant's propensity to be dangerous. In order for the criminal justice system to function, there must be a determination of whether one who is accused of a crime is guilty. This is the purpose of the trial. Without the trial, there is no assurance that justice will prevail. Therefore, it is crucial that the trial transpire in a manner that is just and fair. The traditional reasons for denying bail are not offensive to the constitution, therefore, because they serve to ensure that the system does justice to the defendant and to society.

**D. The Act's Procedural Safeguards**

The Supreme Court addressed the defendants' constitutional challenge to several procedural provisions of the Bail Reform Act designed to determine

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217. *Id.* at 2107-08 (Marshall, J., dissenting).
218. *Id.* at 2112.
219. United States v. Jessup, 757 F.2d 378, 380 (1st Cir. 1985). "It is well established that the government can keep a defendant in custody to secure his presence at trial." *Id.*
220. "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." *Melendez-Carrion*, 790 F.2d at 1002. See United States v. Berrios-Berrios, 791 F.2d 246, 252 (2d Cir. 1986) ("The due process clause was not violated simply because the defendants who posed a risk of flight had been incarcerated for over eight months awaiting trial."). But see United States v. Hazzard, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984) ("[T]he government interest in preventing disruption of the judicial system by the non-appearance of a criminal defendant is not greater than the interest in preventing the harm caused by crime.").
the future dangerousness of the accused.\textsuperscript{221} The purpose of these provisions is to ensure that the judicial officer's decision to detain the defendant is accurately made. These procedural provisions include: (a) a burden of proof by clear and convincing evidence;\textsuperscript{222} (b) defendant's right to counsel;\textsuperscript{223} (c) the requirement that the judicial officer make written findings of fact;\textsuperscript{224} (d) immediate appellate review of the decision;\textsuperscript{225} and, (e) the responsibility of the judicial officer to look to the nature and circumstances of the charges, the criminal history of the defendant, the danger to the community, and the weight of the evidence.\textsuperscript{226} The Court found that these provisions were constitutional because they were more rigid than provisions in statutes held to be adequate in both \textit{Schall} and \textit{Gerstein}.\textsuperscript{227} The Salerno situation is distinguishable from both of these cases and, therefore, provides no support for the Court's claim that the provisions are constitutional.

The first case the Supreme Court employed to support its position was \textit{Schall v. Martin}, a case in which the Court upheld a juvenile pretrial detention statute.\textsuperscript{228} The \textit{Schall} case should not have been used to support the Court's position for two reasons. First, the preventive detention of juveniles cannot be compared with that of adults because juveniles traditionally have a lesser liberty interest. The \textit{Schall} Court determined that minors are either controlled by their parents or other guardians or by the state's \textit{parens patriae} power.\textsuperscript{229} Until a child reaches the age of emancipation, he is not free from the jurisdiction of restrictive adult supervision and rules. Thus, the Court held that juveniles have a less significant interest in freedom from institutional restraints than adults,\textsuperscript{230} and they do not require as stringent safeguards to protect their interests. The Court went on to conclude that the state's interest in the child's welfare makes the juvenile proceeding distinct from that of an adult criminal. Therefore, although the Bail Reform Act's safeguards may be better than those in the juvenile preventive detention statute, it does not follow that they are constitutional.

Second, \textit{Schall} should not be used to support the Supreme Court's claim because the Act subjects adults to harsher conditions than juveniles during detention. Therefore, considerably more stringent safeguards are needed to protect a detained adult than were found adequate in \textit{Schall}. The major differences between the restrictions placed on a defendant under the Act and

\textsuperscript{221} 107 S. Ct. at 2103.
\textsuperscript{223} \textit{Id}.
\textsuperscript{224} § 3142(i).
\textsuperscript{225} 18 U.S.C. § 3145(c) (Supp. III 1985).
\textsuperscript{226} § 3142(g).
\textsuperscript{227} 107 S. Ct. at 2104. The two cases in which these preventive detention statutes were upheld are \textit{Schall v. Martin}, 467 U.S. 253 (1984), and \textit{Gerstein v. Pugh}, 420 U.S. 103 (1975).
\textsuperscript{228} 467 U.S. 253 (1984).
\textsuperscript{229} \textit{Id} at 265. "[T]he juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's 'parens patriae' interest in preserving and promoting the welfare of the child." \textit{Id} (quoting \textit{Santosky v. Kramer}, 444 U.S. 745, 766 (1982)).
\textsuperscript{230} 467 U.S. at 265.
those of the juvenile statute in Schall are twofold. First, the statute in Schall restricts the detention of the juvenile offender to a maximum of 17 days. Under the Bail Reform Act, the time limit may be indefinite. Secondly, most of the juveniles were detained in halfway houses, not jails. Those juveniles placed in more secure surroundings were not incarcerated with adult offenders except in extraordinary situations. In contrast, the Bail Reform Act requires that the detainees be separated from convicted prisoners only "to the extent practicable." Adult detainees have been found to be subjected to harsher conditions of detention than juveniles, including twenty-three hour cell confinements and frequent body cavity searches. The procedures used in the detention statute in Schall cannot be compared with the Act because the conditions are more restrictive and more likely to violate the detainee's liberty interest. More extensive safeguards are required so that no person will be mistakenly subject to these conditions.

