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The Presumption of Innocence: Why Should the Accused Care Whether He Is Being Detained before Trial for Regulatory or Punitive Reasons? Jail Is still Jail: Re-examining the Judicial Gloss That Has Diluted the Bail Reform Act

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Comments

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Raymond E. Gazer*

> How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in McKinley's Case (1817), 33 St. Tr. 275, 506, where Lord Gillies says: 'It is impossible to look at it [a treasonable oath which it was alleged that McKinley had taken] without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be reargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. *It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman*; and I was happy to hear from Lord Hermand [that] he is inclined to give full effect to it . . .'[1]

I. Introduction: Criminal Procedure In A Constitutional Context

Not all rights in the United States Constitution afforded to the accused are created equally. Since the "constitutionalization" of criminal procedure,[2] the accused has been afforded a plethora of rights that

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1. *Coffin v. United States*, 156 U.S. 432, 457 (1895) (White, J.) (emphasis added) (quoting *McKinley's Case*, 33 State Tr. 275, 506 (1817)).

2. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES, 1259 (2d ed. 2003). The authors comment on the forty years of constitutionalization of criminal procedure. The theory is based on the

strengthen and put teeth into provisions of the United States Constitution.[3] Based on the theory of fundamental fairness, derived from both the Fifth and Fourteenth Amendments' Due Process Clause,[4] the constitution has become a broad outline of the minimum standards of criminal procedure. One of those rights, apparently glossed over during the constitutionalization of criminal procedure, is the Eighth Amendment's prohibition on excessive bail.[5] While the Eighth Amendment has been viewed concurrently with the Fifth Amendment Due Process Clause,[6] the right has not been interpreted broadly and given the same inferences and extensions associated with other constitutional guarantees.[7] To the layperson, and perhaps, the law student, the right seems straightforward. If bail is offered, the amount cannot be excessive. That notion is, in fact, correct. In *Stack v. Boyle*, the Supreme Court validated that notion by holding "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose [securing attendance] is 'excessive' under the Eight Amendment."[8] At that time, the Court failed to squarely confront the situation where the defendant is held in custody without bail. Both Congress and the Supreme Court have subsequently addressed the situation in the context of the federal defendant. Congress changed existing pretrial detention legislation by

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then unheard of rights that the Supreme Court granted to the accused during Chief Justice Earl Warren's tenure. *See also infra* note 3.

3. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that unlawfully obtained evidence must be excluded at the defendant's trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (finding the right to counsel during a criminal trial is fundamental, thus requiring the government to provide an attorney for the indigent defendant); Terry v. Ohio, 392 U.S. 1 (1968) (requiring an objective level of suspicion to be present before the police briefly detain an individual); Duncan v. Louisiana, 391 U.S. 145 (1968); Codispoti v. Pennsylvania, 418 U.S. 506 (collectively holding that the accused has a right to be tried before a jury for all crimes punishable by six month incarceration).

4. U.S. CONST. amends. V, XIV, § 1. Rights enumerated in the constitution are considered fundamental when they are "basic in our system of jurisprudence . . . essential to a fair trial" *Duncan*, 391 U.S. at 149.

5. U.S. CONST. amend. VIII.

6. The government must provide the defendant with both Procedural and Substantive Due Process.

7. *See, e.g.*, *Duncan*, 398 U.S. 145 (holding that the Sixth Amendment right to counsel implicitly meant that an indigent defendant must be provided counsel). However, the Supreme Court has never held that the prohibition against excessive bail requires that bail be given in the fist instance. United States v. Salerno, 481 U.S. 739, 752 (1987).

8. Stack v. Boyle, 342 U.S. 1, 5 (1951).

enacting the Bail Reform Act of 1984 ("Act"),[9] and the Supreme Court upheld its constitutionality.[10] The Act authorizes detention without bail. While detaining a defendant before trial has been squared with the constitution, recent case law suggests that the constitutionality of such measures, as applied to the individual defendant, has been called into question.

In *United States v. Goba*, the court undermined the Act's constitutional integrity, by ignoring the Act's clear mandates.[11] It melded together different definitions to render defendants, who were presumed innocent, detained for an indefinite period of time. In this Note, after identifying the facts of *Goba*, I will address the historical approach to pretrial release, highlight the constitutional underpinnings that have validated the Act, and lastly, apply the Act to *Goba* to reveal that it has been rendered unconstitutional as applied because the judiciary has obfuscated many of the Act's protections by supplying illogical definitions to the Act's statutory phrases.

II. The Current Status of Pretrial Detention as Applied: *United States v. Goba*

United States v. Goba is a ripe example of how a defendant in the federal system has no real right to release before trial.[12] As applied in that case, the Supreme Court's pretrial detention jurisprudence and the protections of the Bail Reform Act were watered down to the extent that they were rendered a nullity. The reasoning employed in *Goba* circumvented both the literal interpretations of the Act and the Supreme Court's guidelines for implementing the Act, rendering the decision unconstitutional. In addition to unconstitutional reasoning, the decision also demonstrates the failure of the Bail Reform Act, both as a safeguard to the public and as a shield to protect the defendant from a substantial deprivation of liberty before a finding of guilt.

A. Facts of Goba

At the onset, these defendants were, indeed, alleged to have

9. 18 U.S.C. § 3141-57 (2003).
10. *Salerno*, 481 U.S. 739.
11. *See generally* United States v. Goba, 240 F. Supp. 2d 242 (W.D.N.Y. 2003).
12. *See id.*

committed serious crimes, and some of them admitted to attending terrorist training camps.[13] One might argue that the case reached the right result using the wrong reasoning. However, the faulty reasoning was of such constitutional magnitude that it has the potential to affect every federal defendant. One must look beyond the facts at bar and read the holding broadly to see the flagrant violation of imposing detention without the requisite showing.

The "miscreant defendants"[14] in *Goba* were charged with "[conspiring to] knowingly provide ... material support and resources to a foreign terrorist organization"[15] and the substantive offense of "knowingly and unlawfully providing material support . . . to a foreign terrorist organization."[16] The case was an appeal from a decision of an United States Magistrate's order[17] detaining the defendants before trial.[18] The defendants were alleged to have traveled from the United States to Pakistan and from Pakistan to Afghanistan.[19] While in Pakistan, the defendants were alleged to have received firearms and other tactical training at a terrorist training camp.[20] Most startlingly, they were taught how to use suicide as a weapon and were alleged to have attended a speech by Osama bin Laden, where bin Laden "emphasized the need to prepare and train for a 'fight against Americans.'"[21] While abroad, some of the defendants stayed at an Al Queda "guest house" where they admitted that they were informed that they were going to meet the "The Most Wanted."[22] The court initially noted that the standard of review for detention hearings is *de novo*.[23] As such, the court began to employ its problematic Bail Reform analysis, correctly pointing out that, before a defendant can be detained, the court must engage in a two-step process.[24]

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13. *Id.* at 253.

