ORIGINAL

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE



THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-87

TITLE UNITED STATES, Petitioner V. ANTHONY SALERNO AND VINCENT CAFARO

PLACE Washington, D. C.

DATE January 21, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 86-87

ANTHONY SALERNO AND VINCENT :

CAFARO :

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Washington, D.C.

Wednesday, January 21, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 o'clock p.m.

APPEARANCES:

CHARLES FRIED, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

ANTHONY M. CARDINALE, ESQ., Boston, Massachusetts; on behalf of the Respondent.



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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 86-87, United States against Salerno.

Mr. Fried, you may proceed whenever you're ready.

ORAL ARGUMENT OF CHARLES FRIED, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIED: Thank you, Mr. Chief Justice, and may it please the Court:

In 1966, and again in 1984, Congress restructured and rationalized the law relating to pretrial detention of persons accused of crime.

The guiding principles of that restructuring was, first of all, to minimize the amount of pretrial detention; and subsidiary to that, to make sure -- and I quote from the statute here -- that a judicial officer may not impose a financial condition that results in pretrial detention.

Now, complementary to that principle was a second principle, that in a defined class of serious charges, where it is found on facts established by clear and convincing evidence that no conditions will reasonably assure the appearance of the person as required, and the safety of any other person in the

community, there shall be detention prior to trial.

Factors guiding such a decision are set out, and the judgment of the court must be supported by reasons given in writing.

Now, the legislative history -- and most observers agree that prior to the enactment of this 1984 provision, the very same purposes, the purposes of protecting the communicty, were accomplished sub rosa by the setting of, in effect, impossible high bail.

The purpose of this statute was to accomplish this same purpose, the purpose of protecting the community against pretrial criminality by those who have been indicted, by a frank and fair and open proceeding, which puts it out all on the table, and allows an open discussion under legislatively defined terms.

In this case, the respondents were charged with crimes of violence, and ordered detained after two lengthy hearings in which it was found by, and I quote the court, overwhelming evidence that they were lethally dangerous; that if returned to the street they would continue business as usual; and that business involved frequent episodes of murder and mayhem.

Now, these findings and the procedure, and the length of detention suffered here are not an issue in this case.

This case presents one stark proposition. It is said by the Court of Appeals below that a mere prediction or concern for dangerousness cannot, consist with substantive due process, justify detention of an adult charged with crime.

Detention, by reason of feared criminality, can only be effected by trial and conviction by the usual processes of criminal law -- this is the Court of Appeals' proposition, as it was the proposition of Judge Newman in the Melendez-Carrion case on which the Court of Appeals relied heavily.

Now, Chief Judge Feinberg, in his dissent, sharpened this issue. He put this case. A member of a terrorist organization has been indicted for blowing up an airliner for political reasons, and there is clear and persuasive evidence that he will do so again if not confined. That is the case Judge Feinberg put.

And the Court of Appeals' answer was clear. The Court of Appeals stated: Even the risk of serious crime, such as destruction of an airliner, must under our Constitution be guarded against by surveillance of the suspect and prompt trial.

I would suppose that it is an inevitable corollary of the Court of Appeals' proposition that even if such an accused should be apprehended again, in some

fresh act of violence, he would once again have to be released and remain at large until finally tried and convicted.

Now, what justifies so extreme and counter-intuitive a proposition? First of all, no authority of this Court plainly holds that way.

Respondents, although not the Court of Appeals, argue that the detention here is punitive. Now, there is no doubt that the dentention is incapacitive, and that punitive detention also is.

But if all detention were punitive, then the detention of juveniles, of deportable aliens, of persons thought to be associated with the enemy in wartime, of insane persons, would also be punitive. And it's quite plain that that is not the case.

Punishment is pain or disability inflicted for a past offense in order to exact retribution or to make an example of the offender.

QUESTION: But in fact, General Fried, to go back to your terrorist example, had the same situation, except he isn't arrested for a past offense yet; he has just gone around saying, I am going to blow up an airline.

Now, you acknowledge that in that situation, this legislation would not apply. There would be no way

to detain the individual unless and until he commits an offense for which he's arrested.

That's what causes -- that's what produces the argument that there has to be some punitive element to this detention.

MR. FRIED: That is correct, Justice Scalia. And in fact, there are even more telling examples which, if you like, put it to us.

Judge Newman put the case of a person who has been acquitted on a technicality of some such offense, and at the trial it was perfectly clear that this is an extremely dangerous person who has done very bad things; or a person who has served his sentence and is now free.

Now, I think all of those cases make the point about what kind of a statute this is. This is a statute which is intended to be ancillary to -- it is clearly auxilliary to -- the normal working of the criminal process.

It's like the usual detention of a person who it is feared might flee, or might intimidate witnesses. This is not -- this is not a free standing attempt to supplant or to have a predictive regime replace the normal criminal law.