The Supreme Court next stated that the restrictions were considerably more stringent than those upheld in Gerstein v. Pugh. In Gerstein, the Court held that there must be a prompt probable cause hearing for any defendant arrested without a warrant. The Court in Salerno described Gerstein as a case in which the detainee would be subject to "limited postarrest detention." The procedure in Gerstein is only adequate for a limited detention, until the first appearance of the defendant in front of the judge, when the bond is set. The Bail Reform Act does not limit the detention period in this way. Also, the Gerstein court was only addressing detention for the traditional reasons of ensuring the integrity of the judicial process because bail had not yet been set for the defendant. Until the first appearance, detention was the only method to ensure that the defendant would not disappear. Therefore, Gerstein should not have been used to support the Supreme Court's argument with regard to the constitutionality of the procedures of the Bail Reform Act.

Although the Supreme Court and the majority of the lower courts have seemingly decided the issue of the constitutionality of preventive detention in favor of its being a valid regulation, the majority of commentators disagree. In addition, the large number of strong dissents in Supreme

231. Id. at 270.
232. Id.
233. § 3142(i)(2). The Bail Reform Act, therefore, "inevitably will permit confinement of pretrial detainees with sentenced prisoners in some circumstances." United States v. Melendez-Carrion, 790 F.2d at 999 n.2.
234. Comment, Liberty in the Balance, supra note 19, at 399.
236. Id. at 126.
237. 107 S. Ct. at 2104.
238. Compare Foote, supra note 71, at 964, with Alschuler, supra note 26, at 510-11 ("Detention without bond of a person accused of a crime can be consistent with Anglo-American legal tradition, with fundamental fairness and with sound policy."). But see Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 VA. L. REV. 1223 (1969)
Court cases such as Salerno\textsuperscript{239} and lower court cases such as Edwards,\textsuperscript{240} cannot be ignored. These dissenters make it apparent that the Supreme Court's stance on the Act is not accepted by all those who are familiar with the topic.

VI. IMPACT

A. Negative Impact Of Salerno

The Supreme Court in Salerno held that the Bail Reform Act is not unconstitutional per se, but that each case must be examined on its unique set of facts. The Court, however, set no guidelines for the lower courts to

(preventive detention does not violate the eighth amendment, due process, or the rule of evidence labeled the "presumption of innocence").

Professor Tribe makes it clear that he is strongly opposed to preventive detention. Tribe, supra note 24, at 379-80. He argues that it is impermissible punishment in violation of due process to detain a person for being dangerous before he is found guilty of a crime. "To punish a man because he might choose to break society's rules is to condemn and therefore punish him for nothing more than his supposed intentions." Id. at 379-80. Tribe compares pretrial detention to statutes that have been struck down as unconstitutional because they make status a crime. See Robinson v. California, 370 U.S. 660, 668 (1962) (unconstitutional to make status of narcotics addict a crime); Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (unconstitutional to make status of gang member with prior convictions a crime). Tribe concludes that dangerous propensity is also a status. Tribe, supra note 24, at 392. Cf. United States v. Brown, 381 U.S. 437, 447 (1965) ("[T]he Framers had sought to bar: [the evil of] legislative punishment . . . of specifically designated persons or groups.").

Senator Ervin classifies preventive detention as "gestapo-like." Ervin, supra note 14, at 115. He examines the D.C. Act and argues first that it violates the eighth amendment. The article promotes a common sense interpretation of the eighth amendment. He states that an interpretation that preserves individual liberty is one which requires bail. Id. at 121 (quoting Edwards, 430 A.2d at 1338 (Mack, J., dissenting)). Ervin next argues that it also violates the fifth amendment. The article found several due process problems with the D.C. Act which it examined and which only differs from the Bail Reform Act in its rebuttable presumption and time limit provisions. The problems with which the article is concerned are:

1. It is vague because it violates the requirement of informing those who are subject to it of what conduct will subject them to penalties. See United States v. Hanks, 347 U.S. 612, 617 (1954);
2. It fails to articulate a standard by which the judicial office should determine whether the government has met the burden of proof that the accused should be detained;
3. It violates rights of confrontation and cross-examination;

239. 107 S. Ct. at 2105. See supra notes 149-60 and accompanying text.
240. 430 A.2d at 1365. In Edwards, Judge Mack takes issue with the majority's conclusions based on an historical interpretation of the eighth amendment and suggests that the majority is allowing the legislature, through enactment of a bill, to make the eighth amendment ineffective. He states that the purpose of the Bill of Rights is to guarantee liberty and that cannot be taken away by a government enactment. Id. at 1367. The dissent then argues that the accused's "classification of 'dangerousness' is arbitrary and invalid under due process . . . principles," especially when experts are uncertain as to whether there can be an ability to predict dangerousness adequately. Id. at 1369-70.
follow to make an adequate determination in the cases that they will have to decide.

1. **Time limit criteria**

   The Court acknowledged that the detention could become unconstitutional after a certain period of time. Because the detention period in *Salerno* was only three months, which in the Court's view was a permissible length, the court did not feel it necessary to establish criteria to determine at what point the period becomes unconstitutionally long.\(^{241}\) This creates a problem in that a person accused of a crime will have no indication as to whether to challenge his detention as unconstitutional.\(^2\) Furthermore, by the time the defendant challenges the length of his detention, a due process violation may have already occurred. In this case, the fact that the defendant is released on bail pending trial to rectify this situation does nothing to reverse the harm already incurred. If the Court had established some guidelines to determine when the length of detention becomes punitive, assuming that preventive detention is not unconstitutional per se, a defendant could be released before any constitutional violation occurred.

2. **Balancing of interests criteria**

   The Court did not set any criteria to use in balancing the government's interest with the individual's liberty interest or to determine situations in which this liberty interest might prevail. The Court did not address the factors that create problems for the detainee which should be taken into consideration when applying the balancing test. Some of these factors are crucial because detention creates difficulties for the defendant, in addition to interfering with his liberty interest.

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\(^{241}\) "We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress's regulatory goal." 107 S. Ct. at 2101 n.4.

\(^{2}\) "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection." New York v. Belton, 453 U.S. 454, 458-60 (1981) (no general rule as to proper scope of a search of the inside of automobile "incident to lawful arrest of its occupants."). In a comment concerning preventive detention and criticizing Judge Feinberg's dissent in United States v. Salerno, 794 F.2d 64 (2d Cir. 1986), the author stated:

Judge Feinberg would not order release when lengthy detention seemed likely at the outset. Instead, he would wait until this detention became "punitive" before declaring it unconstitutional. For this reason, the effective representation of a detained defendant apparently would require his lawyer to appear before a judge at periodic interval to ask, "Now?" After an unspecified number of months during which the judge would reply, "not yet" he would answer, "yes, now." Judge Feinberg suggested that the moment of magic metamorphosis would vary from one case to the next. Just when the preventive tadpole would become a punitive bullfrog seems to be anyone's guess. Alschuler, *supra* note 26, at 516-17 n.29.
First, because the detainee is not allowed bail, he and his attorney must prepare his defense in jail. This creates a situation in which there is less access to witnesses, evidence, and other components which are needed to prepare an effective defense to a criminal charge.\textsuperscript{243} In contrast, a defendant who is released on bail prior to trial is unobstructed in the opportunity to prepare his defense, and therefore, derives a benefit from this situation.\textsuperscript{244}

Second, the Act only requires that the detainee be given a reasonable opportunity to consult with counsel.\textsuperscript{245} This obviously impairs the defense of one who is a detainee when more than a reasonable opportunity to consult may be necessary to prepare an adequate defense. Furthermore, there is no standard as to what opportunity is reasonable and who is to determine this standard.

Third, the detainee is adversely affected by the Speedy Trial Act's allowance of continuances where the "interests of justice" would be served. The results of this provision are sometimes the opposite of those which it seeks to accomplish. In order to achieve justice, the judge will grant a continuance for the detainee to prepare his case. The threat of longer detention may discourage the detainee from making motions to continue because he will simply not want to prolong his pretrial imprisonment. This is especially true if the detainee is confident that he will be found innocent. However, because the detainee has rushed his defense, he may not be adequately prepared and this may result in his conviction. In sum, the better prepared the detainee strives to be, the longer he is detained and the more likely that he will be subjected to the other negative effects of detention.

