出國報告（出國類別：進修）

美國檢察官執行智慧財產權犯罪之沒收實務

服務機關 ：臺灣臺南地方法院檢察署
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壹、前言

美國司法部在 1997 年擬定了一部「追訴智慧財產權犯罪」手冊，供全國檢察官在執行追訴智慧財產權犯罪時參考。此本手冊將美國的智慧財產權相關法令加以整理歸納，從著作權法、商標法、營業秘密法到專利法，配合實務運作之說明，並且分析各法令之間關於罰則、回復原狀、沒收、量刑標準之相互關係。該手冊嗣於 2001 年曾修訂過一次。至 2006 年 9 月，因智慧財產權法律迭有變動，美國司法部復動員其電腦犯罪與智慧財產權小組重新編寫該手冊，並有專章介紹、討論千禧年數位著作權法（the Digital Millennium Copyright Act），對其國內檢察官在執行追訴智慧財產權犯罪時，提供相當實際且有效的幫助。

落實犯罪所得之扣押與沒收為法務部近年來大力推動的政策，有效的扣押與沒收智慧財產權犯罪所得，不但因此使得主張權利的民眾獲得保障，更能積極的遏阻與打擊不法集團侵犯智慧財產權的行為。美國司法部於 1997 年即已編寫上開手冊，復於 2001 年、2006 年加以修訂，其頁數多達 343 頁（不含附件），兼具廣度、深度與實用性。因為該手冊頗值我國檢察官於實際執行追訴智慧財產權犯罪時參考，故本報告即以該手冊中第八章關於沒收（forfeiture） 的部分加以介紹及論述。

貳、美國司法部追訴智慧財產權之人力配置

美國司法部從三個方位來達成有效追訴智慧財產權犯罪的目的：

一、刑事犯罪司下設「電腦犯罪與智慧財產權小組」（CCIPS），主要辦公室在華盛頓特區，提供一群具有智慧財產專門知識的檢察官做為核心小組，來調查、追訴及統合國內與跨國的智慧財產權犯罪案件。這群專家負責開發及執行司法部所有的智慧財產權強制策略，同時也對全國的助理檢察官（Assistant U.S. Attorneys）提供訓練和全天候的支援。

二、因為追訴聯邦犯罪的責任，尤其是智慧財產權犯罪，都落在 94 個分設

全美各地及其領土的檢察官辦公室，因此司法部都會指定至少一位「非法侵害電腦及智慧財產權」（CHIP）的協調者，駐在每一個美國檢察官辦公室。這些協調者通常都是經過電腦及智慧財產權犯罪特別訓練的助理檢察官，擔任各地區檢察官辦公室的主要業務負責人。目前全美共約有 230 名 CHIP 檢察官。

三、CHIP 單位擴大延伸它所屬 CHIP 檢察官的網絡。每一個 CHIP 單位是由特定的一群受過訓練的助理檢察官組成。CHIP 單位策略性的將其轄區設在智慧財產權及電腦犯罪較為嚴重的地方，或是侵害所造成的經濟性影響較大的地方。這個特別的組織著力於追訴像商標、著作權侵害及竊取營業秘密的犯罪。此外，他們也追訴高科技犯罪，如電腦病毒、網路詐欺及其他攻擊網路系統的犯罪。CHIP 單位的成員們也負責訓練地區檢察官、聯邦探員，他們也會密切地與智慧財產權被害人聯絡，並致力於犯罪的預防。目前全美共設有 25 個 CHIP 單位，除了散布在其他地區和刑事犯罪司中約 150 名的 CHIP 檢察官外，該 25 個 CHIP 單位約有 80 名助理檢察官的人力。

參、智慧財產權犯罪之沒收程序與注意事項

一般而言，民事賠償雖然可以給智慧財產權利人獲得經濟上的滿足，但刑事制裁才能確實有效的遏止有組織、大規模的集團犯罪。惟上開二者並非互斥，必須視個別案件實際之需求而靈活運用。

就智慧財產權犯罪之沒收而言，為使其標準化與法制化，美國國會於 2006 年 3 月 16 日制定「終止商品仿冒法」（Stop Counterfeiting in Manufactured Goods）,藉以擴大可供沒收財產之範圍，並且建立一套沒收之一般標準程序。但不同種類的沒收規定，仍散見於著作權法、商標法、營業秘密法及專利法中。以下分別就行政沒收、刑事與民事沒收之實務上應注意事項分別加以介紹說明：

一、行政沒收程序

行政沒收通常限於海關方面所需。例如，移民局及海關依照 17 U.S.C.509(b)、603(C)之規定，得扣押、沒收及銷燬自國外進口之侵權物品。但不動產及各人財

產價值超過 50 萬美金者（錢幣除外），則不能僅以行政程序沒收。

二、民事及刑事沒收程序

民事及刑事沒收之最大不同點在於，刑事程序是對人(in personam action)，僅屬於被告之財產得以沒收； 而民事程度則是對物（in rem action），亦即不論是否屬於被告所有之財產，只要檢察官可以證明欲聲請扣押之財產係源自犯罪或用來犯罪，均可成為沒收之標的。

肆、如何選定沒收程序

儘管檢察官得任意選擇民事程序或刑事程序或雙軌併進，但仍有若干因素可供做為選定沒收程序之參考：

一、 財物之可替代性：在刑事程序中，如財物已滅失，法院可以裁定被告繳納與該財物相當價額之金錢。

二、 舉證責任：在民事程序中，檢察官只需釋明有犯罪發生（preponderance of the evidence），而系爭財物係源自該犯罪或被使用來犯罪。但在刑事程序中，則需嚴格之證明被告本身犯罪。

三、 以是否有犯罪行為存在為前提：民事程序只需要有不法行為存在即可進行沒收程序，例如對於通緝中及死亡之被告的財產之沒收。

四、 財物所有權之歸屬：刑事程序中僅能沒收被告之財產。惟若檢察官考慮沒收非被告之財產，則以選定民事程序進行沒收為佳。

五、 證據揭示義務：美國傳統的民事程序中有證據開示制度，可能有提早洩露偵查程序中之事證。

六、 律師費：檢察官如提起民事訴訟程序，如敗訴時政府將須負擔被告的律師費用。

七、 效率：在有行政沒收措施可運用的狀況下，當然以行政程序進行較為迅速有效，因為它不須經過繁複的司法程序。

我國的法制固與美國不同，惟前述擇定訴訟程序所應考量之標準仍有互通之處。

伍 、心得與建議

我國對於智慧財產權保護的法律規範已經日趨與國際同步，但對於如何能夠積極有效的查扣犯罪所得，尚有加強的空間。例如，在將來修訂相關法律時，可參酌美國法律上開規定，在一定之金額內，授權行政機關如海關、移民署得以行政扣押、沒收侵害智慧財產權之物品，以竟追訴智慧財產犯罪之成效。