14. The defendants were convicted of the crime charged at the time of this Note. The author feels it appropriate to call them miscreants to reflect the gravity of the crimes they intended to perpetrate against the United States.

15. 18 U.S.C. § 2339B(a)(1) (2003).

16. *Goba*, 240 F. Supp. 2d at 244 (citing 18 U.S.C. § 2339B).

17. *Id.* at 182.

18. *Id.* at 246.

19. *Id.* at 244.

20. *Id.*

21. *Id.*

22. *Id.* at 252.

23. *Id.* at 245. Discussion of the relevant portions of the Bail Reform Act are set forth in Part III(B) *infra*.

24. *Id.* at 246.

B. The Detention analysis used in Goba

The court first found that, in order to be detained, a defendant must fall within one of the Act's six "entry points."[25] The court correctly described the first three entry points as dealing with the nature of the charged offense,[26] the fourth as dealing with the nature of the offense and the defendant's criminal history,[27] and the last two as dealing with a defendant's risk of flight or risk of obstructing the proceeding.[28] The court found that each defendant satisfied the government's contention, having been both alleged to have committed a "crime of violence," and to being flight risks.[29]

The problem lies with the court's acceptance of the "crime of violence" determination. The court used such a determination as the catchall entry point.[30] Strict compliance with the definition of the term is necessary, as it must be satisfied before a court can even consider the option of detention. Instead, the court borrowed a definition of "crime of violence" from *United States v. Lindh*, the "American Terrorist Case."[31] The *Goba* court conceded that, in *Lindh*, the definition of crime of violence was used in another context: "In *Lindh*, Judge Ellis faced the issue of whether the substantive and conspiracy offenses of knowingly providing material support to al-Queda in violation of § 2339B were 'crimes of violence' within the meaning of 18 U.S.C. § 924(c)(3)(B)."[32] To justify borrowing a definition from another statute, the court stated in a lengthy footnote:

> Eighteen U.S.C § 924(c)(3)(B) defines "crime of violence" as "a felony . . . [sic] that *by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*." (Emphasis added.) As is obvious, it is essentially the same

25. *Id.* (citing 18 U.S.C. § 3142(f)).

26. These three entry points concerning the nature of the offense are the problematic Crime of Violence, 18 U.S.C. § 3142(f)(1)(A), offenses punishable by life in prison or death, § 3142(f)(1)(B), and certain drug offenses. § 3142(f)(1)(C).

27. Section 3142(f)(1)(D) authorizes detention if the defendant is charged with a felony and has already been convicted of the three classifications of offenses listed above.

28. The last entry points dealing with the defendant who is a flight risk or a risk to obstruct the proceeding are located at § 3142(f)(2)(A), (B).

29. *Goba*, 240 F. Supp. 2d at 251.

30. *See id.* at 249.

31. *Id.* at 249-50 (citing United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002)).

32. *Id.* at 250.

> definition Congress utilized at § 3156(a)(4)(B) [the Bail Reform Act], which defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." (Emphasis added.) This Court therefore finds Judge Ellis's analysis instructive, despite it not concerning § 3156(a)(4)(B) directly.[33]

While the *Goba* court was correct that it is obvious that the literal meaning is the same, the court was not clear that the *Lindh* definition deals with sentencing enhancement factors for using a firearm, which is to be taken into consideration by the sentencing body only after conviction.[34] Importing a definition from a different statute, even with identical language, has serious implications on the constitutionality of the Act.[35] Having found an entry point, the *Goba* court conducted a detention hearing.[36] Detention can be predicated on either a finding, by clear and convincing evidence, of dangerousness, or a finding, by a preponderance of the evidence, that the defendants were a risk of flight.[37] Then, the court determined whether the defendants were a flight risk.[38] In holding that all the defendants were flight risks the court noted that each had substantial means to sustain themselves abroad for long periods of time.[39] The court noted that two separate groups of defendants lived in Kandahar, Afghanistan and Quetta, Pakistan just before their arrest.[40] The court found that some of the defendants paid over a thousand dollars for airfare, despite their low paying jobs.[41] Additionally, the court found that it was reasonable to conclude that the only way the defendants were able to sustain themselves abroad was from the assistance of unidentified

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33. *Id.* at 250 n.12.

34. The *Lindh* definition refers to 18 U.S.C. § 924(c)(3)(B). This section is located in Chapter 44 of Title 18, which is entitled "FIREARMS." Specifically, § 924 is entitled "PENALTIES." Thus, this portion of the code deals with penalties for possessing firearms.

35. *See infra* Part IV.

36. *Goba*, 240 F. Supp. 2d 242.

37. 18 U.S.C. § 3142(f) mandates a finding of dangerousness by clear and convincing evidence. The statute is silent concerning the standard for risk of flight, but a judicially created standard of preponderance of the evidence has been widely accepted. *See* United States v. Jackson, 823 F.2d 4, 5 (2d Cir. 1987).

38. *Goba*, 240 F. Supp. 2d at 251.

39. *Id.* at 252.

40. *Id.*

41. *Id.*

co-conspirators.[42] Finally, two of the defendants had the ability to cross international borders without being detected.[43]

Ironically, instead of stopping after finding that the defendants were flight risks, which alone would have authorized detention, the court went further to determine whether they were dangerous.[44] The court subjected the government to a higher standard of proof, but it was clear from the facts that the defendants were, in fact, dangerous.[45] The court found that the purpose of attending terrorist training camps was to inflict harm, and thus, cause danger.[46] Osama bin Laden's alleged role in the speeches that the defendants attended did not help their claim that they were not dangers to the community.[47]

III. From The Common Law Approach To The Bail Reform Act of 1984

A. Stack v. Boyle *and the Common Law Approach to Bail*

The common law bail scheme was established to set bail at an amount no higher than necessary to secure the appearance of the defendant at trial.[48] In *Stack v. Boyle*, the Supreme Court held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eight Amendment."[49] The theory was that "federal law has unequivocally provided that a person arrested for a non-capital offense be admitted to bail."[50] Thus, the Court refused to allow the trial court to set excessive bail solely based on the crime charged, noting:

> To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners

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42. *Id.*
43. *Id.* at 252-53.
44. *Id.* at 252-56.
45. *See supra* notes 18-20 and accompanying text.
46. *Goba*, 240 F. Supp. 2d at 253-54.
47. *See id.* at 255. The court stated, "Usama bin Laden has an infamous history with the United States." *Id.* This author finds that to be a gross understatement.
48. *See, e.g.*, Stack v. Boyle, 342 U.S. 1 (1951).
49. *Id.* at 5.
50. *Id.* at 4.

have been indicted.[51]

The Court rejected the uniform classification of crimes for bail purposes and stated:

> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant.[52]

The Bail Reform Act has superceded the Federal Rule of Criminal Procedure that the Court discussed, but the Court clearly mandated the individualized determination of bail under the constitution. This individualized determination was lacking in *Goba*, and it will have detrimental effects on the Act's constitutionality.

