

Winter 2011

## A Law of Passion, Not of Principle, Nor Even Purpose: A Call to Repeal or Revise the Adam Walsh Act Amendments to the Bail Reform Act of 1984

Michael R. Handler

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Michael R. Handler, *A Law of Passion, Not of Principle, Nor Even Purpose: A Call to Repeal or Revise the Adam Walsh Act Amendments to the Bail Reform Act of 1984*, 101 J. CRIM. L. & CRIMINOLOGY 279 (2013).  
<https://scholarlycommons.law.northwestern.edu/jclc/vol101/iss1/6>

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## COMMENTS

### **A LAW OF PASSION, NOT OF PRINCIPLE, NOR EVEN PURPOSE: A CALL TO REPEAL OR REVISE THE ADAM WALSH ACT AMENDMENTS TO THE BAIL REFORM ACT OF 1984**

Michael R. Handler\*

*The Bail Reform Act of 1984 lays out the rules and procedures for federal pretrial release and detention. In 2006, as part of the Adam Walsh Child Protection and Safety Act, Congress amended the Bail Reform Act. Before the Adam Walsh Act Amendments (AWA Amendments) were passed, a judicial officer decided whether to release a defendant, whether to impose pretrial release conditions, and what pretrial release conditions to impose on a case-by-case basis. The AWA Amendments, in contrast, impose mandatory pretrial release conditions, including electronic monitoring and curfew, on all defendants charged with certain enumerated sexual offenses against children. Many district courts have found mandatory imposition of pretrial release conditions unconstitutional and refuse to apply the AWA Amendments when setting bail.*

*This Comment argues that Congress must repeal or revise the AWA Amendments to the Bail Reform Act of 1984 because they are unconstitutional under the Excessive Bail and Due Process Clauses, are completely inconsistent with the Bail Reform Act's core principle of individualized judicial determination of bail, and come at a great cost to the defendant at little or no additional benefit to the public. This Comment proposes that the AWA Amendments be revised so that certain pretrial release conditions are imposed based on a rebuttable presumption instead*

---

\* Candidate for Juris Doctor, Northwestern University School of Law, May 2011; B.A., M.A., Emory University, 2006.

of mandatorily, as in, a judge will impose them unless a defendant can rebut their imposition with evidence that the conditions are unnecessary to ensure the public's safety. This proposed revision not only fulfills Congress's original purpose of increased safety in enacting the AWA Amendments, but it is also constitutional and consistent with the rest of the Bail Reform Act.

## I. INTRODUCTION

On July 27, 2006, George W. Bush signed the Adam Walsh Child Protection and Safety Act of 2006 (AWA).<sup>1</sup> Standing next to him was John Walsh, the father of the AWA's namesake.<sup>2</sup> Exactly twenty-five years earlier, Adam Walsh, who was six years old at the time, was abducted and murdered.<sup>3</sup> However, John Walsh did not receive the privilege of standing next to President Bush as he signed the AWA because his son was a victim of the type of crime against children the AWA was intended to protect. Instead, John Walsh was likely given the honor because he was also the host of *America's Most Wanted*, a long-running show on the FOX network devoted exclusively to apprehending extremely dangerous fugitives. In addition to helping catch the criminals that *America's Most Wanted* features on the show, Mr. Walsh and his program have been lauded for their role in helping bring the threat of crime, especially sexual offenses against children, to the forefront of the public's mind.<sup>4</sup>

John Walsh and his television program were instrumental to the passage of the AWA.<sup>5</sup> The success of *America's Most Wanted* and other shows inspired by its success, including NBC's *To Catch a Predator* and CNN's *Nancy Grace*, have helped create a public panic about the threat of

---

<sup>1</sup> Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 43 WEEKLY COMP. PRES. DOC. 1395 (July 27, 2006) (enacting Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. §§ 16901-91 (2006))).

<sup>2</sup> *Id.*

<sup>3</sup> Yolanne Almanzar, *27 Years Later, Case is Closed in Slaying of Abducted Child*, N.Y. TIMES, Dec. 16, 2008, at A18.

<sup>4</sup> See Barbara Whitaker, *'America's Most Wanted' Enlists Public*, N.Y. TIMES, Mar. 14, 2003, at A20 (describing the positive impact *America's Most Wanted* has had on capturing violent criminals and recovering abducted children).

<sup>5</sup> See Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 457-58 (2010) ("The mass media has fanned the flames by using . . . war rhetoric in discussing the crackdown on sex offenders. Early in the second Bush administration, CNN featured a rape counselor who called for an aggressive war on sex offenders. In 2006, John Walsh, Adam Walsh's father said that his show, *America's Most Wanted*, was starting a 'war' on sex offenders, Fox News personalities Sean Hannity, Alan Colmes, and Bill O'Reilly offered their support with such a mission.").

child sex offenders.<sup>6</sup> This panic has created a demand for Congress to enact laws that in many other contexts would be considered draconian.<sup>7</sup> Philip Jenkins explains how, during a panic, “concern over sexual abuse provides a basis for extravagant claims-making by professionals, the media, and assorted interest groups, who argue that the problem is quantitatively and qualitatively far more severe than anyone could reasonably suppose.”<sup>8</sup> Fear mongering, in turn, produces excessive and ill-considered legislative responses, with lawmakers adopting new policies that “may cause harm in areas having nothing to do with the original problem and that divert resources away from measures which might genuinely assist in protecting children.”<sup>9</sup>

Much of the AWA—including the AWA Amendments to the Bail Reform Act of 1984 (BRA)—is exactly the excessive and ill-considered legislative response that Mr. Jenkins warns is characteristic of Congress making laws in response to a panic. In enacting the AWA, the federal government for the first time sought a prominent role in sex offender policy, substantially expanding prior federal efforts to regulate and punish sex offenses.<sup>10</sup> The AWA was formed from a conglomeration of bills that were before Congress at the time and includes many different laws. Scholars and appellate courts have vociferously debated the constitutional and practical merits of many of the AWA’s laws. Such laws include the Sex Offender Registration and Notification Act (SORNA), which requires that a sex offender register in any jurisdiction where he or she resides, works, or is a student,<sup>11</sup> and the Jimmy Ryce Civil Commitment Program, which authorizes the federal government to civilly commit, in a federal

---

<sup>6</sup> *Id.*

<sup>7</sup> See 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch) (“The bottom line here is that sex offenders have run rampant in this country and now Congress and the people are ready to respond with legislation that will curtail the ability of sex offenders to operate freely. It is our hope that programs like NBC Dateline’s ‘To Catch a Predator’ series will no longer have enough material to fill an hour or even a minute. Now, it seems, they can go to any city in this country and catch dozens of predators willing to go on-line to hunt children.”).

<sup>8</sup> PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 7 (1998).

<sup>9</sup> *Id.*

<sup>10</sup> Yung, *supra* note 5, at 451. The first significant federal sex offender restriction legislation was The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, subtit. A, 108 Stat. 1796, 2038–42 (1994) (codified at 42 U.S.C. § 14071 (2006)) (requiring states to implement a sex offender and crimes against children registry).

<sup>11</sup> 42 U.S.C. § 16919 (2006).

facility, any “sexually dangerous” person “in the custody” of the Bureau of Prisons—even after that person has completed his prison sentence.<sup>12</sup>

Commentary on the AWA Amendments to the BRA, however, is conspicuously missing from the literature on the AWA laws, even though the Amendments also raise significant constitutional and practical concerns. Before the AWA Amendments were passed, a judicial officer exclusively decided, on a case-by-case basis, whether to release a defendant, whether to impose pretrial release conditions, and what pretrial release conditions to impose.<sup>13</sup> The AWA Amendments, in contrast, impose mandatory pretrial release conditions, including electronic monitoring and curfew, on all defendants charged with certain enumerated sexual offenses against children.<sup>14</sup>

This Comment argues that Congress must repeal the AWA Amendments or, in the alternative, revise them so defendants can avoid the imposition of these now mandatory release conditions with rebuttal evidence that the conditions are not necessary to ensure the public’s safety. First, the AWA Amendments must be repealed or revised because they are unconstitutional on their face as a violation of the Excessive Bail and Due Process Clauses. Second, the Amendments’ imposition of mandatory pretrial release conditions is inconsistent with one of the core principles of federal pretrial release under the BRA—judicially determined individualized bail. Lastly, the Amendments do considerably more harm than good because costly pretrial release conditions are imposed automatically even when they are unnecessary to ensure the public’s safety.