再者，如前述擇定訴訟程序第三點中所示，在美國法制下，檢察官得透過民事訴訟程序，針對通緝中的被告向法院聲請沒收其犯罪所得，不用苦苦等待緝獲被告，再藉由刑事確定判決宣告沒收，此一設計對智慧財產權之保護自有時效上之利益。我國最近在修訂刑法時，亦有增訂就通緝超過 6 個月以上之被告，得由檢察官得單獨向法院聲請裁定沒收犯罪所得之議，雖然此一立法方式不若美國透過民事訴程序為之可以在證據的認定上有較彈性寬鬆的標準，但在刑法中建立此一法制後，將來各別之智慧財產權法律條文將可仿傚該立法精神，運用制定類似之規定以更完整的保護受侵害之智慧財產權。

附錄一

美國聯邦最高法院對於重罪羈押的見解

一、　前言

美國國會在 1984 年間通過了「保釋金改革法案」(即所謂的「1984 年保釋金改革法案」- the Bail Reform Act of 1984)，其主要的操作規定即聯邦刑事訴訟法第 3142 條。該條准許法官在審理程序開始前，基於（重罪等）法定理由裁定羈押被告，檢察官亦得據以向法院提出羈押之聲請。其法定理由如下：(一）暴力犯罪；(二）最重刑度為死刑或無期徒刑的犯罪；(三）最重刑度為 10 年以上有期徒刑的毒品犯罪；(四)所犯為重罪(felony)，且為上述三款型態犯罪的累犯；（四）被告有嚴重的逃亡、妨害司法程序進行、威脅、傷害、恐嚇證人或陪審員之虞。

然而，由於有論者以為該法案違反美國憲法第五增修條款所保障的實質正當程序權利，質疑該法案關於審前羈押規定的有效性，因此實務對於能否依該法案條文在審前裁定羈押被告，見解分歧不一。直到 1987 年，最高法院透過 United States v. Salerno 一案表示該法案並未違憲，法院得依該法案規定於審理程序開始前，在符合若干法

定條件下裁定羈押被告。至此，司法實務上關於審前（重罪）羈押的法律爭議，才算告一段落。

二、 案例事實

被告 Anthony Salerno 和 Vincent Caforo 二人被控 29 項罪名，包括詐欺、組織犯罪、預謀殺人及勒贖等犯罪事實。1986 年 3 月 21 日，檢察官在起訴被告二人後隨即予以逮捕，同時依聯邦刑事訴訟法第 3142 條第(e)項，向地方法院聲請羈押被告二人獲准，被告等向聯邦第二巡迴上訴法院提出上訴，理由為上開法案關於審前羈押的規定違憲。聯邦第二巡迴上訴法院認為上開法案違反憲法第五增修條款關於實質的正當程序保障原則，因此撤銷了原法院的羈押裁定，檢察官因此再上訴聯邦最高法院。

聯邦最高法院於 1987 年 9 月 23 日做成決定，認為上述聯邦保釋金改革法案關於審前羈押的規定並未違憲，撤銷並發回上訴法院的判決。上訴法院依據最高法院的意見重新審理該羈押裁定，被告二人在更審程序中並未提出其他新的理由辯解，因此上訴法院最後維持地方法院原來的羈押裁定。

三、 本案法律爭點

聯邦1984年保釋金改革法案是否違反憲法第五增修條款關於「正當程序」(Due Process Clause)的保障？又是否違反憲法第八增修條款關於「禁止超額保釋金」(proscription against excessive bail)的規定？審前羈押的性質，究竟是刑罰(penal)還是具有行政目的考量的規範(regulation)？

四、　聯邦最高法院的多數見解

雖然Marshall、Brennan、Stevens三位大法官持反對意見，但多數大法官則認同聯邦1984年保釋金改革法案的規範目的。細究該法案的立法背景，其立法意旨並非在於懲罰具有危險性的被告個人，而是試圖有效的解決社會問題。該法案旨在防止犯罪繼續危害社會，而且把羈押的理由謹慎的限縮在重大犯罪等範圍之內，加上被告並非與一般受刑人一起監禁，而是必須分別隔離，因此聯邦最高法院認為該法案關於審前羈押的規定，屬於合法的行政規範性質，並未違反人身自由及實質正當程序等憲法上權利的保障。

聯邦最高法院雖然一再強調個人的人身自由權利不容輕易剝奪，但同時也認為此一權利在國家為維護公共秩序等重大社會法益的情況下必須讓步。依據聯邦保釋金改革法案即聯邦刑事訴訟法第3142條第(e)項，檢方在羈押庭的程序中，首先必須呈現相當的理由

（probable cause）說明被告犯了本罪；此外，檢方還必須提出明確且具有說服力的證據（clear and convincing evidence），說服法官除了羈押被告以外，已無其他方法可以確保社會或任何個人的安全性。設下如此重重嚴密的要件，不僅社會安全獲致最大的保障，對於個人的人身自由亦無侵犯之虞。

至於被告主張聯邦保釋金法案違反憲法第八增修條款的問題，上訴法院並未表示意見(因為上訴法院認為該法案違法第五增修條款即足以宣告無效)，聯邦最高法院則認為該法案亦未違反憲法第八增修條款。大法官們認為憲法第八增修條款並未賦予被告絕對享有具保的權利，亦即在解釋上，上述法案並未要求法院在任何情況下都必須裁定相當的保證金釋放被告。

五、結語

國內人權意識不斷高漲，尤其在人權律師的倡導下，凡事以美國為標竿，推動刑事訴訟程序持續的修正翻新，這毋寧是可喜的現象。然而，美國聯邦最高法院對於法益權衡的觀點亦非死守的被告基本權利而已，隨著時代社會的變遷，美國的大法官們漸有朝向以社會成本為考量重心的趨勢。在 2006 年 Hudson v. Michigan（容日後另撰文介紹）一案中，大法官 Scalia 甚至質疑證據排除法則存在的必

要性即為一例，他認為讓被告逍遙法外的社會成本已經遠遠大於證據法則帶來的利益。筆者引述上開美國聯邦最高法院最新見解或有以偏蓋全之嫌，但回到本文介紹的 United States .v Salerno 一案再為思考，更可印證法益權衡的標準是與時俱進而非一成不變。期本文對於國內近日爭議不斷的重罪羈押的必要性，能夠提供一個不同的思考角度，或有助於實務在處理重罪被告的羈押決定過程中的參考依據。

Appendix

1. 聯邦刑事訴訟法：18 USC 3142

Release or detention of a defendant pending trial

(a) In general. Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be--

(1) Released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) Release on personal recognizance or unsecured appearance bond. The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on conditions.