With the mandate that bail not be set higher than reasonably needed to ensure the defendant's appearance at trial, lower courts were powerless to detain offenders accused of even the most egregious crimes. However, a procedure developed where a court would ostensibly set bail as a financial requirement to secure attendance, but, in reality, use the sum to detain a defendant who was perceived as dangerous.[53] This practice was widely accepted by both Congress and appellate courts.[54]

B. The Bail Reform Act of 1984

When passed, the Act was a departure from the *Stack*-era formulation of bail in that it authorized pretrial detention, rather than just setting bail at a rate to ensure the defendant's appearance.[55] The Act has four stages of pretrial treatment of the defendant. The defendant may be released on his own recognizance,[56] released on an unsecured bond,[57] released on various conditions,[58] or detained pending trial.[59] Release on

51. *Id.* at 6. The defendants were charged with violating the Smith Act, 18 U.S.C. §§ 371, 2385 (2003), making it unlawful to advocate the "overthrowing or destruction of the government."

52. *Id.* at 5.

53. *See* S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 (extensively examining the dilemma faced by judges).

54. *Id.*

55. *Id.*

56. 18 U.S.C. § 3142(b) (2003).

57. *Id.*

58. *Id.* § 3142(c). Examples of conditions of release prescribed in § 3142 are

conditions and pretrial detention require the judicial officer to make a finding that a less restrictive means of securing the defendant's appearance or ensuring the safety of the community will not reasonably work.[60] Additionally, the Act codified one aspect of *Stack* by prohibiting setting a financial barrier to release.[61] Thus, financial bail is only used as a surety.

The detention hearing cannot be authorized unless one of the entry points, as listed by the *Goba* court, are met.[62] The most problematic of these is the term "crime of violence"[63] as it is a vague term that can encompass many types of behavior. As seen in the court's analysis in *Goba*, the term appears in various places throughout the code and is susceptible to many different definitions.[64] The detention portion of the act is bifurcated, so that the court must first be satisfied that the defendant is alleged to have committed a crime falling within one of the entry points.[65] Even if the defendant is alleged to have committed a "crime of violence," or another crime qualifying as an entry point, there still must be a detention hearing, where the judicial officers reviews the individual defendant's characteristics,[66] as opposed to the first inquiry, which focused solely on the crime charged.[67] Once the hearing is

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maintaining employment, complying with a curfew, and reporting to a pretrial services agency.

59. *Id.* § 3142(e), (f).

60. *E.g.*, § 3142(c) requires the magistrate to make a finding that an unsecured bond or release or recognizance will not "reasonably assure the appearance of the person as required or will endanger the safety of the . . . community" before the magistrate orders the defendant released on conditions. *Id.* Similarly, a detention order will not be issued unless the magistrate finds that no conditions will "reasonably assure the appearance of the person as required or will endanger the safety of the community. . . ." *Id.* at § 3142(e).

61. 18 U.S.C. § 3142(c)(2).

62. *See supra* notes 25-28.

63. 18 U.S.C. § 3142(f)(1)(A).

64. *Goba*, 240 F. Supp. 2d at 249-51 (discussing crime violence entry point).

65. *See* 18 U.S.C. § 3142.

66. *Id.* § 3142(g) (listing factors to be considered); § 3142(e) (requiring a hearing).

67. Of the six entry points, all but two look solely at the offense charged. The entry points dealing with risk of flight and risk of obstructing the proceeding naturally look at the defendant's behavior. 18 U.S.C. § 3142(f)(2). For these two entry points, it would appear that the two-tiered detention hearing is illusory. The judicial officers would first decide that the defendant is a flight risk and then decide this again under the factors set forth in § 3142(g), which are largely based on the defendant's ties to the community. *See supra* note 60. This scaled back proceeding seems tolerable because, when detention is based on risk of flight or obstruction, it more closely resembles the common law approach to bail.

commenced, both the government and the defendant may present evidence,[68] and the court will look to five factors to determine whether the defendant is to be detained. The factors are the nature of the offense charged, the weight of the evidence against the defendant, the defendant's history and characteristics, and the danger that the defendant may pose to the community.[69] The defendant has an immediate right for a district court to review a detention order *de novo*.[70]

IV. The Act's Constitutional Underpinnings

In securing a detention order, the court assesses the charge against the defendant in both the entry point and detention hearing phases. Obviously, any determination of this nature is made before a finding of guilt. Thus, the Act must comport with constitutional safeguards in order to ensure that the defendant is not cursorily tried in a fashion that would undermine the presumption of innocence that is fundamental to our system of jurisprudence. "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."[71] Ironically, the Act codifies this premise, stating that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence."[72] Thus, the Act has come under attack, but managed to withstand constitutional scrutiny.

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68. 18 U.S.C. § 3142(f).

69. *Id.* § 3142(g)(1)-(4). Section 3142(g)(3) calls for looking at the defendant's "history and characteristics." More precisely, it provides for a determination based on:

> (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; (B) and 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.

§ 3142(g)(3)(A), (B). Note that some of these factors are identical to those determining whether a defendant fits within certain entry points under § 3142(f).

70. 18 U.S.C. § 3145(b).

71. Taylor v. Kentucky, 436 U.S. 478, 483 (1978) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

72. 18 U.S.C. § 3142(j).

A. United States v. Salerno

In 1987, the Supreme Court examined the constitutionality of the Bail Reform Act for the first time.[73] In *United States v. Salerno,* the defendants were charged with violating the RICO Act, mail and wire fraud, extortion, and various gambling violations.[74] The government moved the court to conduct a detention hearing pursuant to § 3142(e) of the Bail Reform Act, "on the grounds that no condition of release would assure the safety of the community or any person."[75] The defendants claimed the Act violated both their Fifth Amendment Substantive Due Process Rights and the Eighth Amendment prohibition on excessive bail.[76] The Court addressed both of these issues separately, and implicitly discussed Procedural Due Process aspects of the Act.[77]

B. Salerno *and Substantive Due Process*

The Court stated the harsh standard it would use to invalidate the Act as being contrary to the substantive component of the Due Process Clause.[78]

> To determine "'whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. 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].'"[79]

Thus, it was the Court's view that there was no punishment if the purpose of detention could turn on something other than punishment.[80] With this distinction in mind, the presumption of innocence is not invoked because that presumption is only offended when punishment is being inflicted. To highlight this novel idea, the Court noted that, in the past, it has been held constitutional to detain certain people without a