This Comment proceeds in six parts. Part II provides an overview of federal pretrial release and detention under the BRA, the Supreme Court’s decision in *United States v. Salerno* upholding the BRA’s constitutionality, and the AWA Amendments to the BRA. Part III describes how the federal judiciary has reacted to the AWA Amendments. Part IV argues that the AWA Amendments must be repealed or revised. Part V proposes a revision to the Amendments that fulfills Congress’s original purpose in enacting the Amendment while fixing the problems described in Part IV. Part VI concludes.

---

<sup>12</sup> 18 U.S.C. § 4248(a), (d) (2006). In *United States v. Comstock*, 130 S.Ct. 1949 (2010), the Supreme Court held that § 4248, the federal statute allowing a district court to order the civil commitment of a sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released, was constitutional under the Necessary and Proper Clause. *Id.* at 1967–68.

<sup>13</sup> See *infra* Part II.A.

<sup>14</sup> See *infra* Part II.C.

## II. BACKGROUND

### A. THE BAIL REFORM ACT OF 1984

The history of federal bail legislation begins with the Judiciary Act of 1789, in which Congress mandated that bail be granted to all defendants accused of noncapital crimes.<sup>15</sup> Yet, the use of bail was so inconsistent in the mid-twentieth century that Congress passed the Bail Reform Act of 1966.<sup>16</sup> One commentator notes that “[b]efore 1966, federal courts relied on bail ‘almost exclusively’ to ensure a defendant’s presence at trial.”<sup>17</sup> The Bail Reform Act of 1966 required the federal courts to release any defendant charged with a non-capital crime on his or her recognizance or an unsecured appearance bond unless the court determined that the defendant would fail to appear for trial under such minimal supervision.<sup>18</sup>

The Bail Reform Act of 1984, part of the Comprehensive Crime Control Act of 1984, when initially passed “effected a dramatic overhaul of the nature and function of federal pretrial release proceedings.”<sup>19</sup> Section 3142 changed prior law dramatically by including “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release” as a factor a judicial officer must consider in determining conditions of pretrial release.<sup>20</sup> The change in the law reflected “the deep public concern . . . about the growing problem of crimes committed by persons on release.”<sup>21</sup>

The BRA requires a hearing to determine whether any condition or combination of conditions of release would protect the safety of the community and reasonably ensure the defendant’s appearance.<sup>22</sup> The BRA also places the burden on the government to establish the defendant’s

---

<sup>15</sup> Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3141 (2006)).

<sup>16</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217 (codified at 18 U.S.C. §§ 3146–3152 (Supp. V. 1966)).

<sup>17</sup> Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 17 (2005).

<sup>18</sup> BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, FEDERAL PRETRIAL RELEASE AND DETENTION, 1966, at 5 (1999) (citing H.R. REP. NO. 1541-89 (1966)).

<sup>19</sup> John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventative Detention After United States v. Salerno*, 75 VA. L. REV. 639, 648 (1989); see also *United States v. Chimurenga*, 760 F.2d 400, 403–06 (2d Cir. 1984) (describing how § 3142 of the BRA has dramatically changed prior law).

<sup>20</sup> 18 U.S.C. § 3142(g) (2006).

<sup>21</sup> S. REP. NO. 225-98, at 6–7 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3188–89.

<sup>22</sup> 18 U.S.C. § 3142(f).

dangerousness by “clear and convincing evidence.”<sup>23</sup> In a bail hearing, the BRA aides the government by including a rebuttable presumption in favor of detention based on risk of flight and protecting public safety in two categories of cases: (1) where the defendant has, while on pretrial release in the preceding five years, committed and been convicted of one of the offenses for which a detention hearing may be held; or (2) where the defendant is charged with a major drug offense or certain firearm offenses.<sup>24</sup> Thus, while Congress left “[t]he pretrial fate of other defendants subject to a hearing who pose a specific and unrestrainable danger before trial . . . entirely to courts to be determined on a case-by-case basis,” the establishment of presumptions of dangerousness and flight in the BRA gave Congress *some* control over the pretrial process that otherwise would be left to the courts.<sup>25</sup>

Aside from the BRA’s “presumption of dangerousness” provision, “Congress hesitated to go very far in specifying what characteristics should receive the most weight in the determination of dangerousness.”<sup>26</sup> Instead, Congress put in place extensive procedural mechanisms in an effort to increase the accuracy of judicial determinations of future dangerousness.<sup>27</sup> At a bail hearing, the defendant has the right to counsel, the right to testify, the opportunity to examine and cross-examine witnesses in support of or against future dangerousness, and the right to present information by proffer.<sup>28</sup> The judicial officer must take into account certain statutory factors and find by clear and convincing evidence that no conditions of release are adequate to ensure public safety, giving written findings of fact and reasons for his determination. This decision is also subject to immediate review.<sup>29</sup>

---

<sup>23</sup> *Id.*

<sup>24</sup> § 3142(e).

<sup>25</sup> Howard, *supra* note 19, at 652.

<sup>26</sup> *Id.*

<sup>27</sup> See *United States v. Salerno*, 481 U.S. 739, 751 (1987) (“Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination.”).

<sup>28</sup> 18 U.S.C. § 3142(f).

<sup>29</sup> *Id.* §§ 3142(f), (i), § 3145. The Federal Rules of Appellate Procedure require that a written statement of reasons accompany a release order. FED. R. APP. P. 9(a). In several circuits, a failure to comply with this requirement in contested cases results in a remand. DAVID N. ADAIR, *THE BAIL REFORM ACT 4* (3d ed. 2006) (citing to *United States v. Cantu*, 935 F.2d 950, 951 (8th Cir. 1991); *United States v. Tortora*, 922 F.2d 880, 883 (1st Cir. 1990); *United States v. Hooks*, 811 F.2d 391, 391 (7th Cir. 1987) (per curiam); *United States v. Wheeler*, 795 F.2d 839, 841 (9th Cir. 1986); *United States v. Hurtado*, 779 F.2d 1467, 1480 (11th Cir. 1985); *United States v. Coleman*, 777 F.2d 888, 892 (3d Cir. 1985)).

If the judicial officer finds that detention is not necessary to ensure public safety, the judicial officer may release the defendant on personal recognizance or unsecured appearance bond.<sup>30</sup> If such release “will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community,”<sup>31</sup> the judicial officer must impose “the least restrictive . . . condition, or combination of conditions, that . . . will reasonably assure the appearance of the person as required and the safety of any other person and the community.”<sup>32</sup>

#### B. *UNITED STATES V. SALERNO* AND THE CONSTITUTIONALITY OF THE BRA’S PRETRIAL DETENTION PROVISION

In *United States v. Salerno*, the Supreme Court held that the Bail Reform Act’s pretrial detention provision was constitutional.<sup>33</sup> Although the AWA Amendments to the BRA concern situations where a defendant is released on bail pursuant to § 3142(b), *Salerno*’s rejection of due process and excessive bail challenges to the BRA’s detention provision informs the constitutional analysis of the AWA Amendments’ mandatory pretrial conditions.<sup>34</sup>

First, the Court rejected the argument that the BRA’s authorization of pretrial detention constitutes impermissible punishment before trial, and thus violates substantive due process.<sup>35</sup> The Court explained, “the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.”<sup>36</sup> The Court further explained that “[u]nless 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].’”<sup>37</sup>

The Court concluded that the BRA’s legislative history “clearly indicates that Congress did not formulate the pretrial detention provisions

---

<sup>30</sup> 18 U.S.C. § 3142(a).

<sup>31</sup> § 3142(c).

<sup>32</sup> § 3142(c)(1)(B).

<sup>33</sup> 481 U.S. 739 (1987).

<sup>34</sup> This Comment argues that the AWA Amendments violate procedural due process. *See infra* Part IV.A.2. Although the defendants in *Salerno* challenged the BRA on a substantive due process basis, the Supreme Court held that the BRA is facially valid under the Due Process Clause in part because of the “procedural protections it offers.” *Salerno*, 481 U.S. at 752.

<sup>35</sup> *Id.* at 746–47.

<sup>36</sup> *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)).