The Court's balancing of the individual's liberty interest fails to take into consideration any of these negative effects on the detainee. In addition, because the Supreme Court's approach to a case may result in a period of unconstitutional detention before it is challenged, these negative factors have more of an opportunity to take effect.\textsuperscript{246} At the very least, the Court needs to set some guidelines to ensure that the period of detention is not indefinite, so that these negative effects are reduced to their lowest possible level.

\textbf{B. Additional Problems With Preventive Detention}

Now that the United States Supreme Court has put its imprimatur on the Bail Reform Act it will be used with less apprehension and perhaps more


\textsuperscript{244} Stack, 342 U.S. at 4.

\textsuperscript{245} 1984 S. Rep., supra note 23, at 25. However, the Senate Report does not furnish a definition of the reasonable opportunity standard.

\textsuperscript{246} "The only general standard that can be stated safely is that the longer a person is held without bail, the more likely it is that he has not received due process of law." United States v. LoFranco, 620 F. Supp. 1324, 1325 (N.D.N.Y. 1983).
frequently. This will occur because those responsible for invoking the Act will no longer feel threatened that it may be struck down as unconstitutional. More frequent use of the Act will have a negative impact on the defendant tcause preventive detention itself, apart from the inherent problems in the Salerno Court’s decision, creates additional prejudices toward the detainee.

First, a longer period of detention has been linked to an increased likelihood of conviction and longer length of imprisonment. This effect occurs for several reasons: (1) the detainee’s appearance at trial in prison clothes; (2) a state of mind during trial in which the detainee may actually think he is already convicted; and, (3) and inadequate preparation of the defense. The detainee may also be compelled to plead guilty or attempt to plea bargain to simply end the uncertain period of detention. The rationale behind this is that the incarcerated defendant does not want to prolong the detention. At least the defendant can see an end to detention when he is sentenced for a crime.

Second, prolonged detention can create problems in addition to interference with the detainee’s liberty and the impact on the presentation of the defense. The detention may cause the suspect to lose his job which will interrupt his source of income. It may also threaten his family relationships.

Finally, the threat of preventive detention may provide a hardened criminal with less incentive to reform. The risk of these prejudices taking effect increases proportionately with the length of detention. The Speedy Trial Act may cause the period to become almost indefinite. This factor combined with the fact that the Act may be used more often now that the Supreme Court in Salerno has approved

247. See Edwards, 430 A.2d at 1355 (Ferren, J., dissenting). "[T]he defendant at liberty pending trial stands a better chance of not being convicted or, if convicted, of not receiving a prison sentence." Id. (quoting Ares, Rankin & Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N.Y.U. L. Rev. 67, 86 (1963)). See also Alschuler, supra note 26, at 517 ("[S]tudies strongly suggest that pretrial incarceration makes both conviction and severe sentence more likely"); Natalini, supra note 33, at 245 ("High positive correlation between pretrial detention and the severity of any subsequent sentence"); Comment, Preventive Detention: An Empirical Analysis, 6 HARV. C.R.-C.L. L. Rev. 289, 347 (1971) ("[D]efendants incarcerated before trial are more likely to be found guilty and committed to prison than those released").

248. Edwards, 430 A.2d at 1355 (Ferren, J., dissenting).

249. Id.

250. 18 U.S.C. § 3585(b) (Supp. III 1985). The provision reads: "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." Id.

251. Barker, 407 U.S. at 532. See also Alschuler, supra note 26, at 517 ("The jobs of detained defendants frequently disappear and friendships and family relationships disrupted.").

252. Schemes of preventive detention that lack a predicate in past conduct deny people the chance to turn around the opportunity to choose. From the beginning, our history has treated this opportunity as an essential attribute of human dignity and as more than an interest to be weighed on a utilitarian scale.

Alschuler, supra note 26, at 557.
of it, will undoubtedly have a negative effect on any defendant subject to the Bail Reform Act in the future.

VII. Conclusion

The Supreme Court in *United States v. Salerno* apparently resolved the lower courts' controversy over the Bail Reform Act. The Court held that preventive detention based on a fear of the defendant's danger towards the community was constitutional. This Note has suggested several flaws in the Court's reasoning and analysis. A proper analysis would actually result in the opposite conclusion. Furthermore, the Court failed to articulate any guidelines for the lower courts to follow when examining the due process implications of the specific period of time of detention in each individual case. Overall, the Court reached an unsatisfactory result, one which leaves many questions unanswered. The Court should address this issue again and, consistent with the analysis of this Note, find the Bail Reform Act unconstitutional per se. At the very minimum, the Court should set up standards for the lower courts to follow. This will assist in the resolution of the question that is still present: whether the specific time period of detention violates the detainee's due process rights.

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