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73. United States v. Salerno, 481 U.S. 739 (1987).
74. *Id.* at 743.
75. *Id.*; *see also* 18 U.S.C § 3142(e).
76. *Salerno*, 481 U.S. at 746 (citing U.S. CONST. amends. V, cl. 4 & VIII).
77. *Id.* at 742, 745.
78. *Id.* at 746 (citing U.S. CONST. amend. V).
79. *Id.* at 747 (internal citations omitted).
80. *Id.* at 746-47

pending trial.[81] Thus, the logical inference is that if the government may detain someone indefinitely without a trial, it is naturally permissible to detain an accused pending a full and fair trial. The Court went on to find crime prevention as a compelling regulatory purpose of the Act, operating to detain those only having been alleged to have committed a "serious" crime.[82] As long as there could be at least one application of pretrial detention that is legitimate, the Act would withstand a facial constitutional attack.[83] However, the Court noted that there may be a point where the regulatory measures would become excessive and, therefore, punitive.[84]

C. Salerno *and the Eighth Amendment*

In summarily disposing the defendants' Eighth Amendment claim, the Court reasoned that the Eighth Amendment does not forbid the denial of bail, but only requires that once bail is granted, it must not be excessive.[85] The Court also characterized the notion found in *Stack* that bail must only be reasonable to ensure the defendant's appearance at trial.[86] Thus, the defendants in *Salerno* had no Eighth Amendment argument.

D. Salerno *and Procedural Due Process*

While the Procedural Due Process claim was not explicitly brought before the Court, the Court alluded to its procedural fairness. First, the Court noted the usual safeguards found in most procedural contexts were present, i.e., the right to counsel, the right to cross-examine witness, and the findings of a neutral decision maker.[87] More importantly, the Court noted that in order to be detained in the first place, the defendant would have to fall into one of the entry point categories, which the Court described as the "most serious of crimes."[88] This implicitly recognized

81. *Id.* at 749 (stating, under special circumstances, the government may detain individuals without a pending trial); *see also* 18 U.S.C. § 3142(f).
82. *Id.* at 750.
83. *Id.* at 751.
84. *Id.* at 748 n.4.
85. *Id.* at 753.
86. *Id.*
87. *Id.* at 742
88. *Id.* at 750.

recognized the Act's two-tiered detention phase: first, concerning the nature of the crime (the entry point) and second, concerning the nature of the defendant (the detention hearing).[89] The Court repeatedly found that the Act was only facially constitutional and "intimate[d] no view on the validity of any aspects of the Act that are not relevant to respondents' [defendants'] case. Nor have respondents [defendants] claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case."[90] Thus, the possibility was left open that the Act could be applied in an unconstitutional manner.

E. The Expanded Scope of Constitutionality

In *Salerno*, the Act was upheld on Due Process and Eighth Amendment grounds, but only facially.[91] While the holding in *Salerno* is persuasive, it only addressed the facts before the Court. The Court conceded that there may be a point when detention becomes punitive, and as applied, the Act may violate the accused's Due Process rights.[92] Thus, the Act may still be susceptible to impermissible punitive sanctions as applied in each case. In conceding that the Act may be unconstitutionally applied, *Salerno* was an implicit recognition that pretrial detention will not be warranted in all cases, and, even when warranted, there may be times when the Act is unconstitutionally administered, creating dangerous precedent. *Goba* is a prime example of the latter case.

The *Salerno* Court failed to discuss the point at which regulatory detention would become excessive, leaving magistrates, attorneys, judges, and defendants to speculate as to what constitutes impermissible punishment before a finding of guilt. At the very least, a law must not be arbitrarily administered to deprive a person of a liberty interest.[93] Such laws fall into two categories; either they are overbroad and impinge on a constitutional right, usually the First Amendment, or they are vague.[94]

89. *See* 18 U.S.C. § 3142(f)(1)(A) (authorizing a detention hearing after the court finds a crime of violence has been committed). Thus, tier 1 is the initial crime of violence determination and tier 2 is the detention hearing pursuant to §§ 3142(f)(2)(A), (B) & (g)(1)-(4).

90. *Salerno*, 481 U.S. at 745 n.3.

91. *Id.* at 745.

92. *See supra* Part IV(A)-(B).

93. *See generally* City of Chicago v. Morales, 527 U.S. 41 (1999).

94. *Id.*

The *Salerno* Court dismissed the overbroad doctrine as being limited to First Amendment claims.[95] The Court failed to adequately discuss the premise that a law "may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."[96] While in a bail case it is not the police who might arbitrarily deprive a person of his or her liberty, it would be absurd to claim that the danger disappears when a magistrate makes the decision. In fact, the neutral magistrate is supposed to shield the defendant from arbitrary government action.[97] The *Salerno* Court passed on the chance to address this issue because, in their view, the regulatory purpose of the statute was not excessive as applied to the defendant's case. Thus, a substantive attack is still available when the enforcement of the law, by judicial officer, is arbitrary or excessive. Such a judicial gloss over of the procedural safeguards of the Act can cause substantive problems, creating a "sweep" intended to detain all individuals based on the prosecutor's or judge's personal predilections.[98]

The substantive claim of arbitrariness is bolstered when procedural protections are withered away. As illustrated in *Goba*, the approach used to determine the entry point blurred the two-tiered detention setting, thus permitting the grave possibility of an arbitrary detention decision.[99] Additionally, while the *Salerno* court disregarded Eighth Amendment protections in that case,[100] it did not overrule the *Stack* premise that a defendant is to be afforded an individual determination at bail proceedings.[101]

In *Salerno*, the Supreme Court also erected a barrier that might impede future challenges to the Act.[102] The Court intimated the harsh substantive standard of review that "[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

95. *Salerno*, 481 U.S. at 745.

96. *Morales*, 527 U.S. at 52.

97. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (finding a neutral magistrate to act as a shield against government action).

98. *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (stating vagueness in a penal statute might permeate to participants in the judicial hearing).

99. *See generally Goba*, 240 F. Supp. 2d 242.

100. *See supra* note 70.

101. *See supra* Part III(A).

102. *Salerno*, 481 U.S. 739, 745 (1987).

under which the Act would be valid."[103] Such a standard may deter a defendant from asserting that the Act is unconstitutional, or may very well make the Act unassailable. For instance, in *Goba*, the Act was correctly applied to the detention hearing, regarding the defendants being dangerous and their ability to flee the jurisdiction of the court.[104] Even at the entry point stage, wherein the problem lies, a flight risk category was available to the court.[105] The court could have relied on this entry point to authorize a detention hearing and then conducted the hearing based on either the defendant's perceived dangerousness or flight risk.[106] Thus, the statute would have had a legitimate purpose, and the defendant's claim would have been harmless error. What this ignores is the precedent that *Goba* established, which can apply to anyone charged with any crime in the federal system.