<sup>37</sup> *Id.* at 747 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).



as punishment for dangerous individuals,” but “instead perceived pretrial detention as a potential solution to a pressing societal problem”—the legitimate regulatory goal of “preventing danger to the community.”<sup>38</sup> The Court also found that pretrial detention was not excessive in relation to the regulatory goal Congress sought to achieve because the BRA narrowly focuses on a particularly acute problem—crime by arrestees—in which the government’s interests are overwhelming.<sup>39</sup> Further, the BRA satisfied due process scrutiny because the detention provision “operates only on individuals who have been arrested for particular extremely serious offenses,” and carefully delineates the circumstances under which detention will be permitted.<sup>40</sup>

The Court rejected the defendant’s contention that the BRA was a “scattershot attempt to incapacitate those who are merely suspected of these serious crimes”<sup>41</sup> because it guarantees defendants extensive procedural safeguards, including a full-blown adversary hearing where the government is required to convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.<sup>42</sup> In sum, the Court upheld the BRA because of its legitimate and compelling regulatory purpose and the procedural protections it offers.<sup>43</sup>

#### C. THE ADAM WALSH ACT AMENDMENTS TO THE BAIL REFORM ACT

In 2006, as part of the Adam Walsh Child Protection and Safety Act of 2006, Congress enacted “improvements to the bail reform act to address sex crimes and other matters.”<sup>44</sup> The AWA Amendments mandate that in any case involving a minor victim under certain sections of Title 18’s Crime and Criminal Procedure<sup>45</sup> or a failure to register offense under § 2250, “any

---

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 750. The Court in *Salerno* explained that these were the individuals “Congress specifically found . . . are far more likely to be responsible for dangerous acts in the community after arrest.” *Id.*

<sup>40</sup> *Id.* at 749.

<sup>41</sup> *Id.* at 750.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 749–50.

<sup>44</sup> Pub. L. No. 109-248, § 203, 120 Stat. 587, 613 (2006).

<sup>45</sup> The sections mandating mandatory pretrial release conditions pursuant to the Amendment include: §§ 1201 [kidnapping], 1591 [sex trafficking of children or by force, fraud, or coercion], 2241 [aggravated sexual abuse], 2242 [sexual abuse], 2244(a)(1) [abusive sexual contact], 2245 [offenses resulting in death], 2251 [sexual exploitation of children], 2251A [selling or buying of children for sexual exploitation], 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1) [transmission of child pornography], 2252A(a)(2) [receipt of child pornography], 2252A(a)(3) [reproduction of child pornography],

release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified . . . .”<sup>46</sup> Therefore, under the Amendments an individual *charged* with one of the above crimes—which are all sex-offender oriented—must:

- (iv) abide by specified restrictions on personal associations, place of abode, or travel;
- (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
- (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
- (vii) comply with a specified curfew; [and]
- (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon.<sup>47</sup>

Unlike the evidence and legislative findings Congress produced in support of the Bail Reform Act of 1984, the legislative record of the AWA Amendments suggests that Congress neither engaged in substantive debate nor developed supporting congressional reports in enacting the law. The AWA Amendments were added to the bill’s language only seven days prior to the bill’s final passage as part of a Senate floor amendment<sup>48</sup> without any debate.<sup>49</sup> In addition to being absent from the legislative history, the AWA Amendments are also nowhere to be found in President George W. Bush’s signing statement,<sup>50</sup> further suggesting that it was not perceived as a major part of the law when it was enacted.<sup>51</sup> As discussed in Part IV, the AWA

---

2252A(a)(4) [sale or possession of child pornography], 2260 [production of child pornography for importation into the United States], 2421 [transportation of individual for illegal sexual activity], 2422 [coercion or enticement of individual to travel interstate or foreign territory to engage in prostitution], 2423 [transportation of minor to engage in criminal sexual activity], and 2425 [communication of minor under sixteen for purposes of sexual activity].

<sup>46</sup> 18 U.S.C. § 3142(c)(1)(B) (2006).

<sup>47</sup> *Id.*

<sup>48</sup> *See* 152 CONG. REC. S8012 (daily ed. July 20, 2006) (reproducing debate following passage of Sen. Hatch’s amendment in the nature of a substitute that included the mandatory conditions).

<sup>49</sup> In contrast to the AWA Amendments, the other major legislative provisions of the Adam Walsh Act were passed after congressional debate. *See, e.g.*, H.R. REP. NO. 109-218, at 23–24 (2005) (discussing the need for an enhanced sex offender registry program).

<sup>50</sup> Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006, 43 WEEKLY COMP. PRES. DOC. 1395–96 (July 27, 2006).

<sup>51</sup> *See* WILLIAM N. ESKRIDGE, JR. PHILIP FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 315 (2d ed. 2006) (describing how presidential signing statements issued when bills are signed into law have been increasingly designed to provide

Amendments' lack of legislative history severely undermines the argument that there is a compelling interest in carving out a special exception to the BRA's core principle of individualized judicially determined bail and imposing mandatory pretrial release conditions for individuals charged with sexual offenses.

Soon after the AWA Amendments were enacted, federal prosecutors used them to try to impose stricter pretrial release conditions than the judicial officer had determined was necessary after an individualized bail hearing had been held pursuant to § 3142(f). For example, in *United States v. Arzberger*,<sup>52</sup> the day after the judge issued the defendant's pretrial release order, the Government notified the court that certain additional conditions were required under the AWA Amendments and asked the judge to modify the terms of the defendant's release accordingly.<sup>53</sup>

Though the Government responded favorably to the AWA Amendments and used them to try to impose harsher pretrial conditions, the magistrates and district court judges, who were ultimately in charge of setting pretrial release conditions, were generally less receptive. As Part III describes, the district courts have, with few exceptions, refused to modify their pretrial release order pursuant to AWA Amendments on the grounds that they are unconstitutional.

### III. THE DISTRICT COURT SPLIT ON THE CONSTITUTIONALITY OF THE ADAM WALSH ACT AMENDMENTS

The courts are split on whether the AWA Amendments to the BRA are unconstitutional. There is only one published appellate court opinion on this issue;<sup>54</sup> the AWA Amendments' constitutionality has almost exclusively been addressed by magistrate and district court judges.<sup>55</sup> The courts that have decided the AWA Amendments' constitutionality have done so in three different ways: (1) finding them facially unconstitutional, (2) finding them unconstitutional as applied to the defendant, and (3) finding them facially constitutional. The following is a brief review of these three approaches.

---

guidance to administrative actors who will implement the laws and to influence the judicial interpretation of the legislation).

<sup>52</sup> 592 F. Supp. 2d 590 (S.D.N.Y. 2008).

<sup>53</sup> *Id.*

<sup>54</sup> See *United States v. Stephens*, 594 F.3d 1033 (8th Cir. 2010) (holding that the AWA Amendments are facially constitutional). There is also one unpublished Ninth Circuit decision, *United States v. Kennedy*, 327 F. App'x 706, 707 (9th Cir. 2009). See *infra* notes 88–90 and accompanying text for a discussion of *Kennedy*.

<sup>55</sup> Under 28 U.S.C. § 636(a)(2) (2006), magistrates have original jurisdiction over all matters pertaining to pretrial release pursuant to 18 U.S.C. § 3142 (2006).

## A. FACIALLY UNCONSTITUTIONAL

Many district courts faced with applying the AWA Amendments to establish or modify pretrial release conditions for defendants charged with sexual offenses against children have held that the Amendments are facially unconstitutional.<sup>56</sup> This is especially powerful because a judicial finding that a statute is facially unconstitutional renders it inoperative.<sup>57</sup> In *United States v. Crowell*,<sup>58</sup> a judge in the Western District of New York was one of the first to hold that the AWA Amendments were facially unconstitutional.<sup>59</sup> *Crowell* is also important because many district courts that subsequently decided whether the AWA Amendments were facially constitutional referenced the decision, adopting or rejecting its reasoning.<sup>60</sup>

The court in *Crowell* evaluated challenges to the Amendments' constitutionality based on the Eighth Amendment's Excessive Bail Clause, the Due Process Clause, and separation of powers.<sup>61</sup> First, the court cited to *Salerno* for the proposition that the Eighth Amendment requires that pretrial release conditions or detention "not be 'excessive' in light of the perceived evil to be avoided."<sup>62</sup> The court held that although the additional conditions sought to be imposed by the AWA Amendments were not per se violative of the Eighth Amendment's prohibition against excessive bail, the imposition of such conditions regardless of a defendant's personal

---

<sup>56</sup> See *United States v. Stephens*, 699 F. Supp. 960 (N.D. Iowa 2009) (holding that the Amendments are facially unconstitutional under Due Process Clause), *rev'd*, 594 F.3d 1033 (8th Cir. 2010); *United States v. Smedley*, 611 F. Supp. 2d 971 (E.D. Mo. 2009) (same); *United States v. Rueb*, 612 F. Supp. 2d 1068 (D. Neb. 2009) (same); *United States v. Merritt*, 612 F. Supp. 2d 1074 (D. Neb. 2009) (same); *United States v. Torres*, 566 F. Supp. 2d 591 (W.D. Tex. 2008) (same); *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008) (same); *United States v. Vujnovich*, No. 07-20126-01-CM-DJW, 2007 WL 4125901 (D. Kan. Nov. 20, 2007) (holding that the Amendments are facially unconstitutional under the Excessive Bail Clause, Due Process Clause, and separation of powers); *United States v. Crowell*, No. 06-1095, 2006 WL 3541736 (W.D.N.Y. Dec. 7, 2006) (same).