The criminal charge is there. And this is a way of dealing with a problem in the interim. It's not

a independent way of getting at dangerous people.

Now, the Court of Appeals did not find this to be a punitive -- a punitive statute or to have a punitive purpose. Rather it was found to be regulatory in much the same way as the detention in Schall v. Martin was regulatory; in much the same way that the detention in Greenwood was regulatory.

And the question is: Is the regulation here justified? Does the regulation not impose too heavily? Is the government's justification for that regulation not insufficient? That's the question which the Court of Appeals faced, and we think that is the correct question.

Now, there's no doubt that the burden here on the individual is indeed a heavy burden. And there is no doubt, therefore, that the government bears a weighty burden of justifications.

Now, the respondents argue that no justification will work; that no justification is sufficient to permit the detention on account of dangerousness of an adult, competent citizen in time of peace.

Now, of course, all this line, which the respondent draws -- adult, competent, time of peace, citizen not alien -- what this line represents is a

compendium of all of this Court's cases in which it was said that regulatory detention would be permissible.

And it's not surprising, since this is a new scheme, and the Court granted ceriorari to decide an issue it has not previously decided, that the line so drawn will not pass through this case.

But the principles of this Court, we think, plainly dispose of this issue.

The Court of Appeals and the respondents do, I think, raise a serious and important issue about detention as regulation. They are concerned that what is undoubtedly a regulatory scheme here should not oust the familiar constitutionally structured system for redressing crime by condemnation and punishment and replace it with a forward-looking regulatory scheme of detention, however fair and procedurally nice it might be.

The picture, I suppose, that worries them is the world of the novel of the Clockwork Orange, or what happens in some other countries, which we're very glad not to live in.

And that is why Judge Newman's anomalies, which Justice Scalia referred to, are indeed appropriate concerns.

Now, I confess that these anomalies and this

concern makes me nervous too, as does the idea of displacing the criminal law as the paradigm for dealing --

QUESTION: What happened to the Eighth Amendment in this case?

MR. FRIED: The Eighth Amendment was not part --

QUESTION: Wasn't it in the case?

MR. FRIED: It was not urged, and it was not part of the decision below.

QUESTION: Wasn't it in the case originally?

MR. FRIED: I'm not aware that an argument was made on the basis of the Eighth Amendment, and if it were, it would quite properly have been rejected. Because the Eighth Amendment, as we understand, and simply looking at the text of the amendment, says there shall be no unreasonable bail in a case where bail is provided.

Here, the statute does not provide for bail, and so we don't think the Eighth Amendment comes into the question, Justice Marshall.

QUESTION: There is a provision for bail, isn't there?

MR. FRIED: There is a provision for bail under some circumstances.

QUESTION: But somebody dropped it, didn't they? Who first raised the Eighth Amendment?

MR. FRIED: I'm not sure who first raised it, but by the time it got here, it was gone. It was not -- it was no part of the Court of Appeals argument. And Mr. Cardinale will correct me, but I believe it is not part of the respondent's argument.

QUESTION: (Inaudible) from affirming on an alternate ground?

MR. FRIED: It would be unusual to affirm on a ground which was not urged, and was not part of the decision below.

It would be unusual. I wouldn't want to instruct you how to do your job, so I leave that at that.

Now, the statute doesn't force --

QUESTION: General Fried, before you get off this, this really doesn't -- I suppose it doesn't relate to the Eighth Amendment; it could, but would you say that you could -- that a state could simply say, henceforth, there will be no bail for all felonies?

MR. FRIED: It might say that. It might say that in connection with a system of appropriate pretrial release. It could not do that very easily, I think, on the ground -- in connection with a system where all

persons accused of crime are all to be held pending their trial and conviction.

That would be a different system.

QUESTION: What would that violate?

MR. FRIED: I think that would violate, if it violated anything, due process. It would violate the same constitutional provisions which the Court of Appeals and the respondents urge are violated by the provision -- by the procedures here.

QUESTION: That is, because that system would pick up nondangerous accused felons as well as dangerous accused felons; is that it?

MR. FRIED: It would be because persons would be deprived of their liberty for insufficient reasons, for inappropriate and insufficient reasons.

QUESTION: No one would be entitled to any kind of a hearing? It would just be a flat stay in jail until you're tried?

MR. FRIED: The violation, if it were one, would be one of substantive, not procedural, due process, Justice White.

Of course, this is very far from being the present system. Indeed, the system envisaged by the 1984 act is seeking to do the very opposite. It is seeking to minimize the use of money to assure the

presence and proper behavior of a person charged with crime while at the same time taking those few people who are a danger or who might flee and putting them in jail for that reason and not for a kind of sub rosa reason that they can't make a $3 million bail.

QUESTION: But that depends on how good your predictive factors are. Once you say that you can't do it for no reason at all, and just say generally nobody gets bail, then you say the only reason you can deny it is because there is a real danger.