However, the Supreme Court has called into doubt such a standard of review.[107] In *City of Chicago v. Morales,* the Court expressly questioned the *Salerno* standard of review, calling it dictum and noting that "[w]hen asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question."[108] Thus, a challenge to *Goba* would be appropriate not to vindicate the rights of the accused terrorists, but to vindicate the rights of any other individuals who are erroneously subjected to detention proceedings.

V. *Goba* And Its Constitutional Infirmities

The Bail Reform Act, as applied in *Goba*, is unconstitutional when compared with the *Salerno* mandates. Part of the infirmity is based on the *Goba* court importing post-conviction definitions into the Act and expanding the crime of violence entry point. With this expansion, the procedural safeguard, that the Act only detains those "accused of the most serious crimes," has withered away.[109] Another part of the

103. *Id.* at 745.

104. *See supra* Part II(B) (discussing the *Goba* detention analysis).

105. *Goba*, 240 F. Supp. 2d at 251-52 (discussing flight risk).

106. *See* 18 U.S.C. § 3142(f).

107. *See* City of Chicago v. Morales, 527 U.S. 41 (1999).

108. *Id.* at 55 n.22. The Court found that the facial challenge rule does not apply to cases originating in the states, but also questioned the validity of the rule in the federal system. *Id.*

109. *Salerno*, 481 U.S. at 750.

infirmity is the judicial construction of the Bail Reform Act that the *Goba* court was mandated to apply. In this latter sense, *Goba* was reasoned incorrectly, not because of the trial court's decision, but because of the approach mandated by some federal courts of appeals, which acts to render arbitrary detention decisions and lacks the required individualized bail determination.[110]

A. The Categorical Approach to Crime of Violence in the Bail Reform Act

As required by the Act, the *Goba* court found the entry point predicated on the defendants having committed a crime of violence.[111] On its face, this comports with the statute and *Salerno,* but the method the court used to examine this approach is the most troubling feature. The court used the categorical approach, an approach required by the Second Circuit.[112] The *Goba* court cited *Dalton v. Ashcroft* and *United States v. Dillard* for the basis of using this approach.[113] *Dalton* involved the term "crime of violence"[114] in a sentencing enhancement context under 18 U.S.C § 16.[115] The term was present in that section to define an aggravated felony.[116] *Dalton* held that a crime of violence should be defined by the "intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation."[117] This approach was later adopted in *Dillard* to encompass the identical term in the Bail Reform Act for the offense of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[118] Thus, in determining whether one is eligible for detention under the Act, a person is afforded no individualized determination. If the crime is deemed violent, the offender is subject to a hearing, although the offender himself may not have committed any violent act. The judicially crafted categorical approach is contrary to the Act's definition for a crime of violence:

110. *See, e.g.*, Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001).

111. *Goba*, 240 F. Supp. 2d at 251.

112. *Id.* at 249

113. *Id.* (citing *Dalton*, 257 F.3d at 204; United States v. Dillard, 214 F.3d 88, 92 (2d Cir. 2000)).

114. *Id.* at 249.

115. *Dalton*, 254 F.3d at 200.

116. *Id.* at 202.

117. *Id.* at 204.

118. *See Dillard*, 214 F.3d at 91-97.

> [A]n offense that has an element . . . the use, attempted use, or threatened use of physical force against a person or property or another. . .[or] any other offense that is a felony and that, by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense.[119]

The provision that calls for the court to look at the nature of the offense does not use the word intrinsic. In order to make the individualized determination of who is subject to a hearing, it is vital to look to the characteristics of the defendant's acts that constituted the crime, and not simply the crime's definition as it appears in the code.

While *Salerno* ruled out any Eighth Amendment violation for the complete denial of bail, it retained the individualized determination requirement that each defendant was guaranteed in *Stack*.[120] If an individualized determination is required in a bail hearing, it is only logical that it is also required in determining whether a defendant is eligible for pretrial detention. When the court is only concerned with the crime charged, the defendant is denied this individual determination at the initial entry point stage. While the defendant will still have individual treatment at the detention hearing phase, considerations such as the defendant's past record and community ties are in front of the court. This prejudices the defendant, whose initial crime was categorically determined to be violent, when the defendant has a past record or lacks a job or a family in the community. Such a defendant would quite likely be subject to detention at the hearing when, in fact, the detention hearing should not have been authorized in the first place.

Further, the *Goba* categorical approach allows the court to arbitrarily determine what constitutes a crime of violence. In *Salerno*, the Court emphasized the narrow classification of defendants that are subject to detention.[121] The Substantive Due Process claim, which once withstood constitutional muster in *Salerno*, is readily apparent. The defendant is left to speculate what behavior constitutes "a crime of violence." In making its determination, the magistrate need only demonstrate that there is any tendency for the behavior proscribed in the in the code to result in physical force to a person or property.[122] The

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119. 18 U.S.C. § 3156(a)(4)(A)-(B) (2003).

120. *Salerno*, 481 U.S. at 753 (1987) (citing Stack v. Boyle, 342 U.S. 1, 5 (1951)).

121. *Id.* at 750 (finding pretrial detention only available to defendants who commit the "most serious crimes").

122. *See generally* 18 U.S.C § 3156(a)(4) (2003).

categorical approach takes away the word "substantial" from the Act's definition. Since the defendant's alleged conduct is beyond the intrinsic nature of the offense, the court must look at the crime's definition and decide if the words on paper create a substantial risk of physical force against people or property. However, the definition calls for looking at whether there was a substantial possibility of force "in the course of committing the offense."[123] Speculation is the only means of determining whether there is a substantial risk of force during the course of the offense when one is limited to the code, and not the defendant's behavior. Speaking for the Seventh Circuit, Judge Richard Posner noted the effect of this untenable position:

> The Second Circuit in *Dillard* asked whether felons do a lot of violence with the weapons they possess illegally, and answered "yes," leading to the conclusion that the risk of violence created by being a felon in possession of a firearm is substantial. But the statute asks whether there is a "substantial risk that physical force against the person or property of another may be used *in the course of committing the offense*," and the offense is possession of a firearm. People who commit that offense may end up committing another, and violent, offense, such as robbing a bank at gunpoint, but that doesn't make the possession offense violent. Otherwise we would have to say that the offense of driving a car without a license is a crime of violence because people who commit that offense are likely to drive when drunk, or to speed, or to drive recklessly, or attempt to evade arrest. For that matter the illegal sale of. . .burglars' tools, would on that analysis be a crime of violence.[124]