<sup>57</sup> Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 880 (2005). See also *infra* notes 96–103 and accompanying text for expanded discussion of the requirements of making a facial challenge to the AWA Amendments.

<sup>58</sup> *United States v. Crowell*, No. 06-1095, 2006 WL 3541736 (W.D.N.Y. Dec. 7, 2006).

<sup>59</sup> See *United States v. Cossey*, 637 F. Supp. 2d 881, 884 (D. Mont. 2009) (describing *Crowell* as "the first district court opinion to conclude the AWA amendments are unconstitutional"); *United States v. Arzberger*, 592 F. Supp. 2d 590, 595 (S.D.N.Y. 2008) (describing how *Crowell* was the first to consider the constitutionality of the AWA Amendments).

<sup>60</sup> See, e.g., *Vujnovich*, 2007 WL 4125901, at \*2 ("[T]his Court, for the purpose of brevity in this opinion, adopts and incorporates herein, in their entirety, the legal conclusions reached by the *Crowell* court."); *United States v. Gardner*, 523 F. Supp. 2d 1025, 1028 (N.D. Cal. 2007) ("[T]his Court does not find *Crowell* dispositive to the case at bar.").

<sup>61</sup> *Crowell*, 2006 WL 3541736, at \*4.

<sup>62</sup> *Id.* at \*5 (citing to *Salerno*, 481 U.S. at 754).

characteristics, the circumstances of the offense, or consideration of factors demonstrating that those same legitimate objectives can be achieved through less onerous release conditions “will subject a defendant, for whom such conditions are, in the court’s judgment, unnecessary, to excessive bail in violation of the Eighth Amendment.”<sup>63</sup>

Next, the court held that the AWA Amendments violate procedural due process under the Fifth Amendment because mandating certain pretrial release conditions and eliminating a defendant’s right to an independent judicial determination directly restrict judicial discretion, the procedural safeguard the *Salerno* Court cited as saving the BRA from violating procedural due process.<sup>64</sup> The court in *Crowell* also held that the AWA Amendments violate separation of powers because they “unambiguously impose[] upon the federal judiciary a specific rule to be applied in determining the release of a defendant charged with specified offenses, thereby denying the court . . . its judicial authority to set such conditions.”<sup>65</sup>

Many other courts have followed *Crowell*’s lead and similarly held that the AWA Amendments are facially unconstitutional.<sup>66</sup> In *United States v. Torres*,<sup>67</sup> a judge from the Western District of Texas held that the AWA Amendments’ mandatory pretrial release conditions violated the Due Process Clause because “procedural due process as set out by the United States Supreme Court in *Mathews v. Eldridge*<sup>68</sup> and *Salerno*” demands more than mandating that “every arrestee be treated the same,” stripped away of any independent judicial evaluation.<sup>69</sup> Unlike *Crowell*, however, the court in *Torres* did not find that the AWA Amendments violated the Eighth Amendment’s Excessive Bail Clause on its face because “there are circumstances when a court could reasonably find that the Adam Walsh Amendments are valid under the Eighth Amendment.”<sup>70</sup>

---

<sup>63</sup> *Id.* at \*7.

<sup>64</sup> *Id.* at \*9 (citing to *Salerno*, 481 U.S. at 751).

<sup>65</sup> *Id.* at 11 (citing to *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

<sup>66</sup> *See supra* note 56.

<sup>67</sup> 566 F. Supp. 2d 591, 595 (W.D. Tex. 2008).

<sup>68</sup> 424 U.S. 319 (1976). *See infra* note 122 and accompanying text for full discussion of *Mathews v. Eldridge* and its procedural due process analysis.

<sup>69</sup> *Torres*, 566 F. Supp. 2d at 596.

<sup>70</sup> *Id.* at 600. Like in *Torres*, in *United States v. Arzberger* the district judge in the Southern District of New York also held that the AWA Amendments facially violated the Due Process Clause but did not facially violate the Excessive Bail Clause. *See* 592 F. Supp. 2d at 604; *see also* *United States v. Smedley*, 611 F. Supp. 2d 971, 975–77 (E.D. Mo. 2009) (holding that the AWA Amendments were facially unconstitutional under the Due Process Clause but not resolving whether they were unconstitutional under the Excessive Bail Clause or separation of powers grounds).

## B. UNCONSTITUTIONAL AS APPLIED

Some courts have declined to rule on whether the AWA Amendments are facially unconstitutional, preferring to rule narrowly on an as-applied basis. In *United States v. Vujnovich*, the magistrate judge granted the defendant's motion to remove the pretrial condition of electronic monitoring imposed by the AWA Amendments, and "adopt[ed] and incorporate[d] . . . the legal conclusions reached by the *Crowell* court" in holding that the Amendment was unconstitutional.<sup>71</sup> On appeal, the district judge declined to decide the AWA Amendments' facial constitutionality and instead held that the mandatory imposition of electronic monitoring based solely on the crimes charged violated procedural due process as applied to the defendant in the case.<sup>72</sup>

Similarly, a judge in the Western District of Washington in *United States v. Kennedy* found that the AWA Amendments "under facts of this case" were unconstitutional as a violation of the Excessive Bail Clause and Due Process Clause.<sup>73</sup> In *Kennedy*, like most other cases where the constitutionality of the Amendments was raised, the Government sought to have the court modify the conditions of the defendant's release.<sup>74</sup> Although the court adopted the reasoning of the court in *Crowell*, which held that the AWA Amendments were facially unconstitutional, it instead found that the AWA Amendments were unconstitutional "as applied to the Defendant."<sup>75</sup> Moreover, the court did not even address the requirements of a facial challenge. As discussed below, the Ninth Circuit ultimately reversed the court's decision.<sup>76</sup>

In addition, in *United States v. Polouizzi*, United States District Judge Jack Weinstein of the Eastern District of New York found that AWA's requirement of electronic monitoring was "unconstitutional as applied in the present case" because it "violates the constitutional prohibition on excessive bail and guarantee of procedural due process as applied to this defendant at the present time."<sup>77</sup> Judge Weinstein declined to decide whether the Adam

---

<sup>71</sup> No. 07-20126, 2007 WL 4125901, at \*2 (D. Kan. Nov. 20, 2007).

<sup>72</sup> *United State v. Vujnovich*, No. 07-20126, 2008 WL 687203, at \*3 (D. Kan. Mar. 11, 2008).

<sup>73</sup> 593 F. Supp. 2d 1221, 1227 (W.D. Wash. 2008), *rev'd*, 327 F. App'x 706 (9th Cir. 2009).

<sup>74</sup> *Id.* at 1223. In *Kennedy*, the Government sought to add the following conditions pursuant to the Adam Walsh Act Amendments: (1) electronic monitoring; (2) restrictions on place of abode; and (3) a specified curfew. *Id.*

<sup>75</sup> *Id.* at 1233 (emphasis added).

<sup>76</sup> See *infra* notes 88–90 and accompanying text for a discussion of *United States v. Kennedy*, 327 F. App'x 706 (9th Cir. 2009).

<sup>77</sup> 697 F. Supp. 2d 381, 395 (E.D.N.Y. 2010).