So you really are stuck with defending the rough validity of the predictive factor.

MR. FRIED: Justice Scalia, there's no doubt that this system assumes that some measure of prediction is possible.

So has this Court, in Schall v. Martin, so did this Court in Jurek v. Texas. And so would commonsense.

There is a question, of course: How are you going to calibrate the prediction? How many false positives will you tolerate?

And I suppose in future cases which raise the issue of the proper level of prediction, which this case does not -- in future cases, you may wish to address that question.

But in this case, that is not a problem unless you are prepared to say that one can never predict dangerousness, in no circumstances. And that, I think, is an extreme proposition which this Court has already rejected.

QUESTION: Over dissents. Over dissents.

MR. FRIED: Over dissents. That is so often the case, Justice Blackmun.

(Laughter.)

QUESTION: Not only this Court, but the American Psychiatric Association.

MR. FRIED: I suppose there were dissents within the American Psychiatric Association, but I doubt they publish them in the same way.

(Laughter.)

MR. FRIED: The point about this statute is that it is purely ancillary to the regular working out of the criminal justice system. That is why the Clockwork Orange scenario does not trouble me, as it might, under Judge Newman's hypotheticals.

The idea is that this power is brought into life only when the government seeks to try and convict a person; it exists only so long as it is seeking to do it; and when it has done so, or when it has failed to do so, or when the charges have been dismissed, the power

vanishes with it.

And I think that is the main difference between this and the kinds of things that we're being frightened with, and that I must say, frighten me as well.

Now, what I view this as, and how I urge the Court to look at this, is as an interim response until or so that the normal criminal processes can reach their conclusion.

The Court of Appeals, I think rather blithely says, oh well, what you do in the interim is, you get prompt trial. But that's a never-never land. We don't live in a world where you can get prompt trial.

In serious cases preparation for trial and motions take time.

The Court of Appeals says, well, therefore you have to take care of this by surveillance. But we live in a world which is anonymous, which is crowded, which is not the world of the 15th Century. And it's not always possible to keep tabs on people by surveillance.

What this statute does, it fills the gap created by the delay, which is inevitable --

QUESTION: Mr. Solicitor General, do you think that the promptness of the trial has anything to do with the propriety of seeking pretrial detention? In other

words, does it make any difference whether the government would be ready to go to trial right away on the one hand, or recognize that there's congestion on the calendar and all sorts of things that might require prolonged delay?

Is that a relevant factor to consider?

MR. FRIED: Well, a number of judges, and serious and respected judges, have certainly thought that the period of detention, and indeed, the reasons why the period of detention might be quite long, bear on the due process of this provision.

And in an appropriate case, which this is not -- because that issue has not been raised -- in an appropriate case, the length of detention might well become an issue for this Court's determination.

QUESTION: But it wasn't of concern to the Court of Appeals here?

MR. FRIED: It was not of concern to the Court of Appeals. The Court of Appeals said, any delay, no matter how brief, violates the Constitution.

That is why I say, we have a very stark proposition in this case.

QUESTION: But underneath it all, there is 11 months in this case, at least.

MR. FRIED: There have been 11 months in this

case. We don't know why there have been 11 months; whether the 11 months have been laid at the door of the government, at the door of the defendants.

I think it would be inappropriate for me to seek to allocate that blame in a case where that is simply not an issue.

I might --

QUESTION: Mr. Fried, while I have you interrupted, I think in your brief you haven't mentioned the two rebuttable presumptions that are in Section 3142(e).

This is a facial challenge. Do you have any comments about the existence of those rebuttable presumptions?

MR. FRIED: Well, I should say first that in this case, those rebuttable presumptions were not invoked.

QUESTION: That's correct.

MR. FRIED: Those rebuttable presumptions have, I believe, universally been interpreted by the Courts of Appeals to simply shift the burden of going forward onto the defendant, the burden of going forward as to dangerousness.

In those Courts of Appeal, the presumption then remains in the case, as it were, as a bit of

evidence, but they are not -- they are not dispositive, and they have not been treated in that way.

Once again, I think with a new scheme like this, it would be much better to confront the issues raised by those presumptions in a case where really they were litigated and there was a real worry about them.

I note that the respondents, on the very last page of their brief, shrink from -- it seems to me they shrink from the conclusion -- that society is entirely helpless to protect itself against a determined lawbreaker who is apprehended in several acts of violence while awaiting trial.

For they say, on that last page, that in that case, there might be detention for violation of the conditions of release.

Perhaps the only difference, then, between the respondents and us is that they seem to think that due process absolutely requires one bite at the apple of post-indictment criminality.

I don't see why.

If I may reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Yes, General Fried.

We'll hear now from you, Mr. Cardinale.

You're representing Mr. Cafaro as well as Mr. Salerno?