Putting aside the issue of firearms for the moment,[125] the analysis lends itself well to the syllogism that can be employed to determine a crime of violence. Posner highlights the possibility analysis and shows its absurd results. The court need only ask itself whether the proscribed act may cause violence. It lacks the individual formulation of whether the defendant's alleged actions might have substantially caused violence in the course of committing the offense. However, some of the nature of the defendant's crime may be looked into at the entry point stage.[126]

The *Goba* court, following *Dillard*, arrived at the same reasoning

123. 18 U.S.C § 3156(a)(4)(B).
124. United States v. Lane, 252 F.3d 905, 907 (7th Cir. 2001).
125. *See infra* Part V(B).
126. *See infra* Part V(C).

that Posner warned against.[127] In determining whether materially providing support to terrorists was a crime of violence, the court simply combined the crime charged with the statutory definition of the term "crime of violence."[128] The court simply stated, "providing material support or resources to a foreign terrorist organization [the crime charged] involves a substantial risk that physical force against the person or property of another may occur."[129] This is nearly all the categorical approach permits the court to do at the entry point stage. It does not let the court focus on what the defendants actually did. Had the court done so initially, it may have indeed concluded that attending terrorist training camps involves a substantial risk of violence. One must remember that while the defendants in *Goba* were accused of heinous crimes, the categorical approach to the Bail Reform Act is employed in the Second Circuit regardless of the crime charged.[130] *Goba* establishes a startling precedent extending the already flawed categorical approach to a new approach, where the magistrate need only add the charged statute to the Bail Reform Act's definition and come up with a plausible nexus without regard to how tenuous the nexus between the actual behavior of the defendant and the probability of violence.

Such arbitrary decision-making concerning one's liberty has the same effect, as allowing a police officer to proscribe what is a crime. Such unfettered discretion principal is widely held unconstitutional in a law enforcement context, since "it may authorize and even encourage arbitrary and discriminatory enforcement."[131] Given that crime prevention is an aspect of law enforcement and crime prevention was the regulatory purpose of the Bail Reform Act,[132] it is reasonable to conclude that the arbitrary decision-making employed in *Goba* should be subject to the same scrutiny as vague penal laws. Indeed, in *United States v. Singleton*, the court held that bail proceedings are subject to the same scrutiny against vagueness.[133] The *Goba* court has violated this principal by summarily concluding that the codified definition of an offense was a crime of violence.

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127. *See Lane*, 252 F.3d at 907 (discussing Posner's view).
128. *See generally Dillard*, 214 F.2d 88.
129. *Goba*, 240 F. Supp. 2d at 251 (statutory definition of crime of violence).
130. *See id.* at 249.
131. *Morales*, 521 U.S. at 56.
132. *See supra* Part III(B).
133. United States v. Singleton, 183 F.3d 7, 13 n.12 (D.C. Cir. 1999).

B. Goba *Uses Firearm Definitions in a Bail Reform Context*

The *Dillard* court, which authorized the categorical approach, only expounded on the fact that gun crimes usually involve a risk of violence.[134] It never discussed how a court should make the individualized determination about whether a defendant has committed a crime of violence not involving firearm. Without direction on the matter, the *Goba* court looked to other circuits to see whether materially providing support to terrorists was a crime of violence.[135] As noted, the court relied on *United States v. Lindh* for the proposition that such crimes are crimes of violence within the meaning of the Bail Reform Act.[136] Again, the *Lindh* court was concerned with a different provision of the code.[137] In *Goba*, firearms were not at issue. The court took the *Lindh* definition and reasoned that providing material support to terrorist organizations involves a substantial risk of physical force.[138] *Lindh* involved a post-conviction sentencing enhancement factor for using firearms.[139] However, the *Lindh* Court's definition of what constitutes a crime of violence was based on another statute, 18 U.S.C. § 924(c)(3)(B).[140] There, the statutory definition of crime of violence, although identical to the Bail Reform Act, involves firearms.[141] Firearms, by their very nature, have a tendency to bring about violence when possessed during a crime. Under the Bail Reform Act, there is no assumed possession of a firearm. Thus, there is a danger of using a judicially crafted interpretation of identical terms. Judge Posner warned of this in his definition supplanting the bail reform context: "even identical language can mean very different things in different statutes or regulations, depending on purpose and context."[142] In *United States v. Lane*, the court refused to use the extrinsic nature of the offense for the purposes of the Act, instead using a narrow interpretation of the definition.[143]

134. *Dillard*, 214 F.3d at 93-94.
135. *Goba*, 214 F. Supp. 2d at 249-50.
136. *Id.* at 250-51.
137. *Lindh*, 212 F. Supp. 2d at 579.
138. *Goba*, 214 F. Supp. 2d at 250-51.
139. *Lindh*, 212 F. Supp. 2d at 541.
140. *Id.* at 578.
141. *See* 18 U.S.C. § 924(c)(1)(A) (2003).
142. *Lane*, 252 F.3d at 907 (7th Cir. 2001).
143. *Id.* at 908.

The natural consequence of constraining a court to look only extrinsically at the crime charged is to borrow definitions from other statutes in order to avoid the conclusory formula used in *Goba*.[144] This creates findings of fact and reasoning that, on their face, seem plausible.[145] Had Congress wanted the courts to look intrinsically at crime they would have expressly provided for it. Instead, they imposed a definition in the Bail Reform Act, which should be interpreted independently of any other provision since an individual's liberty is at stake before a trial. At the very least, the magistrate should consider the underlying facts of the crime charged so that the defendant is afforded the maximum protection. The entire Act was found constitutional on the premise that it was applied to "an arrestee [who] presents an identified and articulable threat to an individual or the community."[146] This is the prime example of the liberal construction of the "crime of violence" phrase.

C. Categorical Approach Is Not Really Categorical in the Firearms Sense

The *Goba* court explicitly noted that the firearms definition of "crime of violence" was identical to the definition of the term in the Act.[147] As previously illustrated, the definitions, although identical, connote two different meanings.[148] Beyond the obvious notion that the nexus between firearms and violence is sufficiently direct, the borrowing of the definition highlights the broader problems experienced by the circuits in determining whether possession of firearms is a crime of violence at all. The most litigated issue concerning the Bail Reform Act is whether possession of a firearm is a crime of violence.[149] The circuits are badly split. As noted above, in *United States v. Dillard*, the Second Circuit found that possession of firearms was a crime of violence within

144. For the *Goba* court's conclusory rendition of a crime of violence, see *supra* part V(A) of this Note.

145. The Act requires every detention order to state the court's conclusions in ordering detention. 18 U.S.C. § 3142(i)(1) ("[A] detention order issued . . . shall—include written findings of fact and a written statement of the reasons for detention.").