Walsh Act was facially constitutional, but suggested that it was because “[t]here will be situations where certain sex offenders require that Adam Walsh’s most stringent conditions be imposed.”<sup>78</sup>

The Eighth Circuit, one of two appellate courts to address the constitutionality of the AWA Amendments to the BRA, overturned a decision from the Northern District of Iowa that held the AWA’s imposition of mandatory pretrial release conditions unconstitutional because the defendant could not “establish there are no child pornography defendants for whom a curfew or electronic monitoring is appropriate.”<sup>79</sup> Like the other courts, the Eighth Circuit did not believe that *Salerno*’s “no circumstances” for facial unconstitutionality was satisfied.<sup>80</sup>

### C. CONSTITUTIONAL AS APPLIED

Only a few courts have found that the AWA Amendments are constitutional as applied. In *United States v. Gardner*, a judge in the Northern District of California upheld the constitutionality of the AWA Amendments as applied to the defendant, rejecting his argument that the Amendments violated the Excessive Bail Clause, the Due Process Clause, and separation of powers.<sup>81</sup>

First, the court held that imposing electronic monitoring pursuant to the Amendments was not a violation of the Excessive Bail Clause as applied to the defendant because the conditions legislatively imposed were not excessive in relation to the government’s interest in “ensuring that children have additional protection from sexual attacks and other violent crimes” and “obtaining an additional safeguard against the risk of post-arrest criminal activity.”<sup>82</sup> The court reasoned that electronic monitoring is “slightly more intrusive” than the conditions the judicial officer found necessary—curfew and travel restrictions.<sup>83</sup> But, the court concluded electronic monitoring did not “change the substantive restrictions on [the defendant’s] liberty—she is to comply with the curfew irrespective of how it is monitored.”<sup>84</sup>

---

<sup>78</sup> *Id.*; see also A.G. Sulzberger, *Defiant Judge Takes On Child Pornography Law*, N.Y. TIMES, May 21, 2010, at A1 (describing Judge Weinstein’s rulings in the *Polouizzi* case).

<sup>79</sup> *United States v. Stephens*, 594 F.3d 1033, 1038 (8th Cir. 2010), *rev’g* 699 F. Supp. 960 (N.D. Iowa 2009).

<sup>80</sup> *Id.*

<sup>81</sup> 523 F. Supp. 2d 1025 (N.D. Cal. 2007).

<sup>82</sup> *Id.* at 1029, 1031 (internal quote omitted).

<sup>83</sup> *Id.* at 1030.

<sup>84</sup> *Id.* The court in *Gardner* also addressed and rejected the defendant’s argument that the AWA Amendments violate the separation of powers, explaining that “[t]here is no final

The court also addressed the defendant's procedural due process argument, admitting that while the lack of any opportunity to be heard on the enumerated conditions imposed by the AWA Amendments raises a closer question under the Due Process Clause than under the Excessive Bail Clause,<sup>85</sup> a Due Process Clause challenge as applied to the current facts could not be sustained.<sup>86</sup> The court reasoned that "even assuming *arguendo* that some conditions of release would impair liberty interests cognizable under the Fifth Amendment, here what is at issue is the singular condition of electronic monitoring to enforce an already imposed curfew," an "incremental restriction" that alone does not implicate a protected liberty interest within the meaning of the Due Process Clause.<sup>87</sup>

Likewise, the Ninth Circuit in an unpublished memorandum decision in *United States v. Kennedy*<sup>88</sup> held that the AWA Amendments were constitutional because they could be construed as "requir[ing] the district court to exercise its discretion, to the extent practicable, in applying the mandatory release conditions."<sup>89</sup> Thus, in applying the pretrial release conditions mandatorily imposed by the AWA Amendments to individuals charged with sexual offenses against children, the court "consider[ed] all relevant factors, including the defendant's job related needs," and explained how a lower court could set a procedure by "which defendant may travel by air for work, with prior notice and approval."<sup>90</sup> Similarly, in *United States v. Cossey*,<sup>91</sup> a judge in the District of Montana upheld the AWA Amendments' constitutionality because they could be construed "as allowing a judicial officer broad discretion to fashion conditions of pretrial release on an individualized basis within the framework the AWA amendments provide."<sup>92</sup> Both the Ninth Circuit in *Kennedy* and the District of Montana in *Cossey* justified their unique approach to applying the AWA Amendments by citing to the principle of statutory construction that a

---

judgment in [the defendant's] case" and that the "[b]ail process is not part of the adjudication of the merits of the case but an ancillary proceeding." *Id.* at 1035.

<sup>85</sup> *Id.* at 1032 ("While the Court is troubled by automaticity of the Adam Walsh Act in imposing certain release conditions without a judicial determination, the facts of the instant case do not support [the defendant's] procedural due process claim.").

<sup>86</sup> *Id.* at 1031.

<sup>87</sup> *Id.* at 1032.

<sup>88</sup> 327 F. App'x 706 (9th Cir. 2009).

<sup>89</sup> *Id.* at 707.

<sup>90</sup> *Id.* at 708.

<sup>91</sup> 637 F. Supp. 2d 881 (D. Mont. 2009).

<sup>92</sup> *Id.* at 891.



statute is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality.<sup>93</sup>

The conflict among the courts regarding the AWA Amendments' constitutionality underscores the pressing need for the issue to be resolved either judicially by a Supreme Court decision or congressionally by repeal or revision of the Amendments. Since there are no published circuit court opinions on this issue, let alone a circuit split, Supreme Court review is extremely unlikely any time soon.<sup>94</sup> Accordingly, Part IV argues that Congress should repeal or revise the AWA Amendments to the BRA, and Part V proposes revisions to the Amendments.

#### IV. CONGRESS MUST REPEAL OR REVISE THE ADAM WALSH ACT AMENDMENTS TO THE BRA

First and foremost, the AWA Amendments are facially unconstitutional as a violation of the Excessive Bail and Due Process Clauses.<sup>95</sup> As discussed in Part III, many district courts have taken this position. In addition to the AWA Amendments' unconstitutionality, this Comment also argues that the Amendments mandatory imposition of pretrial release conditions on certain enumerated defendants is inconsistent with the BRA's well-established regulatory scheme of federal pretrial release and detention, and yields little additional benefit to public safety at a high cost to defendants.

##### A. THE ADAM WALSH AMENDMENTS TO THE BAIL REFORM ACT ARE FACIALLY UNCONSTITUTIONAL

A threshold question in any case challenging the constitutionality of legislation is whether the attack is directed to the validity of the statute on its face or only as applied to the particular circumstances of the litigant

---

<sup>93</sup> *Id.* at 888 (citing *Jones v. United States*, 526 U.S. 227, 239 (1999)); *see also Kennedy*, 327 F. App'x at 707 (“In light of the government’s concessions and in view of the established principle that a statute should be read to avoid serious constitutional issues, we construe the Walsh Act to require the district court to exercise its discretion, to the extent practicable, in applying the mandatory release conditions.”).

<sup>94</sup> *See* SUP. CT. R. 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons,” which include “a United States court of appeals [entering] a decision in conflict with the decision of another United States court of appeals on the same important matter.”).

<sup>95</sup> This Comment agrees with Judge Francis’s opinion in *Arzberger* that the AWA Amendments do not violate separation of powers because “the Supreme Court has already determined that Congress may impinge on the traditionally judicial function of bail setting by declaring that defendants who meet certain criteria will not be entitled to bail at all” and “the role of the judiciary in setting bail conditions, while primary, is not exclusive.” *United States v. Arzberger*, 592 F. Supp. 2d 590, 607 (S.D.N.Y. 2008).

bringing the challenge.<sup>96</sup> If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application.<sup>97</sup> When a court holds a statute unconstitutional as applied to particular facts, however, the state may enforce the statute in circumstances involving different facts.<sup>98</sup>

The Supreme Court generally disfavors facial challenges.<sup>99</sup> In *Salerno*, the Court explained 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 under which the Act would be valid.”<sup>100</sup> On the other hand, in *Chicago v. Morales* the Court suggested that *Salerno*’s “test” was merely dicta and had never been a decisive factor in any Supreme Court case.<sup>101</sup> Other recent cases also suggest that the *Salerno* rule is in retreat.<sup>102</sup> Despite these developments, as one commentator has pointed out, “*Salerno* still hangs on as official doctrine” because “[a]s of yet, a majority of the Court has not repudiated or explicitly limited *Salerno*” and “[l]ower courts continue to apply *Salerno*.”<sup>103</sup> Accordingly, this Comment assumes *Salerno* controls a facial challenge analysis.