MR. CARDINALE: That's correct, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you.

ORAL ARGUMENT OF ANTHONY M. CARDINALE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CARDINALE: May it please the Court, Justices:

As I listen to General Fried's address, I must confess that I got more and more afraid of what I perceive in this issue before the Court a very great danger.

And the danger is not only to the rights of Mr. Salerno, the rights of Mr. Cafaro, but to everyone's rights.

Because up until this point, I think I certainly have lived under the assumption, and have practised law under the assumption, that you got punished, you went to jail, only after the government was able, after trial, after proof of guilt beyond a reasonable doubt, to inflict punishment.

And I think that's the starting point, certainly, of our brief, and the starting point of the issues now before this Court.

In response to what Justice Marshall brought up about the Eighth Amendment, I submit, Your Honor, that we didn't drop the ball.

The Eighth Amendment is a very, very vital part of our argument in this case. It's a vital part as that right is encompassed within every defendant's due process rights, substantive due process rights. Because they don't just deal with one simple right versus another, but embodied in the substantive due process claim that we make, and a very large part of it, is, that the Eighth Amendment must mean something.

As this Court has pointed out in prior decisions, particularly Stack v. Boyle, where you found -- and the language used there I don't believe can be termed mere dicta -- but the language speaks of the right to bail in certain circumstances.

To be sure, our argument is not that there is a right to bail in each and every case. For there is certainly historical reasons, and valid ancillary reasons, to the criminal justice system to deny bail in very extreme circumstances, and only, I submit, where the risk to society is not that there's going to be danger, or that perhaps we can predict somehow that there will be a crime committed by this individual, but only where the threat to the system is that he will not reappear, subject himself to the jurisdiction of the court, or where the actions, as we point out in our brief, the actions may demonstrate to the courts that

this individual is a dangerous to particular persons who are necessary to the very operation of the particular function that the court is about to embark on.

Now, what we say, again, if Stack v. Boyle is to mean anything, and certainly in reference to the dissents that were brought up, if the dissens in th Carlson v. Landon case are to mean anything, the Eighth Amendment is very much a part of this issue before the Court.

QUESTION: Well, do you think that dissents in Carlson v. Landon ought to mean more than the Court opinion?

MR. CARDINALE: No. And I say that only because of the very particular facts that the Court addressed in Carlson v. Landon, facts, as we point out, and as General Fried must agree, facts that are very dispositive in their distinction with the facts before the Court and the issue before the Court.

In Carlson v. Landon, it wasn't a -- it was not a criminal proceeding. And the Court, very easily, in those circumstances, I submit, perhaps too easily -- but that's my personal view as opposed to what the jurisprudence shows -- said that the Eighth Amendment in these circumstances, and bail, simply doesn't apply.

In conjunction with that, we had a very, very

strong right that the Court recognized in Carlson v. Landon that the executive branch has to keep out of our country, whether by expulsion or refusal to enter, aliens; in that case, those that were deemed to be dangerous.

So those are the types of dispositive differences that I think are made up in each one of the examples that we have brought to this Court's attention that have, in the past, allowed for preventive detention, as it were.

And they do not exist in this case. Schall v. Martin, we point out, I believe very aptly, is like the mental deficient cases, a situation where you have not only an admitted societal interest being propounded and enforced by the government, that is, the safety of the community, but also, a very necessary dual purpose without which, I submit, this Court would not have come to the conclusion it did.

And that dual purpose being that there was a subject of that preventive detention who was not clearly free of detentive aspects in general; it was always, as the Court has pointed out, juveniles always in some form of custody. And in a situation where the custodial interests of the parents of this individual had somehow broken down, and it was not the duality coming in, the

state's parens patria power, in conjunction with the very specific interest in protecting society.

That duality you see throughout the only cases that this Court has ever addressed. There has always been a conjunction between not only the -- the government interest in protecting society, but also the party to whom this protection was being addressed.

And it deals again, with aliens, with incompetents, with juveniles.

But it has never, and this Court has never held, that it would ever in any way, shape, or form apply to the people we describe as competent adult citizens.

Now, General Fried makes a very big distinction, saying that, well, the respondents can't simply carve out a niche, a new class, that has heretofore never existed.

I somewhat agree with that analysis, but I submit to the Court that what we are talking about here is not a class that is being carved out; but we're talking about 99.999 percent of the population, and people about whom this Court has never had to step over the line and address the issues that this case brings before the Court.

You've never had to do that when you were

faced, again, with competent citizens who were adults.

And there is no effort to gerrymander, as the court puts it, the prior jurisprudence of this Court in an effort to create something that doesn't exist.

The fact that there has been no case about this demonstrates, I submit, exactly our point: That there is no need to make such distinctions.

QUESTION: Well, is the lack of a case perhaps due in part to the admitted misuse of the setting of high bail for dangerous offenders, do you suppose?