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample

is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which

shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [18 USCS ?1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), (2), (3), 2252A(a)(1), (2), (3), (4), 2260, 2421, 2422, 2423, or 2425], or a failure to register offense under section 2250 of this title [18 USCS ?2250], any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion. If the judicial officer determines that--

(1) such person--

(A) is, and was at the time the offense was committed, on--

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and

Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.

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

(2) 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--

(A) 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;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) 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 subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed--

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS ?70501 et seq.];

(B) an offense under section 924(c), 956(a), or 2332b of this title [18 USCS ?924(c), 956(a), or 2332b];

(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code [18 USCS ?2332b(g)(5)(B)], for which a maximum term of imprisonment of 10 years or more is prescribed;

(D) an offense under chapter 77 of this title [18 USCS 卝 1581 et seq.] for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [18 USCS ?1201, 1591, 2241, 2242, 2244, (a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425].

(f) Detention hearing. The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community--

(1) upon motion of the attorney for the Government, in a case that involves--

(A) a crime of violence, a violation of section 1591 [18 USCS ?1591], or an offense listed in section 2332b(g)(5)(B) [18 USCS ?2332b(g)(5)(B)] for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence 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 (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS 卝 70501 et seq.];

(D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921 [18 USCS ?921]), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code [18 USCS ?2250]; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--

(A) a serious risk that such person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, the person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

(g) Factors to be considered. The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591 [18 USCS ?1591], a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including--

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct,

history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of release order. In a release order issued under subsection (b) or (c) of this section, the judicial officer shall--

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of--

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title [18 USCS ?1503] (relating to intimidation of witnesses, jurors, and officers of the court), 1510 [18 USCS ?1510] (relating to obstruction of criminal investigations), 1512 [18 USCS ?1512] (tampering with a witness, victim, or an informant), and 1513 [18 USCS ?1513] (retaliating against a witness, victim, or an informant).

(i) Contents of detention order. In a detention order issued under subsection (e) of this section, the judicial officer shall--

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private

consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

2. 聯邦最高法院判決: United States v. Salerno

January 21, 1987, Argued May 26, 1987, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

DISPOSITION: reversed.

REF-LINKS: View References Turn Off Lawyers' Edition Display

DECISION:

Provisions of Bail Reform Act of 1984 (18 USCS 3141 et seq.) allowing pretrial detention without bail on ground of dangerousness held not to violate either (1) bail clause of Eighth Amendment, or (2) due process.

COUNSEL:

Solicitor General Fried argued the cause for the United States. With him on the briefs were Assistant Attorney General Weld, Deputy Solicitor General Bryson, Jeffrey P. Minear, Samuel Rosenthal, and Maury S. Epner.

Anthony M. Cardinale argued the cause for respondents. With him on the brief was Kimberly Homan. *

* Briefs of amici curiae urging affirmance were filed for the National Association of Criminal Defense Lawyers by Jon May and Mark King Leban; and for the Public Defender Service by Cheryl M. Long,

James Klein, and David A. Reiser.
Briefs of amici curiae were filed for the American Bar Association by Eugene C. Thomas, Charles G. Cole, and David A. Schlueter; for the American Civil Liberties Union et al. by William J. Genego, Dennis E. Curtis, Mark Rosenbaum, Paul Hoffman, Richard Emery, Martin Guggenheim, Alvin Bronstein, and David Goldstein; and for Howard Perry by Allen N. Brunwasser.

JUDGES:

Rehnquist, C. J., delivered the opinion of the Court, in which White, Blackmun, Powell, O'Connor, and Scalia, JJ., joined. Marshall, J.,

filed a dissenting opinion, in which Brennan, J., joined, post, p. 755. Stevens, J., filed a dissenting opinion, post, p. 767.

OPINIONBY:

REHNQUIST

OPINION:

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A] [2A] [3A]The Link Int. HN▲ Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court's words, this type of pretrial detention violates "substantive due process." We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act. n1 479 U.S. 929 Shepardize (1986). Link Quick Holding▲ We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements. We therefore reverse.

n1 Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge. United States v. Walker, 805 F.2d 1042 Shepardize (CA11 1986); United States v. Rodriguez, 803 F.2d 1102 Shepardize (CA11 1986); United States v. Simpkins, 255 U. S. App. D. C. 306 Shepardize , 801 F.2d 520 Shepardize (1986); United States v. Zannino, 798 F.2d 544 Shepardize (CA1 1986); United States v. Perry, 788 F.2d 100 Shepardize (CA3), cert. denied, 479 U.S. 864 Shepardize (1986); United

States v. Portes, 786 F.2d 758 Shepardize (CA7 1985).

I

Responding to "the alarming problem of crimes committed by persons on release," S. Rep. No. 98-225, p. 3 (1983), Congress formulated the Bail Reform Act of 1984, 18 U. S. C. § 3141 Shepardize et seq. (1982 ed., Supp. III), as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. No. 98-225, at 3.

To this end, § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. [HN1] Section 3142(e) provides that "if, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." [HN2] Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with "clear and convincing evidence," § 3142(f).

The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order

detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to § 3142(e), on the ground that no condition of release would assure the safety of the community or any person. The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese crime family of La Cosa Nostra and that Cafaro was a "captain" in the Genovese family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses. He offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterized the wiretap conversations as merely "tough talk."