### *1. The Adam Walsh Act Amendments are Facially Unconstitutional Under the Eighth Amendment’s Excessive Bail Clause*

The imposition of mandatory pretrial release conditions is unconstitutional as a violation of the Eighth Amendment’s Excessive Bail Clause. The Eighth Amendment addresses pretrial release by providing that “[e]xcessive bail shall not be required.”<sup>104</sup> Although the text of the Eighth Amendment appears to address the amount of bail fixed (i.e. a monetary constraint), courts agree that it controls pretrial release.<sup>105</sup> As noted by the court in *United States v. Gardner*, “[i]f this most extreme condition—

---

<sup>96</sup> Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236. (1994).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> 481 U.S. 739, 745 (1987).

<sup>101</sup> 527 U.S. 41, 55 n.22 (1999).

<sup>102</sup> *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1336 n.16 (2005) (“The *Salerno* rule, of late, is in retreat. In a number of recent cases, the Court has disregarded the *Salerno* rule and invalidated challenged statutes under a different, more lenient rule, without as much as a nod towards *Salerno*.”).

<sup>103</sup> *See id.*

<sup>104</sup> U.S. CONST. amend. VIII.

<sup>105</sup> *United States v. Gardner*, 523 F. Supp. 2d 1025, 1029 (N.D. Cal. 2007).

detention—is amenable to scrutiny under the Excessive Bail Clause of the Eighth Amendment, it would seem that conditions of release, particularly those that approach confinement in function (e.g., home detention enforced by electronic monitoring), should be subject to scrutiny as well.”<sup>106</sup> Moreover, in *Salerno*, the Supreme Court explained that “[t]he only arguable substantive limitation of the Bail Clause is that the Government’s *proposed conditions of release* or detention not be ‘excessive’ in light of the perceived evil,” a clear indication that the Excessive Bail Clause governs pretrial release.<sup>107</sup>

*Salerno* also suggests that the Excessive Bail Clause requires a judicial officer to exercise his discretion in setting pretrial release conditions.<sup>108</sup> The Court in *Salerno* explained that the Excessive Bail Clause requires that “the Government’s *proposed conditions of release* or detention not be ‘excessive’ in light of the perceived evil.”<sup>109</sup> According to the Court, “to determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response.”<sup>110</sup> Thus, the Court concluded that “when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more.”<sup>111</sup> Therefore, the BRA’s pretrial detention provision was not facially excessive because it fell within a “carefully limited exception” of “arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel.”<sup>112</sup>

Accordingly, under *Salerno* we must compare the government’s general interest in protecting the public with its “response” to that interest—the AWA Amendments’ mandatory imposition on the defendant accused with sexual offenses against children of the following pretrial release conditions: (1) refraining from contact with minors absent the direct supervision of a responsible adult; (2) refraining from contact with the alleged victims, witnesses, or family of the victims or witnesses;

---

<sup>106</sup> *Id.*

<sup>107</sup> *United States v. Salerno*, 481 U.S. 739, 754 (1987) (emphasis added).

<sup>108</sup> *Id.* at 751–53; *see also* *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (holding that “the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant,” and that “[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”).

<sup>109</sup> *Salerno*, 481 U.S. at 754 (emphasis added).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 754 (citing *Stack*, 342 U.S. at 5).

<sup>112</sup> *Salerno*, 481 U.S. at 755.

(3) participating in a home confinement program and abiding by all requirements of the program, including electronic monitoring or other location verification system, the cost of which each defendant will be required to pay, either in whole or in part; and (4) submitting to a curfew restricting each defendant to his residence.<sup>113</sup>

Even assuming *arguendo* that the pretrial release conditions advance the public's valid interest in protecting children from sexual abuse and exploitation, the Amendments still subject a defendant to excessive bail in violation of the Eighth Amendment. Imposition of the AWA Amendments' mandatory pretrial release conditions on all defendants charged with certain crimes, regardless of personal characteristics, circumstances of the offense, or consideration of factors demonstrating that those same legitimate objectives cannot be achieved with less onerous release conditions, will inevitably subject a defendant to pretrial release conditions that are excessive.<sup>114</sup>

Moreover, Congress did not articulate any interest in making these pretrial conditions mandatory. As discussed above, the AWA Amendments to the BRA were added to the language of the AWA only seven days prior to the bill's final passage, without substantive debate or supporting congressional reports.<sup>115</sup> Unlike the AWA's other provisions,<sup>116</sup> there are no legislative findings explaining Congress's interest in having *mandatory* pretrial release conditions.<sup>117</sup> In fact, some of the courts that have rejected the Excessive Bail Clause argument for holding the AWA Amendments unconstitutional have found that the general interest of "protecting the safety of children" is sufficient to justify the AWA Amendments' pretrial release conditions, but have not separately considered whether the interest justifies the fact that they are mandatorily imposed.<sup>118</sup> Whereas the AWA Amendments' general interest in protecting children from sex offenders

---

<sup>113</sup> 18 U.S.C. § 3142(c)(1)(B) (2006).

<sup>114</sup> *United States v. Crowell*, No. 06-1095, 2006 WL 3541736, at \*7 (W.D.N.Y. Dec. 7, 2006).

<sup>115</sup> *See* 152 CONG. REC. S8012 (daily ed. July 20, 2006) (debate following passage of Sen. Hatch's amendment in the nature of a substitute that included the mandatory conditions).

<sup>116</sup> *See supra* note 48.

<sup>117</sup> *Id.*

<sup>118</sup> *See, e.g., United States v. Torres*, 566 F. Supp. 2d 591, 600 (W.D. Tex. 2008) ("[The defendant] is correct insofar as he points out that Congress did not engage in substantive debate nor develop supporting congressional reports with regard to the Adam Walsh Amendments at issue here. However, there are legislative findings pertaining to the Adam Walsh Act itself. The Act states that the Government's interest in the legislation is to provide additional protection to children 'from sexual attacks and other violent crimes.'" (citation omitted).

might suffice if the conditions were based on individual circumstances, it is insufficient in light of the much greater burden mandatory pretrial release conditions impose on defendants.

Some have argued that the AWA Amendments cannot be facially unconstitutional under the Excessive Bail Clause because they fail to meet *Salerno's* “no circumstances” standard for facially unconstitutional legislation,<sup>119</sup> since there are in fact some circumstances when a court would determine that these conditions of release are not excessive in light of the perceived evil an individual poses based on his individual circumstances and characteristics.<sup>120</sup> Yet, even if the “some circumstances” requirement for a facial challenge forces courts to rule on the AWA Amendments’ constitutionality on an “as applied” basis, this will essentially render the mandatory requirement moot anyway. The AWA Amendments will be toothless when a judge determines after an individualized hearing that the mandatory conditions imposed on the defendant are excessive and, therefore, unconstitutional as applied.

## *2. The Adam Walsh Act Amendments are Facially Invalid Under the Due Process Clause*

The AWA Amendments to the Bail Reform Act of 1984 are also facially unconstitutional as a violation of procedural due process under the Fifth Amendment, which provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>121</sup> Under *Mathews v. Eldridge*, procedural due process requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>122</sup>

Each of the AWA Amendments’ mandatory pretrial release conditions infringe upon a significant private interest. Electronic monitoring,

---

<sup>119</sup> 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”). See also *supra* notes 96–103 and accompanying text for discussion on facial challenge requirements.

<sup>120</sup> See, e.g., *United States v. Arzberger*, 592 F. Supp. 2d 590, 594 (S.D.N.Y. 2008) (rejecting Excessive Bail Clause facial challenge to the AWA Amendments because there are circumstances when a court could reasonably find the Amendments valid); *Torres*, 566 F. Supp. 2d at 600 (same).

<sup>121</sup> U.S. CONST. amend. V.

<sup>122</sup> 424 U.S. 319, 334 (1976).

mandatory curfew, and restrictions on personal associations, place of abode, or travel deprive an individual of his right of “freedom of movement among locations” and the right “to remain in a public place,” which are fundamental to our sense of personal liberty “protected by the Constitution.”<sup>123</sup>

The AWA Amendments’ mandatory condition that a defendant charged with one or more of the enumerated offenses avoid all contact with a potential witness who *may* testify implicates the First Amendment right of association. The Supreme Court in *NAACP v. Claiborne Hardware Co.* declared that “one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.”<sup>124</sup> The Supreme Court has held that to be cognizable, the interference with associational rights must be “direct and substantial” or “significant.”<sup>125</sup> The AWA Amendments surely meet this requirement, as a person accused of certain crimes is categorically prohibited from any contact with a class of individuals.<sup>126</sup>

Also, the AWA Amendments’ mandatory requirement that an individual refrain from possessing a firearm, destructive device, or other dangerous weapon infringes on an individual’s Second Amendment right to bear arms as established in *District of Columbia v. Heller*.<sup>127</sup> Although the Court in *Heller* indicated that this privilege may be withdrawn from some groups of persons such as convicted felons, there is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm.<sup>128</sup>

The AWA Amendments’ mandatory pretrial release conditions pose a high risk of erroneously depriving individuals of their private interests<sup>129</sup> because there is no individualized judicial determination of whether their imposition is necessary to ensure the public’s safety based upon the arrestee’s particular circumstances.<sup>130</sup> Consequently, “there is no means of

---

<sup>123</sup> *Torres*, 566 F. Supp. 2d at 597 (citing *Williams v. Fears*, 179 U.S. 270, 274 (1900)).