MR. CARDINALE: I don't -- I assume, Justice O'Connor, what you're referring to is the government's argument, or General Fried's argument, about the sub rosa practice that went on in the past.

I think, and I strongly urge this Court, the fact that the government would agree that that was sub rosa indicates quite clearly that it wasn't proper before, and it is now the very first time in criminal jurisprudence in this country, is it now proper in Federal courts to take that into consideration.

And I think that's a very important point. If it was done sub rosa, again, Justice O'Connor, it was done concededly improperly, and never before --

QUESTION: (Inaudible.)

MR. CARDINALE: I believe you're --

QUESTION: Chief Justice Vinson said that excessive bail violated the Eighth Amendment.

MR. CARDINALE: I believe that's exactly what Stack v. Boyle dealt with, in particular, when it related, as this case must also bring to the Court's attention, the fact that one of the most important rights, forgetting about obviously the harsh penalties we're talking about here -- the loss of liberty; there can be no harsher imposition on individuals in our society -- but in addition to that, we have a situation where as in Stack v. Boyle, Chief Justice Vinson pointed out, the right to bail in these circumstances is necessary to enable someone to fairly meet the prosecutor's challenge.

And without that opportunity, I submit to the Court, there is a drastic difference between what an individual may be prepared to submit himself to than if he were free and able to, in the best way he can, assist in the preparation of the defense.

And that's certainly been part of what the Stack v. Boyle case mentioned; certainly the dissents in Carlson --

QUESTION: Mr. Cardinale, if you're going to make an Eighth Amendment argument, then -- and I gather you say the Eighth Amendment is available to you?

MR. CARDINALE: Yes, Your Honor, certainly.

QUESTION: Well, how can you read the Eighth Amendment to prohibit the denial of bail? Because it does not have an exception for capital crimes. It says, excessive bill shall not be required.

Now, if you read that as meaning, there must always be bail, then you wouldn't be able to render capital cases non-bailable, which I assume you don't assert that that's the case.

MR. CARDINALE: No, I don't, Your Honor. I think that what we have to do --

QUESTION: Then you must be appealing to some principle other than the Eighth Amendment.

MR. CARDINALE: No, I don't think so, Your Honor. I think that you have to again combine the Eighth Amendment with the Fifth Amendment dues process rights.

And I submit that the mere fact that the framers of the Constitution did not explicitly put that language in there -- and of course there is debate among the academics as to whether or not that was a drafting error or not; whether or not it should have said, except in capital cases where the proof is evident or the presumption great, which has been the historical basis of the denial for bail --

QUESTION: And in most cases, you can require excessive bail instead of simply deny bail? Doesn't sound like a drafting error.

MR. CARDINALE: I think there would be no reasons for the framers of the Constitution to have included such language if it were up to the legislature, at their whim, to decide when and if crimes were bailable or not.

I submit that that is exactly what this Court would have to find to uphold the government's position in this case, that it was --

QUESTION: Could have been meant to be a protection against the judges. At the time of the revolution judges were not particularly smiled upon by the framers.

And it could have been, as many think it is, that the King's judges had been imposing excessive bails for those crimes that were bailable. And the Eighth Amendment is easily explicable as something directed against judges rather than legislatures.

MR. CARDINALE: I don't mean to disagree, Justice Scalia. But I submit that what they were really intended to do was to prevent legislatures from acting the way they have, in my view, in this case; and that is, by some quick magic formula, changing and altering

what has been the tradition and foundational basis for bail, because they think it's a good simple answer to a very complex question, and one which, I submit, may turn around some day and swallow up the very legislators that are enacting this.

And I don't --

QUESTION: It isn't usually the legislature that makes the bail excessive. The language, excessive bail shall not be required; the legislature -- I don't know of any legislative statutes that sets the amount of bail.

To prohibit excessive bail is to prohibit something that's done by judges, not by legislators.

MR. CARDINALE: I understand, and I appreciate the Court's position about where it is that the Eighth Amendmeent is historically directed.

But I submit that if it was -- it was, at the same time, directed at the lawmakers. While it certainly dealt in terms of explicit terms about excessive bail, and that can obviously be directed toward the judiciary, it also has to mean something -- the Eighth Amendment has to mean something more than, simply, you can have the legislature, at its whim, what is not a bailable offense.

Now, we submit that what happens in cases like

these -- and again, our first argument is interrelated with the second, and they all deal with substantive due process, I submit -- is that what we do have here is punishment.

It's not regulation. No matter how you look at, no matter what you want to call it, when you break it down and test it within the formulations that this Court has heretofore announced, it comes up as punishment.

There is no other way to look at it. And certainly, if the Court were to come to that conclusion, that is obviously the simple answer to this.

Now, in the --

QUESTION: Mr. Cardinale, is it any different, in punishment terms, from the examples that you say are permissible? Say there was proof that the defendant had threatened the life of, or was about to try and kill a witness? Would that not also be punishment?