[4A]The District Court granted the Government's detention motion, concluding that the Government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person:

"The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as

usual. When business as usual involves threats, beatings, and
murder, the present danger such people pose in the community is
self-evident." 631 F.Supp. 1364, 1375 Shepardize (SDNY 1986). n2
[4B]
n2 Salerno was subsequently sentenced in unrelated proceedings
before a different judge. To this date, however, Salerno has not been
confined pursuant to that sentence. The authority for Salerno's
present incarceration remains the District Court's pretrial detention
order. The case is therefore very much alive and is properly
presented for our resolution.
Respondents appealed, contending that to the extent that the Bail
Reform Act permits pretrial detention on the ground that the arrestee
is likely to commit future crimes, it is unconstitutional on its face.
Over a dissent, the United States Court of Appeals for the Second
Circuit agreed. 794 F.2d 64 Shepardize (1986). Although the court
agreed that pretrial detention could be imposed if the defendants
were likely to intimidate witnesses or otherwise jeopardize the trial
process, it found "§ 3142(e)'s authorization of pretrial detention [on
the ground of future dangerousness] repugnant to the concept of
substantive due process, which we believe prohibits the total
deprivation of liberty simply as a means of preventing future crimes."
Id., at 71-72 Shepardize . The court concluded that the Government
could not, consistent with due process, detain persons who had not
been accused of any crime merely because they were thought to
present a danger to the community. Id., at 72 Shepardize , quoting
United States v. Melendez-Carrion, 790 F.2d 984, 100-1001 Shepardize
(CA2 1986) (opinion of Newman, J.). It reasoned that our criminal
law system holds persons accountable for past actions, not
anticipated future actions. Although a court could detain an arrestee
who threatened to flee before trial, such detention would be

permissible because it would serve the basic objective of a criminal
system -- bringing the accused to trial. The court distinguished our
decision in Gerstein v. Pugh, 420 U.S. 103 Shepardize (1975), in which
we upheld police detention pursuant to arrest. The court construed
Gerstein as limiting such detention to the "'administrative steps
incident to arrest.'" 794 F.2d, at 74 Shepardize , quoting Gerstein, supra,
at 114 Shepardize . The Court of Appeals also found our decision in

Schall v. Martin, 467 U.S. 253 Shepardize (1984), upholding postarrest, pretrial detention of juveniles, inapposite because juveniles have a lesser interest in liberty than do adults. The dissenting judge concluded that on its face, the Bail Reform Act adequately balanced the Federal Government's compelling interests in public safety against the detainee's liberty interests.

II

[1B] [2B] [3B] [5][HN3] A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. Link Quick Holding▲ The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. Schall v. Martin, supra, at 269 Shepardize , n. 18. We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional. n3

n3 We intimate no view on the validity of any aspects of the Act that are not relevant to respondents' case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.

Respondents present two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness. First, they rely upon the Court of Appeals' conclusion that the Act exceeds the limitations placed upon the Federal Government by the Due Process Clause of the Fifth Amendment. Second, they contend that the Act contravenes the Eighth Amendment's proscription against excessive bail. We treat these contentions in turn.

A

[6]The Due Process Clause of the Fifth Amendment provides that [HN4] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that [HN5] the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 Shepardize (1952), or interferes

with rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325-326 Shepardize (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335 Shepardize (1976). This requirement has traditionally been referred to as "procedural" due process.

[1C] [7A] Respondents first Link P. Arg.▲ argue that the Act violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial. See Bell v. Wolfish, 441 U.S. 520, 535, and n. 16 Shepardize (1979). Link P. Arg.▲ The Government, however, has never argued that pretrial detention could be upheld if it were "punishment." The Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is.

[7B] [8]As an initial matter, the Link Int. HN▲ mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. Bell v. Wolfish, supra, at 537 Shepardize . To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Schall v. Martin, 467 U.S., at 269 Shepardize . Unless

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Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns 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].'" Ibid. Shepardize , quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 Shepardize (1963).

[7C]We conclude that Link Quick Holding▲ the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98-225, at 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. Id., at 4-7 Shepardize . There is no doubt that preventing danger to the community is a legitimate regulatory goal. Schall v. Martin, supra.

[7D]Nor are the incidents of pretrial detention excessive in relation to

the regulatory goal Congress sought to achieve. [HN6] The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See 18 U. S. C. § 3142 Shepardize (f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). [HN7] The arrestee is entitled to a prompt detention hearing, ibid., and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act. n4 See 18 U. S. C. § 3161 Shepardize et seq. (1982 ed. and Supp. III). Moreover, as in Schall v. Martin, the conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" Government. 467 U.S., at 270 Shepardize . As in Schall, the statute at issue here Link Int. HN▲ requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U. S. C. § 3142 Shepardize (i)(2). Link P. Arg.▲ We conclude, therefore, that Link Quick Holding▲ the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

n4 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' regulatory goal.

The Court of Appeals nevertheless concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." 794 F.2d, at 71 Shepardize . Link P. Arg.▲ Respondents characterize the Due Process Clause as erecting an impenetrable "wall" in this area that "no governmental interest -- rational, important, compelling or otherwise -- may surmount." Brief for Respondents 16.

[9A]We do Link P. Arg.▲ not think the Clause lays down any such categorical imperative. We have repeatedly held that the Link Int. HN▲ Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. See Ludecke v. Watkins, 335

U.S. 160 Shepardize (1948) (approving unreviewable executive power to detain enemy aliens in time of war); Moyer v. Peabody, 212 U.S. 78, 84-85 Shepardize (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. Carlson v. Landon, 342 U.S. 524, 537-542 Shepardize (1952); Wong Wing v. United States, 163 U.S. 228 Shepardize (1896). We have also held that the government may detain mentally unstable individuals who present a danger to the public, Addington v. Texas, 441 U.S. 418 Shepardize (1979), and dangerous defendants who become incompetent to stand trial, Jackson v. Indiana, 406 U.S. 715, 731-739 Shepardize (1972); Greenwood v. United States, 350 U.S. 366

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Shepardize (1956). We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community. Schall v. Martin, supra Shepardize . Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. Gerstein v. Pugh, 420 U.S. 103 Shepardize (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see Bell v. Wolfish, 441 U.S., at 534 Shepardize , or a danger to witnesses.

[9B]Respondents characterize all of Link P. Arg.▲ these cases as exceptions to the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Link P. Arg.▲ 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. Given the wellestablished authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in

precisely the same manner that we evaluated the laws in the cases discussed above.