<sup>124</sup> 458 U.S. 886, 933 (1982).

<sup>125</sup> *Lyng v. Int’l Union*, 485 U.S. 360, 366, 367 & n.5 (1988) (citation omitted).

<sup>126</sup> *United States v. Arzberger*, 592 F. Supp. 2d 590, 603–04 (S.D.N.Y. 2008).

<sup>127</sup> 128 S. Ct. 2783 (2008).

<sup>128</sup> *Id.* at 2816–17.

<sup>129</sup> *See Arzberger*, 592 F. Supp. 2d at 603–04 (“[T]here is no indication of what the overall ‘error rate’ might be with respect to defendants generally, that is, how many defendants upon whom the Amendments automatically impose a curfew would be relieved of that condition if their specific circumstances were considered. But especially in the absence of any findings by Congress as to the efficacy of a curfew requirement, it cannot be assumed that courts would generally require a curfew for defendants charged with child pornography offenses if such a condition were discretionary rather than mandatory.”).

<sup>130</sup> *United States v. Torres*, 566 F. Supp. 2d 591, 598 (W.D. Tex. 2008).

knowing whether the deprivation is erroneous or warranted.”<sup>131</sup> Imposing certain pretrial conditions based merely on an arrestee’s status as one allegedly involved in a certain crime will lead to situations where the defendant is burdened with conditions that a judge would have found unnecessary and inappropriate.<sup>132</sup>

Procedural safeguards in imposing the AWA Amendments’ pretrial release conditions would alleviate the risk of erroneous deprivation because a judicial officer would be able to ensure that conditions are appropriate in light of the arrestee’s individual circumstances. In fact, the Supreme Court in *Salerno* found that the BRA’s procedural safeguards under § 3142(f),<sup>133</sup> including judicial evaluation of an individual’s circumstances at a hearing, “further[ed] the accuracy” of the determination of defendant’s future dangerousness, and, ultimately, whether pretrial detention or conditional pretrial release was appropriate.<sup>134</sup> Likewise, limiting the imposition of the AWA Amendments’ pretrial conditions to situations where they are found to be appropriate after a § 3142(f) hearing would similarly “further the accuracy” of the defendant’s pretrial release order.

Lastly, affording a defendant the procedural protections provided to him under the BRA—namely, the opportunity to present evidence at a bail hearing as to his individual characteristics and the particular circumstances of his offense—would not impede or burden the government’s interest in applying the pretrial conditions prescribed by the AWA Amendments.<sup>135</sup> For one, the Amendments’ pretrial conditions could still be imposed, but only when a judicial officer deems them appropriate. Also, the additional procedural protections would reduce the risk of erroneous deprivation at little cost; proceedings are already conducted to determine whether a defendant should be detained or released on bail, the amount of bail, and the need for conditions of release other than those required by the AWA Amendments.<sup>136</sup> Accordingly, the additional burden of requiring a judicial officer to make an individualized determination as to whether the AWA Amendments’ now mandatory pretrial conditions are necessary to ensure the public’s safety would be minimal.

The Court’s discussion of procedural due process in *Salerno* further supports the AWA Amendments’ facial unconstitutionality. Unlike the

---

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Section 3142(f) also provides a defendant with the right to counsel, the ability to testify on one’s own behalf, the ability to present information by proffer or otherwise, and the right to cross-examine witnesses who appear at the hearing.

<sup>134</sup> 481 U.S. 739, 751 (1987).

<sup>135</sup> 18 U.S.C. § 3142(g) (2006).

<sup>136</sup> § 3142(f).

facial test for the Excessive Bail Clause, which looks at the substantive consequence of the Amendments, whether bail will be excessive in light of the perceived evil,<sup>137</sup> in *Salerno* the Court explained it would sustain a facial challenge to BRA's detention provision if the procedures were "adequate to authorize the pretrial detention of at least some [persons] charged with crimes whether or not they may be insufficient in some particular circumstances."<sup>138</sup> The Court held that the BRA's "extensive safeguards suffice to repel a facial challenge" because the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of the future dangerousness determination.<sup>139</sup>

There are absolutely no procedural safeguards when applying the AWA Amendments' pretrial release conditions to individuals charged with the applicable offenses. In fact, the *raison d' être* of *mandatory* pretrial release conditions is to ensure that they are imposed when a judge would otherwise think they are unnecessary based on the individual defendant's circumstances. Some might argue that the Court's procedural due process analysis in *Salerno* does not control the AWA Amendments because the pretrial release conditions at issue are inapposite to detention without bail. While it is true that a defendant has significantly more at stake in the context of detention than conditions limiting an individual's pretrial release liberty, there is no hierarchy of constitutional rights.<sup>140</sup>

Some might also argue that the Amendments are not facially violative of the Due Process Clause because there will be some situations where the imposition of the mandatory pretrial release conditions would not be unconstitutional.<sup>141</sup> Yet, while this argument has some merit in the context of the Excessive Bail Clause, it fails in the context of due process because *Mathews v. Eldridge* requires that the *procedures* themselves be adequate.

---

<sup>137</sup> See *supra* notes 104–120 and accompanying text for discussion of facial challenge to Excessive Bail Clause.

<sup>138</sup> United States v. Salerno, 481 U.S. 739, 751 (1987) (quoting Schall v. Martin, 467 U.S. 253, 264 (1984)).

<sup>139</sup> *Id.* at 752.

<sup>140</sup> See *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

<sup>141</sup> See, e.g., United States v. Gardner, 523 F. Supp. 2d 1025, 1032–33 (N.D. Cal. 2007) (arguing that the imposition of electronic monitoring does not violate procedural due process in part because it "represents only a minor change in [the defendant's] current regimen of release conditions").



3. *Is There an Alternative Construction of the Adam Walsh Act Amendments to Avoid Constitutional Doubt?*

Under the constitutional avoidance doctrine of statutory interpretation, judges construe a statute to avoid raising doubts of its constitutionality.<sup>142</sup> Conceding that the dictates of the Due Process and Excessive Bail Clauses require an individualized assessment in determining appropriate pretrial release conditions, some courts contend that the AWA Amendments can be interpreted consistently with this requirement so long as judicial officers *apply* the mandatory pretrial release conditions based on their individualized determination of all relevant factors, including job-related needs.<sup>143</sup> For example, all defendants charged under the AWA Amendments are subject to a curfew, but one defendant may have a later curfew than another because he gets off of work at a later time.<sup>144</sup>

While it is true that the AWA Amendments “confer[] upon the [district judge] a great deal of discretion with respect to the implementation of the [release] conditions that are required by the [AWA Amendments],”<sup>145</sup> the dictates of procedural due process as set out in *Mathews v. Eldridge* require individualized determination of appropriate conditions, not just the scope of the condition. Even assuming that a judge frames the conditions in a manner most favorable to the defendant, their imposition still impedes his significant interest in liberty. This argument is bolstered by the fact that neither of the two decisions to take the “constitutional avoidance” approach described in Parts III and IV<sup>146</sup>—*Cossey* and *Kennedy*—applied the *Mathews* procedural due process test.<sup>147</sup>

---

<sup>142</sup> See ESKRIDGE ET AL., *supra* note 50, at 361; see also *Ashwanter v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

<sup>143</sup> See cases cited *supra* notes 88–93 and accompanying text.

<sup>144</sup> See, e.g., *United States v. Cossey*, 637 F. Supp. 2d 881, 890–91 (D. Mont. 2009) (describing how AWA Amendments were not imposed as a “blanket prescription” because the magistrate “fashion[ed] an appropriate condition of electronic monitoring that would enable [the defendant] to continue his employment”).