MR. CARDINALE: No, not -- it is ancillary, I submit, and the Court must make this distinction, it is ancillary to the justice system to protect its ability to function normally; just, for example, why it would be okay for a very preliminary detention of an individual to get the jurisdiction to attach, just as it would be ancillary to the justice system to stop somebody from

leaving the jurisdiction and never coming back.

And similarly, that is something that is directed very squarely at the functioning, and therefore, very much more ancillary to the judicial system.

My position, quite simply, and certainly in contradistinction to General Fried's argument, that this punishment here, this pretrial detention, is ancillary to the criminal justice system in the same way actual penalties and prison sentence are -- prison sentences are, in the same system.

I just don't believe that it is not punishment, where the only reason someone is being placed in jail, away from his family, away from his job, away from his attorney, is because somehow or another the government has decided that we can predict that this person will be a danger.

QUESTION: Well, how do you predict that a defendant may kill a witness?

MR. CARDINALE: Well, I think that you don't -- if the case law in that regard, Your Honor --

QUESTION: What do you have to have? Probable cause to arrest him for -- or if he were out, you would have probable cause to arrest him and charge him with that crime?

MR. CARDINALE: I think, Your Honor --

QUESTION: Or an attempt, or what?

MR. CARDINALE: -- that each case involving threats to the judicial system rise and fall on their own facts. And I don't think there's any hard and fast ruling.

One case that comes to mind is the Godde case which preceded the Salerno case in the Second Circuit, and a very recent case, where they found, by a preponderance of the evidence, that he was a threat to the judicial system.

QUESTION: Well, here are two defendants in the same case, and one of them, pretty solid evidence turns up that he's about to kill a witness, or wants to kill a witness, or would if he was free; and his codefendant, it is found, hasn't got any real plans to kill a witness, but he's got some real plans to kill a nonwitness, just somebody else.

MR. CARDINALE: Well, I don't -- Your Honor, I think that the distinctions --

QUESTION: You could hold the one and not the other?

MR. CARDINALE: I think the distinctions are very dispositive. One is that you have something, an act, directed, that you have evidence about an act

directed to the functioning of the judicial system; and the other, you have some amorphous belief that this person, whether it's because of his background, social status, color perhaps, is more likely to commit a crime.

QUESTION: Well, refine that hypothesis a little bit, if you will, Mr. Cardinale.

Supposing that you have equally convincing predictive evidence in respect to each of the defendants referred to by Justice White that A would kill a witness and B would kill Mr. X whom he's got a big grudge against but is not a witness.

Why is the sanctity of the judicial system somehow much, much greater than the sanctity of the life of someone not involved in the judicial system?

MR. CARDINALE: Because it't not a crime, Your Honor, to think about and even plan mentally to kill somebody in our society. It's only when some act is undertaken in that regard. There's the difference.

QUESTION: Is it a crime to think about killing a witness?

MR. CARDINALE: It isn't a crime a to think about it, and I don't think that if that were the only evidence, that we would have an issue before the court.

QUESTION: Supposing exactly the same degree of evidence is present with respect to each of these.

Exactly the same amount of evidence that A will kill a witness and B will kill somecne not connected with the judicial system.

MR. CARDINALE: Well, I think the tradition of our system, in terms of the bail -- bailability, if you will, of individuals, is that where you can determine it to be very much ancillary to the ability for the function of the judiciary to continue and to bring this person to justice, that is one standard.

As to the other standard, I submit, Your Honor, even with equal evidence, the unfortunate, perhaps, but only constitutional remedy is surveillance, and certainly, going to Mr. X and saying, by the way, we have some information, you better lay low, or do you want to come in and we'll protect you.

QUESTION: Well, you could go to a witness and say, lay low.

MR. CARDINALE: I understand that. But I think that in the -- from practical experience, the notion of someone being dangerous to the judicial system to the point that he's considering one witness, there may very well more easily be an inference drawn by the trier of fact that --

QUESTION: What if there's a bail, but there's a condition on bail: You don't leave the jurisdiction;

you don't associate with certain people; and you don't kill anybody.

MR. CARDINALE: That's right. That's usually part of it.

QUESTION: Then you have solid evidence, A, that he may be going to leave the jurisdiction.

MR. CARDINALE: Put him in jail.

QUESTION: Put him in jail. You have solid evidence that he's associating with people he shouldn't?

MR. CARDINALE: Put him in jail.

QUESTION: Third, you have very good evidence that he's about to kill somebody?

MR. CARDINALE: No. And the reason you stop is --

QUESTION: Well, but then you say, well --

MR. CARDINALE: Unless --

QUESTION: -- you just are about to violate one of your conditions, so we're going to put you in jail. You're about to violate one of our orders.