[1D] [3C] [10A][HN8] The government's interest in preventing crime by arrestees is both legitimate and compelling. De Veau v. Braisted, 363 U.S. 144, 155 Shepardize (1960). In Schall, supra Shepardize , we recognized the strength of the State's interest in preventing juvenile crime. This general concern with crime prevention is no less compelling when the suspects are adults. Indeed, "the harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." Schall v. Martin, supra, at 264-265 Shepardize . The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in Schall. The statute we upheld in Schall permitted pretrial detention of any juvenile arrested on any charge after a showing that the individual might commit some undefined further crimes. Link Int. HN▲ The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U. S. C. § 3142 Shepardize (f). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. See S. Rep. No. 98-225, at 6-7. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a fullblown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U. S. C. § 3142 Shepardize (f). While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

[1E] [10B]On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and

fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. Link Quick Holding▲ When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97,

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105 Shepardize (1934).

[2C]Finally, we may dispose briefly of Link P. Arg.▲ respondents' facial challenge to the procedures of the Bail Reform Act. Link P. Arg.▲ To sustain them against such a challenge, we need only find them "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," Schall, supra, at 264 Shepardize , whether or not they might be insufficient in some particular circumstances. We think they pass that test. As we stated in Schall, "there is nothing inherently unattainable about a prediction of future criminal conduct." 467 U.S., at 278 Shepardize ; see Jurek v. Texas, 428 U.S. 262, 274 Shepardize (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); id., at 279 (WHITE, J., concurring in judgment).

[2D][HN9] Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U. S. C. § 3142 Shepardize (f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. Ibid. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. § 3142(g). The Government must prove its

case by clear and convincing evidence. § 3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. § 3142(i). The Act's review provisions, § 3145(c), provide for immediate appellate review of the detention decision.

[1F] [2E]We think Link Quick Holding▲ these extensive safeguards suffice to repel a facial challenge. The protections are more exacting than those we found sufficient in the juvenile context, see Schall, supra, at 275-281 Shepardize , and they far exceed what we found necessary to effect limited postarrest detention in Gerstein v. Pugh, 420 U.S. 103 Shepardize (1975). Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.

B

[3D]Respondents also Link P. Arg.▲ contend that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment. The Court of Appeals did not address this issue because it found that the Act violates the Due Process Clause. Link P. Arg.▲ We think that Link Quick Holding▲ the Act survives a challenge founded upon the Eighth Amendment.

[11]The Eighth Amendment addresses pretrial release by providing merely that "excessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on Stack v. Boyle, 342 U.S. 1, 5 Shepardize (1951), in which the Court stated that "bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21-22. Respondents characterize

these exceptions as consistent with what they claim to be the sole purpose of bail -- to ensure the integrity of the judicial process.
[3E] [12]While Link Quick Holding▲ we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial
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release. The above-quoted dictum in Stack v. Boyle is far too slender a reed on which to rest this argument. The Court in Stack had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial.
The holding of Stack is illuminated by the Court's holding just four months later in Carlson v. Landon, 342 U.S. 524 Shepardize (1952). In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release would be prejudicial to the public interest and would endanger the welfare and safety of the United States." Id., at 529 (emphasis added) Shepardize . The detainees brought the same challenge that respondents bring to us today: the Eighth Amendment required them to be admitted to bail. The Court squarely rejected this proposition:
Link Int. HN▲ "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all

arrests must be bailable." Id., at 545-546 (footnotes omitted) Shepardize

.

[3F] [13] Carlson v. Landon was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. Stack v. Boyle, supra Shepardize . We believe that Link Quick Holding▲ when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

III

[1G] [2F] [3G] [14]In Link Quick Holding▲ our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government -- a concern for the safety and indeed the lives of its citizens -- on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

The judgment of the Court of Appeals is therefore

Reversed .

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DISSENT BY:

MARSHALL; STEVENS

DISSENT:

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,
dissenting.

Link Concur/Dissent▲ This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

I

A few preliminary words are necessary with respect to the majority's treatment of the facts in this case. The two paragraphs which the majority devotes to the procedural posture are essentially correct, but they omit certain matters which are of substantial legal relevance.

The Solicitor General's petition for certiorari was filed on July 21, 1986. On October 9, 1986, respondent Salerno filed a response to the petition. No response or appearance of counsel was filed on behalf of respondent Cafaro. The petition for certiorari was granted on November 3, 1986.

On November 19, 1986, respondent Salerno was convicted after a jury trial on charges unrelated to those alleged in the indictment in this case. On January 13, 1987, Salerno was sentenced on those charges to 100 years' imprisonment. As of that date, the Government no longer required a pretrial detention order for the purpose of keeping Salerno incarcerated; it could simply take him into custody on the judgment and commitment order. The present case thus

became moot as to respondent Salerno. n1

n1 Had this judgment and commitment order been executed immediately, as is the ordinary course, the present case would certainly have been moot with respect to Salerno. On January 16, 1987, however, the District Judge who had sentenced Salerno in the unrelated proceedings issued the following order, apparently with the Government's consent:

"Inasmuch as defendant Anthony Salerno was not ordered detained in this case, but is presently being detained pretrial in the case of United States v. Anthony Salerno et al., SS 86 Cr. 245 (MJL),

"IT IS HEREBY ORDERED that the bail status of defendant Anthony Salerno in the above-captioned case shall remain the same as it was prior to the January 13, 1987 sentencing, pending further order of the Court." Order in SS 85 Cr. 139 (RO) (SDNY) (Owen, J.).

This order is curious. To release on bail pending appeal "a person who has been found guilty of an offense and sentenced to a term of imprisonment," the District Judge was required to find "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ." 18 U. S. C. § 3143 Shepardize (b)(1) (1982 ed., Supp. III). In short, the District Court which had sentenced Salerno to 100 years' imprisonment then found, with the Government's consent, that he was not dangerous, in a vain attempt to keep alive the controversy as to Salerno's dangerousness before this Court.