146. *Salerno*, 481 U.S. at 751 (1987).

147. *See supra* Part II(B).

148. *Id.*

149. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.3(a) n.17.1 (2d ed. 1999 & Supp. 2004).

the gambit of the Bail Reform Act,[150] while in *United States v. Lane,* the Seventh Circuit decided the opposite.[151] The First Circuit has an intra-circuit split, with some of the district courts finding possession of a firearm to be a crime of violence within the meaning of the Act and some not, largely based on the defendant's prior status as a felon.[152] While the circuits need not be uniform, the lack of uniformity clearly suggests that the *Goba* court was erroneous in using a definition based on firearms for purposes of defining when a defendant should be subject to a detention hearing. This is startling for two reasons.

First, in the determination of whether possession of a firearm is a crime of violence, the *Dillard* court placed much emphasis on the fact that a felon in possession of a firearm is more likely to commit a violent crime, stating:

> The prohibition of gun possession by previously convicted criminals seeks to protect society by reducing the risk of violence that may result from the possession of guns by persons inclined to crime. By possessing guns in violation of that law, previously convicted criminals increase the risk that they may engage in violent acts. The risk results from the nature of the offense.[153]

Thus, the court based its firearm definition on the propensity of felons to use weapons for engaging in crimes of violence. What impact does this have on the categorical approach to defining crimes under the Bail Reform Act? After all, the *Goba* court relied on *Dillard* for the categorical approach theory in this case. When considering the propensity of a felon, one looks beyond the words of the statute defining the offense. The court engages in speculation of the defendant's characteristics. While this affords the defendant with the constitutionally mandated individual approach to detention, it does so unilaterally by lumping felons into a "will cause violence again category." There is no option to rebut the *Dillard* presumption because a court is still operating under the categorical approach. The decision rests on two conflicting

150. *Dillard*, 214 F.3d 88.

151. *Lindh*, 252 F.3d 905.

152. *Compare* United States v. Say, 233 F. Supp. 2d 221 (D. Mass. 2002) (finding simple possession of a firearm is not a crime of violence), *with* United States v. Phillips, 732 F. Supp. 235 (D. Mass. 1990) (holding that convicted felon in possession of a firearm is not a crime of violence). The *Say* court cited *Dillard* for the premise that the status of being a felon in possession of a firearm increases the likelihood that the defendant would commit a crime of violence. *Say*, 233 F. Supp. 2d at 225.

153. *Dillard*, 214 F.3d at 93.

principles.[154] First, the defendant who is a felon in possession of a firearm is more likely to have committed a crime of violence, and, second, the principle that the courts are to look no further than the words that define the crime.[155] The *Goba* court took this already flawed dichotomy and applied its reasoning to a situation where the defendants neither had firearms nor were convicted felons and used its reasoning to establish a direct nexus between the crime charged and the Bail Reform Act's Definition of a crime of violence.

Second, the *Dillard* method melds the two-tiered detention scheme into one, so that an inferior court, like the *Goba* court, blurs the entry point phase with the detention phase. A strict reading of *Dillard* authorizes the use of propensity based on classifications.[156] In *Dillard*, felons were more likely to commit crimes of violence.[157] If the classification-propensity approach is taken to its logical extreme, certain defendants subject to detention will always be subject to detention regardless of the crime. Most notably, of course, convicted felons are scrutinized based on their propensity at the entry point stage. This again will happen at the detention stage hearing, so that the two-tiered detention phase is largely illusory. Felons, however, may not be sympathetic, but the *Dillard* approach will look to any classification found in the penal statute. For instance, conspirators usually conspire to commit crimes. Thus, there is a propensity that a conspirator posed a risk of harm to property or persons because the goals of conspiracies are usually to thwart the law. Thus, by adding this offense to the substantive offense of an indictment, the prosecutor has the benefit of arguing that conspirators by their very nature are likely to commit crimes of violence. In *Goba*, the court summarily stated that conspiracies to commit violent crimes have long been held as crimes of violence.[158] This would turn on examining the extrinsic nature of the conspiracy rather than its definition in the code. These same facts would be used in the detention phase part of the hearing subjecting the defendant to fending off allegations in both parts of the hearing. However, the *Goba* court did not review the extrinsic nature of the conspiracy to see whether any of the defendants furthered the objectives of the conspiracy. The *Dillard* categorical rule

154. *See generally Dillard*, 214 F.3d 88.
155. *Id.*
156. *Id.*
157. *See id.*
158. *Goba*, 240 F. Supp. 2d at 250-51.

would bar this approach. Note how the rule operates. Felons, conspirators, aiders and abettors would have the court look to the fact that people in such categories have a propensity to be dangerous, but no such evidence will be taken into account to establish that, in actuality, none of the defendants were principals. The rule is one-sided. In *Goba*, it is likely that all defendants furthered the conspiracy because credible evidence showed that all attending terrorist training camps while abroad,[159] but it is noteworthy that the reasoning could be employed under different circumstances. This withering away of the two-tiered detention hearing casts a doubt on the Act's application, as was once found constitutional in *Salerno*.

D. Goba *Used A Post-Conviction Definition of Crime of Violence*

The judicial definition used in *Goba* was imported from a statute that exists to punish those already found guilty of an underlying crime. Thus, a liberal and broad interpretation of the phrase might be warranted. In a sentencing enhancement provision, the government should be entitled to the benefit of the doubt because the individual has had a full and fair trial on the merits. When defining a crime of violence in this context, the government is entitled to broader inferences of a possibility of harm to property or persons because a fact finder has established the extrinsic nature of the crime.[160] This is not so in a pretrial context when the defendant is presumed to be innocent, and there is little opportunity to consider the extrinsic nature of the facts. In fact, under the *Goba* reasoning, courts are not allowed to look at the extrinsic nature of an offense. Thus, under the *Goba* interpretation of the Bail Reform Act, standards in place to guard against excessive punishment of convicted felons are not in place to protect the presumed innocent defendant.

The *Salerno* court also found that a regulatory statute conformed with Substantive Due Process because it was not punitive or excessive.[161] Under the *Goba* crime of violence definition, it would seem that the Bail Reform Act is being punitively administered. Consider that the *Goba* court used a punitive, post-conviction definition of crime of violence. In

159. *Id.* at 252.

160. *Cf.* McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986) (stating "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime").