MR. CARDINALE: I think again what we're dealing there is predictive behavior. And you can't, I think -- if the action of the individual was not a direct violation of a condition, or a direct sufficient act to engage the police power of a state by an arrest, you simply can't say, we have evidence that you've been

thinking of robbing that bank, and therfore, because we saw you go and get gloves and masks and everything, therefore, we can charge you with that, and by charging you with that, you're now violated, if he's done sufficient actions toward that end.

And again, we have actions instead of prediction. And I think that that's where the fatal flaw in this whole statutory --

QUESTION: Mr. Cardinale, isn't it possible that the reason for the difference in the two cases, one person who's going to kill a witness and one not, the reason for the differing treatment is not any inherent greater sanctity for the judicial process, but just simply because as common law courts, courts had the power and the authority to protect their own processes?

They weren't given any right to protect the society at large.

MR. CARDINALE: Certainly.

QUESTION: But now there is a statute from the body which does have the authority to protect the society at large, the Congress, which says, do the same thing for the society at large that you've been doing under your inherent judicial authority to protect your own processes.

MR. CARDINALE: Well, I think under --

QUESTION: Isn't that one way to explain how come we've done this in the past but haven't done the other in the past?

MR. CARDINALE: Well, I think the reason, Your Honor, is that while I certainly agree that Congress has the power, and certainly the duty, to be concerned about the public welfare and safety, when it comes to this type of behaior, the balance, unfortunately, and it's the only way to look at this, while the government's position is that you can't tell me that the Constitution, whether it's because the legislature through the Constitution has this power, or any other power inherent in the Constitution, that the Constitution can protect the judicial system but cannot protect society at large.

I disagree with that vehemently. It can protect society at the same time. But when you have the balancing factors being -- like this case, or any of the examples we've been discussing, the Constitution must protect the individual and society at the same time.

And when you deal with predictive behavior, the balance, I submit, is necessarily on the side of the individual. And it has to be.

QUESTION: Mr. Cardinale, I want to be sure I understood an earlier colloquy you had with Justice

Scalia. Did you agree that it is constitutional for a defendant in a capital case to be denied bail?

MR. CARDINALE: It is constitutional, and it has been held from time immemorial that because the ultimate sanction, whether again, we have the death penalty nowadays or not, whether because the ultimate sanction in a case like that may be life imprisonment without parole, or the death penalty, that because that would give somebody a very, very good reason to leave the jurisdiction, that under those circumstances, it's a fair inference, when, again, the evidence is strong and the presumption great, as the old language went, to constitutionall deny that person bail.

But it doesn't have anything to do with --

QUESTION: You say that's based on a presumption that in view of the severity of the sentence, there is a probability that there will be flight?

MR. CARDINALE: There would be no reason for him to stay around to get electrocuted.

QUESTION: That is something that you didn't think the framers wanted to prevent by the Eighth Amendment?

MR. CARDINALE: I'm suggesting that they didn't want to prevent the judiciary from enacting or

imposing no bail situations in capital offenses.

And of course, going back into the old history, capital offenses included petty larceny and things like that.

So I think if you go back to the English precedents, which I think are very little help in this area, and the older ones particularly, everything was practically a capital offense.

QUESTION: Yes, but the Eighth Amendment has been held to prevent a lot of things that used to be accepted.

MR. CARDINALE: That's right. That's right, Your Honor. And I believe that this is one --

QUESTION: So what about bail being denied in a capital case?.

MR. CARDINALE: Well, it wouldn't in that, again, based upon what we commonly accept as the tradition --

QUESTION: I mean today. Today. Not way back then; today.

MR. CARDINALE: Today, what we accept as the traditional reason for the grant or denial or bail. And that being -- the foremost one being whether the person will show up and subject himself to the --

QUESTION: Would this statute have been

constitutional if they had, with respect to the crimes for which these people were charged, Congress had authorized the death penalty? Would that make the pretrial detention in this very case permissible?

MR. CARDINALE: No, because there was no evidence -- and the government conceded that -- there was no evidence, despite everything and the enormity of the charges, even though they didn't include death penalties, they certainly added up to an excess of 300 years, the government submitted in that circumstance that they were not flight risks; they were not at all concerned that these people wouldn't come back when their time came to appear, and go through trial, and be sentenced, if necessary.

I think, again, if I could, with the short period of time I've got left, I really think we need to address -- I would like to address -- the issue that if we get by the substantive due process challenges we make, when you assess the validity of the statute, you must look at what -- and you assess also whether or not this predictive behavior is ever a proper basis, look at the statute as to what actually happens in fact to people who are charged in Federal courts nowadays?

QUESTION: Don't we just look at what happened to these people?

MR. CARDINALE: No, I think that the challenge that we're making -- and I will get to the exat facts in this case, because I think they do shed some light on this whole area -- but when we are challenging, facially, the constitutionality of this statute, that includes whether or not they were applied properly.