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The situation with respect to respondent Cafaro is still more disturbing. In early October 1986, before the Solicitor General's petition for certiorari was granted, respondent Cafaro became a cooperating witness, assisting the Government's investigation "by working in a covert capacity." n2 The information that Cafaro was cooperating with the Government was not revealed to his codefendants, including respondent Salerno. On October 9, 1986, respondent Cafaro was released, ostensibly "temporarily for medical care and treatment," with the Government's consent. Docket, SS 86 Cr. 245-2, p. 6 (MJL) (SDNY) (Lowe, J.). n3 This release was conditioned upon execution of a personal recognizance bond in the sum of $ 1 million, under the general pretrial release provisions of 18 U. S. C. § 3141 Shepardize (1982 ed., Supp. III). In short, respondent

Cafaro became an informant and the Government agreed to his
release on bail in order that he might better serve the Government's
purposes. As to Cafaro, this case was no longer justiciable even
before certiorari was granted, but the information bearing upon the
essential issue of the Court's jurisdiction was not made available to
us.
n2 This characterization of Cafaro's activities, along with an account
of the process by which Cafaro became a Government agent,
appears in an affidavit executed by a former Assistant United States
Attorney and filed in the District Court during proceedings in the
instant case which occurred after the case was submitted to this
Court. Affidavit of Warren Neil Eggleston, dated March 18, 1987, SS
86 Cr. 245, p. 4 (MJL) (SDNY).
n3 Further particulars of the Government's agreement with Cafaro,
including the precise terms of the agreement to release him on bail,
are not included in the record, and the Court has declined to order
that the relevant documents be placed before us.
In his reply brief in this Court, the Solicitor General stated: "On
October 8, 1986, Cafaro was temporarily released for medical
treatment. Because he is still subject to the pretrial detention order,
Cafaro's case also continues to present a live controversy." Reply
Brief for United States 1-2, n. 1. The Solicitor General did not inform
the Court that this release involved the execution of a personal
recognizance bond, nor did he reveal that Cafaro had become a
cooperating witness. I do not understand how the Solicitor General's
representation that Cafaro was "still subject to the pretrial detention
order" can be reconciled with the fact of his release on a $ 1 million
personal recognizance bond.
The Government thus invites the Court to address the facial
constitutionality of the pretrial detention statute in a case involving
two respondents, one of whom has been sentenced to a century of
jail time in another case and released pending appeal with the
Government's consent, while the other was released on bail in this
case, with the Government's consent, because he had become an
informant. These facts raise, at the very least, a substantial question
as to the Court's jurisdiction, for it is far from clear that there is now
an actual controversy between these parties. As we have recently
said, "Article III of the Constitution requires that there be a live case

or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." Burke v. Barnes, 479 U.S. 361, 363 Shepardize (1987); see Sosna v. Iowa, 419 U.S. 393, 402 Shepardize (1975); Golden v. Zwickler, 394 U.S. 103, 108 Shepardize (1969). Only by flatly ignoring these matters is the majority able to maintain the pretense that it has jurisdiction to decide the question which it is in such a hurry to reach.

II

The majority approaches respondents' challenge to the Act by dividing the discussion into two sections, one concerned with the substantive guarantees implicit in the Due Process Clause, and the other concerned with the protection afforded by the Excessive Bail Clause of the Eighth Amendment. This is a sterile formalism, which divides a unitary argument into two independent parts and then

professes to demonstrate that the parts are individually inadequate. On the due process side of this false dichotomy appears an argument concerning the distinction between regulatory and punitive legislation. The majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement. The major premise is that "unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns 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]."'" Ante, at 747 (citations omitted). The majority finds that "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals," but instead was pursuing the "legitimate regulatory goal" of "preventing danger to the community." Ibid. n4 Shepardize Concluding that pretrial detention is not an excessive solution to the problem of preventing danger to the community, the majority thus finds that no substantive element of the guarantee of due process invalidates the statute.

n4 Preventing danger to the community through the enactment and enforcement of criminal laws is indeed a legitimate goal, but in our system the achievement of that goal is left primarily to the States.

The Constitution does not contain an explicit delegation to the
Federal Government of the power to define and administer the
general criminal law. The Bail Reform Act does not limit its definition
of dangerousness to the likelihood that the defendant poses a
danger to others through the commission of federal crimes. Federal
preventive detention may thus be ordered under the Act when the
danger asserted by the Government is the danger that the defendant
will violate state law. The majority nowhere identifies the
constitutional source of congressional power to authorize the federal
detention of persons whose predicted future conduct would not
violate any federal statute and could not be punished by a federal
court. I can only conclude that the Court's frequently expressed
concern with the principles of federalism vanishes when it threatens
to interfere with the Court's attainment of the desired result.
This argument does not demonstrate the conclusion it purports to
justify. Let us apply the majority's reasoning to a similar, hypothetical
case. After investigation, Congress determines (not unrealistically)
that a large proportion of violent crime is perpetrated by persons who
are unemployed. It also determines, equally reasonably, that much
violent crime is committed at night. From amongst the panoply of
"potential solutions," Congress chooses a statute which permits,
after judicial proceedings, the imposition of a dusk-to-dawn curfew
on anyone who is unemployed. Since this is not a measure enacted
for the purpose of punishing the unemployed, and since the majority
finds that preventing danger to the community is a legitimate
regulatory goal, the curfew statute would, according to the majority's
analysis, be a mere "regulatory" detention statute, entirely
compatible with the substantive components of the Due Process
Clause.
The absurdity of this conclusion arises, of course, from the majority's
cramped concept of substantive due process. The majority proceeds
as though the only substantive right protected by the Due Process
Clause is a right to be free from punishment before conviction. The
majority's technique for infringing this right is simple: merely redefine
any measure which is claimed to be punishment as "regulation," and,
magically, the Constitution no longer prohibits its imposition.
Because, as I discuss in Part III, infra, the Due Process Clause
protects other substantive rights which are infringed by this

legislation, the majority's argument is merely an exercise in obfuscation.
The logic of the majority's Eighth Amendment analysis is equally unsatisfactory. The Eighth Amendment, as the majority notes, states that "excessive bail shall not be required." The majority then declares, as if it were undeniable, that: "this Clause, of course, says nothing about whether bail shall be available at all." Ante, at 752. If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the magistrate sets

bail at $ 1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter. Indeed, such a result would lead to the conclusion that there was no need for Congress to pass a preventive detention measure of any kind; every federal magistrate and district judge could simply refuse, despite the absence of any evidence of risk of flight or danger to the community, to set bail. This would be entirely constitutional, since, according to the majority, the Eighth Amendment "says nothing about whether bail shall be available at all."
But perhaps, the majority says, this manifest absurdity can be avoided. Perhaps the Bail Clause is addressed only to the Judiciary. "We need not decide today," the majority says, "whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." Ante, at 754. The majority is correct that this question need not be decided today; it was decided long ago. Federal and state statutes which purport to accomplish what the Eighth Amendment forbids, such as imposing cruel and unusual punishments, may not stand. See, e. g., Trop v. Dulles, 356 U.S. 86 Shepardize (1958); Furman v. Georgia, 408 U.S. 238 Shepardize (1972). The text of the Amendment, which provides simply that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," provides absolutely no support for the majority's speculation that both courts and Congress are forbidden to inflict cruel and unusual punishments, while only the courts are forbidden to require excessive bail. n5
n5 The majority refers to the statement in Carlson v. Landon, 342 U.S. 524, 545 Shepardize (1952), that the Bail Clause was adopted by