161. *See supra* Part IV(B).

so doing, it bypassed the crime prevention purpose and "erase[d] what is obviously a considered legislative decision to distinguish between bail pending trial and bail pending appeal [after conviction]."[162] In a bail context, the accused should be afforded the benefit of the doubt because the likelihood of a "miscarriage of justice" is greater before a conviction.[163] In determining when incarceration becomes punitive, the Supreme Court has implied that although a detention is rationally related to crime prevention, it still may become punishment if it is arbitrarily administered.[164] Thus, although there is a clear purpose to pretrial detention, the Court alluded that arbitrariness is a factor. In *Goba,* the court used a factor that is normally meant to enhance the already-convicted defendant's sentence. Obviously, in *Goba*, the defendants had yet to be even brought to trial. By borrowing the post-conviction definition, the court created an arbitrary deprivation of liberty which was only supported by a conclusory molding of the statute.[165]

With no clear definition of crime of violence, the *Salerno* Substantive Due Process claim has evaporated. The *Goba* court arbitrarily determines one's liberty interest before trial. While not classified a penal statute, the Act's effect is essentially identical. Courts have annulled the presumption of innocence by utilizing interpretation principals that are normally employed only after a defendant loses his presumption of innocence after a trial, where all facts alleged against him are proved beyond a reasonable doubt.[166] While it would be absurd to require proof beyond a reasonable doubt at a bail hearing, it is equally absurd to extend the same inferences used in a post-conviction proceeding to a pretrial bail hearing.

VI. Conclusion

Goba was flawed because of the imported definition, usually used

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162. *Lane*, 252 F.3d at 908.

163. *See id.*

164. *See* Bell v. Wolfish, 441 U.S. 520, 539 (1979) ("if a restriction or condition is not reasonably related to a legitimate goal—*if it is arbitrary or purposeless*—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees") (initial emphasis added).

165. *See supra* Part III(A).

166. *See In re* Winship, 397 U.S. 358 (1970) (holding that, in a criminal proceeding, the Constitution requires all facts against the defendant must be established beyond a reasonable doubt).

to enhance sentences for those convicted of firearms offenses. But, in the greater sense, it was flawed because of the categorical approach that creates arbitrary detention decisions and does not afford the defendant the individualized determination that the Constitution mandates. This renders the Bail Reform Act susceptible to constitutional invalidity. Instead of judges determining what constitutes a crime of violence through comparison of the instant case to precedents that may not be the same, Congress should speak on the matter.

President Bush recently spoke of the need to reform pretrial detention laws in order to detain more suspected terrorists.[167] Given *Goba*, it escapes reason to think that a suspected terrorist cannot be detained. However, the President's message is valid to the extent it urges congressional, as opposed to judicial, measures to authorize detention. The judicial scheme just does not work. Take, for instance, the split of authority concerning crimes of violence and possession of a firearm. The *Dillard* court, using the categorical approach held that possession of firearms was a crime of violence,[168] while the *Singleton* court, using the same approach, held that the offense was not.[169] The approach enables the judiciary to craft definitions as they see fit. As *Goba* illustrates, arbitrary and conclusory assumptions are the consequences of this judicial approach.

Congress should set up a series of offenses that are bailable *per se* or not bailable *per se*, so that the interpretation is uniform. At the entry point phase, a burden shifting mechanism can be put in place. Thus, if the crime is bailable *per se*, the government would have the burden of production to show that a detention hearing is warranted. At this point, the government would have to establish evidence sufficient to support a finding that the defendant's participation in the crime had the effect of substantially creating harm to persons or property.[170] Such a minimal showing would not prolong the bail hearing, and, at the same time, it looks beyond the crime charged to the facts and circumstances of the case, affording the defendant the initial individualized determination.

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167. Press Release, The White House, President Bush Discusses Homeland Security at the FBI Academy (Sept. 10, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/09/20030910-6.html.

168. *Dillard*, 214 F.3d at 96.

169. *Singleton*, 182 F.3d at 16.

170. Such a standard is a minimal showing. Unless no reasonable judge could have found that the fact exists, the government will have satisfied its burden. *See* JOHN W. STRONG, MCCORMICK ON EVIDENCE § 388 (5th ed. 1999).

Ironically, even as bail hearings are administered today, courts have information available regarding the defendant's participation in a crime.[171] It would be illogical to assume, courts ignore this information when making the initial entry point determination.

Conversely, if the crime were non-bailable per se, the defendant would have the initial burden of showing that she is entitled to bail. She could meet this burden by showing that the crime is not alleged to have been committed in a dangerous manner. Again, this affords an initial defendant specific determination beyond what is available under the categorical approach. However, a problem lies with the defendant, who contests all involvement in the crime. If this arises, as it most certainly will, the defendant has the fall back option of the detention hearing. At the hearing, today's practice, where the court looks at relevant factors to determine the defendant's perceived danger and community ties,[172] would remain in place. This approach would correct the problems prevalent in *Goba*, allowing proffers of evidence to be made beyond the statutory definition of the crime and, at the same time, classifying crimes in a uniform matter, so as to provide the defendant with reasonable notice. Various state systems, which classify crimes by the level of punishment that is ultimately administered, provide guidance to Congress in their attempt to define crimes as bailable or non-bailable.[173] Such a system would not pose any of the post-conviction assumptions because the distinctions are not based on any inferences in place after conviction, like the statute used in *Goba*, instead reflecting society's interest in the severity of crime.

The Bail Reform Act of 1984 is a representation of the clash of two of society's cherished interests: the protection of society from those accused of heinous crimes, and the protection of the accused's right to a presumption of innocence. Both of these are valid reasons for a compromise. When the Act works correctly, it provides a balance between these to compelling interests. However, *Goba* illustrates the

171. *See* FED. R. CRIM. P. 7(c) (requiring initial complaint to allege the *facts* constituting the crime charged).

172. 18 U.S.C. § 3142(g). This is the same provision used today under the current Act, which includes the relevant factors a magistrate will consider.

173. *See, e.g.*, N.Y. PENAL LAW § 55.05(1) (McKinney 2003) ("Felonies are classified, for the purpose of sentence, into five categories . . . ."); *see also* N.Y. CRIM. PROC. LAW. § 530.20 (2)(a)(1) (limiting a judge's discretion to grant bail or deny in certain situations). The Model Penal Code also classifies crimes in a similar fashion. *See* MODEL PENAL CODE § 1.04 (Official Draft 1962).

failures of the Act. If deprivation of liberty is necessary before a finding of guilt, the accused must be afforded all available rights, or else the presumption of innocence will evaporate. When clear and uniform standards are set, the federal defendant will be subject to neither arbitrary determinations nor rules of law that have no place in a bail hearing. Unfortunately, the *Goba* defendants were the most undesirable of people, but, nevertheless, this article was not premised on radical notions of liberation, but on the bigger picture of the problems that plague the judiciary in making detention decisions. In sum, we must remember the old phrase, "If you are going to do something, make sure you do it right." No constitutional safeguards should be ignored in the determination of pretrial detention. While some defendants may seem undesirable, they share the same status as you and I. Until the jury renders a verdict of guilty, they are to be presumed innocent.