In this case, the fact that the procedures when applied to this case or any case, are insufficient to maintain the constitutionality on a due process basis of this statute.

QUESTION: I thought we only did that for the First Amendment. You mean, even though you weren't subjected to the presumptions, for example, you can complain about the existence of those presumptions?

MR. CARDINALE: Well, let me -- yes, I think in this respect. In this case, if the following -- ask the Court to follow the following scenario. I show up in court. I'm handed an 88-page indictment with 29 counts.

My client, Mr. Salerno, not Mr. Cafaro, had a year earlier been indicted on a very similar type case, which I submit, given the factual predicate of that indictment, which came down at a time when this statute was in effect, where there were several more murders, and a conspiracy of dimensions even much larger than the

one in this case, the goverment agreed, in front of a magistrate, to a $2 million bail, with the usual conditions; even though this statute was in place.

A year goes by, and based on the same evidence, I submit, a new charge is brought; a new very multiplicitous, I submit, indictment, a wide conspiracy; same evidence.

I walk into court. I'm handed an 88-page indictment. And I'm told, oh, by the way, we're not going in front of the magistrate. I don't know why. We wind up in front of a judge.

How that happened, I still don't know, because the practice in the Southern District as I understood it, and as my client had a year earlier, started in front of a magistrate.

I wind up in front of the part one judge. The government tells me, they're moving for detention. I ask them: Why? Well, we don't have to tell you, is basically the answer. You'll find out, in essence.

Five days later, I walk in, the government gets up, gives a great final argument on untested evidence --

QUESTION: Is this all in the record?

MR. CARDINALE: It is in the Appendix, Your Honor.

QUESTION: All right.

MR. CARDINALE: Certainly. Gives in essence a final argument. No witnesses. No cross-examination. No notice. And the ballgame was over.

I mean, the court is being submitted by the government -- their position -- their submission is that this is all part of a main event, this ancillary jurisdiction they claim to hold people, the main event being the criminal trial.

If they're right, and I can find no --

QUESTION: Well, you don't -- what you're saying, you -- even if you were permitted to challenge this provision on its face, it sounds like you'd get a lot farther challenging it as it applied in this case?

MR. CARDINALE: No, Your Honor, I don't think we need to do that, not only given the facts of this case, but given the specific language and the lack of due process, we submit, are inherent in the statute.

In conclusion --

QUESTION: In part one, approximately how much time do you have on the motion?

MR. CARDINALE: Well, it took as long as the government took to give its recitation. When I asked to produce certain witnesses, I was denied that right. And it was very quick after that, let's put it that way.

QUESTION: Sort of perfunctory, wasn't it?

MR. CARDINALE: In my view, yes.

As I conclude my address, may it please the Court, I'm aware that the issues in this case call upon this Court to act and to perform its duty in perhaps the most grave and delicate of matters.

I'm asking you to declare constitutional -- unconstitutional, an act of the legislature, an act of Congress.

But I'm also aware at this time that there are hundreds, and perhaps thousands, of individuals being held, pretrial, on this supposed prediction, and are being punished, as we stand here; and everyday that goes by, it gets worse.

I urge the Court, therefore, to affirm the court below, and to declare this statute unconstitutional.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cardinale.

General Fried, you have seven minutes remaining.

REBUTTAL ARGUMENT OF CHARLES FRIED, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIED: A number of factual matters.

There is a extensive record, extensive appendix, available for the hearings. There were two hearings before two different judges.

I don't agree with the characterization of those hearings as perfunctory. But if Mr. Cardinale believes they were --

QUESTION: How many motions are usually handled in part one in the Southern District in a day?

MR. FRIED: I have no idea, Justice Marshall.

But these two motions fill two very large volumes of records.

If Mr. Cardinale had felt those rather extensive hearings were perfunctory, then he should have made an objection on that score, and allowed this Court to consider it on that basis.

Mr. Cardinale refers to, and the Court referred to, conditions of release. One of the conditions of release, a mandatory condition of release, and a traditional one is, that a person released pretrial is subject to the condition that he not commit a federal, state or local crime during the period of release.

The case that haunts me is this: A person is released on that condition, perhaps as a result of Mr. Cardinale's argument. He then does indeed commit such a

crime.

What is to be done about such a person? I take it on the logic of the argument, and on the logic of the argument of the court below, he must again be released pending conviction.

And if he commits yet another crime, he must again be released, until such time as there is a conviction.

That, I think, is a situation, describes a state of affairs, describes a mode of criminal procedure, which I don't think we are constitutionally required to admit in the face of a reasonable statute which seeks to do the opposite.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried.

The case is submitted.

(Whereupon, at 3:00 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-87 - UNITED STATES, Petitioner V. ANTHONY SALERNO AND VINCENT CAFARO

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BY Paul A. Richardson

(REPORTER)