Congress from the English Bill of Rights Act of 1689, 1 Wm. & Mary, Sess. 2, ch. II, § I(10), and that "in England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." A sufficient answer to this meager argument was made at the time by Justice Black: "The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689." Carlson v. Landon, supra, at 557 (dissenting opinion) Shepardize . Our Bill of Rights is contained in a written Constitution, one of whose purposes is to protect the rights of the people against infringement by the Legislature, and its provisions, whatever their origins, are interpreted in relation to those purposes.

The majority's attempts to deny the relevance of the Bail Clause to this case are unavailing, but the majority is nonetheless correct that the prohibition of excessive bail means that in order "to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response." Ante, at 754. The majority concedes, as it must, that "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." Ibid. But, the majority says, "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail." Ante, at 754-755. This conclusion follows only if the "compelling" interest upon which Congress acted is an interest which the Constitution permits Congress to further through the denial of bail. The majority does not ask, as a result of its disingenuous division of the analysis, if there are any substantive limits contained in both the Eighth Amendment and the Due Process Clause which render this system of preventive detention unconstitutional. The majority does not ask because the answer is apparent and, to the majority, inconvenient.

III

The essence of this case may be found, ironically enough, in a provision of the Act to which the majority does not refer. Title 18 U. S. C. § 3142 Shepardize (j) (1982 ed., Supp. III) provides that "nothing in this section shall be construed as modifying or limiting the presumption of innocence." But the very pith and purpose of this

statute is an abhorrent limitation of the presumption of innocence. The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the role of the Bail

Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 Shepardize (1895). Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 Shepardize (1937), and is established beyond legislative contravention in the Due Process Clause. See Estelle v. Williams, 425 U.S. 501, 503 Shepardize (1976); In re Winship, 397 U.S. 358, 364 Shepardize (1970). See also Taylor v. Kentucky, 436 U.S. 478, 483 Shepardize (1978); Kentucky v. Whorton, 441 U.S. 786, 790 Shepardize (1979) (Stewart, J., dissenting).

The statute now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the Government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for that would allow the Government to imprison someone for uncommitted crimes based upon "proof" not beyond a reasonable doubt. The result must therefore be that once the indictment has failed, detention cannot continue. But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal

would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. "'If it suffices to accuse, what will become of the innocent?'" Coffin v. United States, supra, at Shepardize 455 (quoting Ammianus Marcellinus, Rerum Gestarum Libri Qui Supersunt, L. XVIII, c. 1, A. D. 359).

To be sure, an indictment is not without legal consequences. It establishes that there is probable cause to believe that an offense was committed, and that the defendant committed it. Upon probable cause a warrant for the defendant's arrest may issue; a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate. See Gerstein v. Pugh, 420 U.S. 103 Shepardize (1975). Once a defendant has been committed for trial he may be detained in custody if the magistrate finds that no conditions of release will prevent him from becoming a fugitive. But in this connection the charging instrument is evidence of nothing more than the fact that there will be a trial, and

"release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." Stack v. Boyle, 342 U.S. 1, 4-5 Shepardize (1951) (citation omitted). n6

n6 The majority states that denial of bail in capital cases has traditionally been the rule rather than the exception. And this of course is so, for it has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee. If in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause. Thus what the majority perceives as an exception is nothing more than an example of the traditional operation of our system of bail.

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The finding of probable cause conveys power to try, and the power to try imports of necessity the power to assure that the processes of

justice will not be evaded or obstructed. n7 "Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested." 794 F.2d 64, 73 Shepardize (CA2 1986) (quoting United States v. Melendez-Carrion, 790 F.2d 984, 1002 Shepardize (CA2 1986) (opinion of Newman, J.)). The detention purportedly authorized by this statute bears no relation to the Government's power to try charges supported by a finding of probable cause, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment.

n7 It is also true, as the majority observes, that the Government is entitled to assurance, by incarceration if necessary, that a defendant will not obstruct justice through destruction of evidence, procuring the absence or intimidation of witnesses, or subornation of perjury. But in such cases the Government benefits from no presumption that any particular defendant is likely to engage in activities inimical to the administration of justice, and the majority offers no authority for the proposition that bail has traditionally been denied prospectively, upon speculation that witnesses would be tampered with. Cf. Carbo v. United States, 82 S. Ct. 662 Shepardize , 7 L. Ed. 2d 769 Shepardize (1962) (Douglas, J., in chambers) (bail pending appeal denied when more than 200 intimidating phone calls made to witness, who was also severely beaten).

It is not a novel proposition that the Bail Clause plays a vital role in protecting the presumption of innocence. Reviewing the application for bail pending appeal by members of the American Communist Party convicted under the Smith Act, 18 U. S. C. § 2385 Shepardize , Justice Jackson wrote:

"Grave public danger is said to result from what [the defendants] 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 helpful to Communist countries, 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 . . . unprecedented in this country and . . . fraught with danger of excesses and injustice . . . ." Williamson v.

United States, 95 L. Ed. 1379, 1382 Shepardize (1950) (opinion in chambers) (footnote omitted).

As Chief Justice Vinson wrote for the Court in Stack v. Boyle, supra Shepardize : "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S., at 4.

IV

There is a connection between the peculiar facts of this case and the evident constitutional defects in the statute which the Court upholds today. Respondent Cafaro was originally incarcerated for an indeterminate period at the request of the Government, which believed (or professed to believe) that his release imminently threatened the safety of the community. That threat apparently vanished, from the Government's point of view, when Cafaro agreed to act as a covert agent of the Government. There could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or of the dangers which the almost inevitable abuses pose to the cherished liberties of a free society.

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"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, 339 U.S. 56, 69 Shepardize (1950) (Frankfurter, J., dissenting). Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth

without authority, and come back without respect.

I dissent.

JUSTICE STEVENS, dissenting.

Link Concur/Dissent▲ There may be times when the Government's interest in protecting the safety of the community will justify the brief detention of a person who has not committed any crime, see ante, at 748-749, see also United States v. Greene, 497 F.2d 1068, 1088-1089 Shepardize (CA7 1974) (Stevens, J., dissenting). n1 To use Judge Feinberg's example, it is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he or she would otherwise kill a group of innocent people in the immediate future. United States v. Salerno, 794 F.2d 64, 77 Shepardize (CA2 1986) (dissenting opinion). Similarly, I am unwilling to decide today that the police may never impose a limited curfew during a time of crisis. These questions are obviously not presented in this case, but they lurk in the background and preclude me from answering the question that is presented in as broad a manner as JUSTICE MARSHALL has. Nonetheless, I firmly agree with JUSTICE MARSHALL that the provision of the Bail Reform Act allowing pretrial detention on the basis of future dangerousness is unconstitutional. Whatever the answers are to the questions I have mentioned, it is clear to me that a pending indictment may not be given any weight in evaluating an individual's risk to the community or the need for immediate detention.

n1 "If the evidence overwhelmingly establishes that a skyjacker, for example, was insane at the time of his act, and that he is virtually certain to resume his violent behavior as soon as he is set free, must we then conclude that the only way to protect society from such predictable harm is to find an innocent man guilty of a crime he did not have the capacity to commit?" United States v. Greene, 497 F.2d, at 1088 Shepardize .

If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense. In this case, for example, it is unrealistic to assume that the danger to the community that was present when respondents were at large did not justify their detention before they were indicted, but did require that measure the moment

that the grand jury found probable cause to believe they had committed crimes in the past. n2 It is equally unrealistic to assume that the danger will vanish if a jury happens to acquit them. JUSTICE MARSHALL has demonstrated that the fact of indictment cannot, consistent with the presumption of innocence and the Eighth Amendment's Excessive Bail Clause, be used to create a special class, the members of which are, alone, eligible for detention because of future dangerousness.

n2 The Government's proof of future dangerousness was not dependent on any prediction that, as a result of the indictment,

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respondents posed a threat to potential witnesses or to the judicial system.

Several factors combine to give me an uneasy feeling about the case the Court decides today. The facts set forth in Part I of JUSTICE MARSHALL's opinion strongly support the possibility that the Government is much more interested in litigating a "test case" than in resolving an actual controversy concerning respondents' threat to the safety of the community. Since Salerno has been convicted and sentenced on other crimes, there is no need to employ novel pretrial detention procedures against him. Cafaro's case is even more curious because he is apparently at large and was content to have his case argued by Salerno's lawyer even though his interests would appear to conflict with Salerno's. But if the merits must be reached, there is no answer to the arguments made in Parts II and III of JUSTICE MARSHALL's dissent. His conclusion, and not the Court's, is faithful to the "fundamental principles as they have been understood by the traditions of our people and our law." Lochner v. New York, 198 U.S. 45, 76 Shepardize (1905) (Holmes, J., dissenting). Accordingly, I respectfully dissent.

附錄二

失控的陪審團？

史丹佛法學院 JD 學生的必修課之一刑事程序法（Adjudication），由知名的刑事法教授 Weisber 講授，他在到陪審團章節時，當時報紙適出現一則中年婦女喬裝搜證並預謀接近陪審員為子申冤的新聞，情節與電影「失控的陪審團」（Runaway Jury）有異曲同工之妙。

46 歲的 Doreen 她的兒子 John 三年前被控共同殺人而必須服刑 25 年，但是 Doreen 始終不相信 John 參與這樁集體謀殺事件。她為了找出事實的真相，開始精心策畫一連串的蒐證行動。她認為其中有一位年約 30 歲的男性陪審員 Jason 先前可能與 John 有過節，於是計畫接近 Jason 來取得審判不公的證據，再聘請律師為 John 非常上訴。Doreen 在 Jason 住家附近室租了一間公寓，然後開始勤上健身房修飾身材，腳蹬六吋高跟鞋並且穿上魔術胸罩。在幾次刻意開車繞過 Jason 的住家後，終於有一天她和 Jason 在路上「巧遇」了。Doreen 展開攻勢猛烈追求 Jason，雖然 Jason 在記者採訪時表示他對 Doreen 一點兒興趣也沒有，但 Jason 坦承他和 Doreen 見過好幾次面，而且

每次 Doreen 都會請他喝酒。

Doreen 告訴 Jason 她原本是一位財務分析師，專門為瀕臨倒閉的公司解決問題。辭職之後她轉而從事法律服務性質的工作，包括為遭受冤獄的被告上訴，Jason 不疑有他。雖然當時 Doreen 在 John 的審判過程中幾乎都到場聆聽，但 Jason 卻一直沒有認出她來。

在幾次的約會見面之後，兩人的話題逐漸打開。Doreen 在約會前，都會準備隱藏的錄音設備，偷偷錄下他們兩人的談話內容。終於有一次，Jason 在酒後失控的嘶吼，他後悔的說他不該在 John 的殺人案中擔任陪審員，他在挑選陪審員的程序中沒有說實話，他其實認識幫 John 作證的那些證人，而那些證人曾經欺負他的弟弟，他在陪審團開會討論本案時，他是第一個主張 John 有罪的人。當天回到家裏之後，Doreen 痛哭失聲的告訴她先生：「I made it!」

記者問 Jason 不曾懷疑過 Doreen 接近他的動機嗎？Jason 說就在那次酒後，他試著聯絡 Doreen，但一直沒有辦法找到她。不久之後 Doreen 打電話告訴 Jason 說她在加州的房子因為森林大火遭到波及必須回去處理，此後就失去 Doreen 的音訊了。

Doreen 在取得上述錄音之後，隨即委任律師為 John 提出再審的聲請。然而，精通刑事再審程序的專家說，這樣模糊不明的證據要讓法院再開審判程序，理由並不充分。在過去，以陪審員對被告有偏見

導致審判有不公之虞的控訴，幾乎都遭到法院駁回。但對於一個護子心切的母親來說，這樣的發現，卻比一個已經確定的判決還要來的鏗鏘有力!不管未來結果如何，母愛在這個努力過程中已經表露無遺。