<sup>145</sup> *United States v. Kennedy*, 327 F. App’x 706, 707 (9th Cir. 2009).

<sup>146</sup> See *supra* notes 88–93 and Part IV.A.3.

<sup>147</sup> See *United States v. Stephens*, No. 09-3037, 2009 WL 3823964, at \*9 n.2 (N.D. Iowa 2009) (holding that the AWA Amendments constituted facial violation of due process and rejecting the reasoning and decision in *United States v. Cossey*, 637 F. Supp. 2d 881 (D. Mont. 2009) and *United States v. Kennedy*, 327 F. App’x 706, 707 (9th Cir. 2009) because “neither contain any *Mathews* analysis”).

B. THE ADAM WALSH ACT AMENDMENTS ARE INCONSISTENT WITH THE BRA'S INDIVIDUALIZED BAIL FRAMEWORK

Although the AWA Amendments' unconstitutionality is as good of a reason as any for their repeal or revision, and the district courts have primarily justified their refusal to apply the Amendments' mandatory imposition of pretrial release conditions on constitutional grounds, there is also a normative legal justification. The AWA Amendments' imposition of mandatory pretrial release conditions is inconsistent with the central principle of the BRA's regulatory scheme—individualized bail based on a judicial determination.

When Congress enacted the BRA, one of its goals was to “provid[e] for flexibility in setting conditions of release appropriate to the characteristics of individual defendants.”<sup>148</sup> Congress further observed that

[m]any of the changes in the bail reform act [of 1984] . . . reflect the committee's determination that federal bail law must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.<sup>149</sup>

One possible argument is that the whole act rule of statutory interpretation mandates that judges interpret the Amendments so that they are consistent with the BRA's procedural scheme of individualized bail based on judicial hearing. Under the whole act rule, a statute is interpreted with the presumption in mind that “Congress uses terms consistently, intends that each provision add something to the statutory scheme, and does not want one provision to be applied in ways that undercut other provisions.”<sup>150</sup>

Here, however, there is no ambiguity in the text of the AWA Amendments from which one can reasonably construe them so that, consistent with the BRA's regulatory scheme, the conditions of pretrial release are decided by a judicial officer based on individual characteristics.<sup>151</sup> All courts that have issued reported decisions addressing

---

<sup>148</sup> S. REP. NO. 225-98, at 26 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3187–88 (1984).

<sup>149</sup> *Id.*

<sup>150</sup> ESKRIDGE ET AL., *supra* note 51, at 271.

<sup>151</sup> The whole act rule is a canon of statutory construction that is used to interpret ambiguous statutes. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs, Ltd.*, 484 U.S. 365, 371 (1988) (describing statutory construction as a “holistic endeavor” and noting that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law”) (citation omitted).

the AWA Amendments' constitutionality agree with the court in *Crowell* that "[t]he plain language of the Adam Walsh Amendments establishes that Congress has attempted to mandate the imposition by the court of certain pretrial release conditions for those defendants charged with certain crimes."<sup>152</sup> Thus, considering that congressional intent is clear based on the text of the AWA Amendments, anything but interpreting the statute to mandate that the court impose the pretrial release conditions prescribed by the Amendments would be the equivalent of the judiciary rewriting the statute.

Instead of judicial application of the whole act rule, Congress should aspire to the doctrine's normative goal of a consistent statutory scheme because "[a] polity whose law knits together into a seamless fabric is one whose law enjoys greater authority than a polity whose statutory law appears largely random."<sup>153</sup> As Ronald Dworkin explains in *Law's Empire*, "[i]nternally compromised statutes cannot be seen as flowing from any single coherent scheme of principle; on the contrary, they serve the incompatible aim of a rulebook community, which is to compromise convictions along lines of power."<sup>154</sup> Therefore, Congress should revise the Amendments so that, consistent with the rest of the BRA's principled approach to bail, the prescribed pretrial conditions are imposed only if found appropriate to the individual's circumstances after a judicial hearing.

#### C. THE ADAM WALSH ACT AMENDMENTS ARE CHARACTERIZED BY HIGH COSTS AND LOW BENEFITS

The AWA Amendments' mandatory pretrial release conditions are not only unconstitutional and inconsistent with the BRA's regulatory scheme of judicially determined bail, but also come at a great cost to defendants while yielding marginal additional safety to the public. Since there were no legislative findings behind Congress's adding and passing the Amendments to the BRA as part of the Adam Walsh Act, we can only speculate as to why Congress thought mandatory pretrial release conditions were necessary.<sup>155</sup>

It is clear that electronic monitoring and the other conditions in the BRA that are made mandatory by the Amendments are intended to protect the public from the defendant. Yet, as courts have pointed out, "[p]roceedings are already conducted to determine whether a defendant

---

<sup>152</sup> *United States v. Crowell*, No. 06-1095, 2006 WL 3541736, at \*4 (W.D.N.Y. Dec. 7, 2006).

<sup>153</sup> RONALD DWORKIN, *LAW'S EMPIRE* 214 (1986).

<sup>154</sup> *Id.*

<sup>155</sup> *See supra* note 49 and accompanying text.

should be detained or released on bail, the amount of bail, and the need for conditions of release other than those required by the Amendment . . . .”<sup>156</sup> Thus, by making the pretrial release conditions mandatory, Congress is in effect second-guessing the judicial officer’s judgment. Separation of powers aside, this is troubling because Congress is doing so via a blanket rule that bases pretrial release conditions exclusively on the offense the defendant is charged with and, unlike the rest of the BRA’s regulatory bail scheme, does not take into consideration the individual’s circumstances.

Even assuming that Congress is justifiably concerned that judicial officers apply overly lenient pretrial release conditions, there are other procedural prophylactic measures in place to ensure pretrial release conditions are appropriate. For example, either party may directly appeal a trial court’s release order.<sup>157</sup> Considering that district court judges usually decide bail on appeal after a magistrate judge has issued a pretrial release order, a prosecutor fearful that pretrial release conditions are not strict enough has two opportunities to appeal.<sup>158</sup>

A blanket rule imposing pretrial release conditions on defendants without regard to their individual characteristics and circumstances, and the inevitable unnecessary constraints placed on defendants that naturally follow from such a rule, is especially offensive when one considers how costly implementing these conditions is to the defendants themselves and to the government. As discussed above, all of the AWA Amendments’ prescribed pretrial release conditions infringe on a significant individual private interest.<sup>159</sup> Furthermore, the defendant does not always bear the cost of following the AWA Amendments’ mandatory pretrial release conditions by himself.

For example, the defendant must pay for electronic monitoring out of his own pocket unless he cannot afford it.<sup>160</sup> At around thirty dollars per week,<sup>161</sup> the cost of electronic monitoring can accumulate quickly, considering that many defendants wait months or even years for a trial. Usually, someone in addition to the defendant, such as a spouse, children,

---

<sup>156</sup> United States v. Arzberger, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008); *see also* United States v. Smedley, 611 F. Supp. 2d 971, 974 (E.D. Mo. 2009).

<sup>157</sup> See Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 144 (2009) (“Appeal from pretrial detention is available, although the standard of review varies widely among the circuit courts of appeal.”).

<sup>158</sup> 28 U.S.C. § 636(b)(1) (2006).

<sup>159</sup> See *supra* Part IV.A.2.

<sup>160</sup> Telephone Interview with Anne Marie Carey, Chief of Pretrial Servs., N. Dist. of Ill. (Mar. 12, 2010).

<sup>161</sup> *Id.*

or parents, will help pay for electronic monitoring.<sup>162</sup> When the defendant is indigent, taxpayers foot the bill for electronic monitoring.<sup>163</sup> Although it might be a cost they would be happy to pay for if it provides additional safety to children, indiscriminately applying costly conditions based on the arrestee's charge rather than individual circumstances will likely lead to situations where they pay for electronic monitoring with no net safety benefit.

#### V. A PROPOSED CHANGE TO THE ADAM WALSH ACT AMENDMENTS

This Comment has criticized the AWA Amendments as (1) unconstitutional, (2) inconsistent with the core principle of the BRA regulatory scheme, and (3) characterized by high costs and low benefits. In light of these problems, Congress must take swift action to fix the flaws in the AWA Amendments. Obviously, it could repeal the Amendments. However, Congress will likely disfavor such a steep measure, as there is no sign that the "passion" which served as impetus for the AWA and the AWA Amendments has subsided since 2006.<sup>164</sup>

As an alternative, Congress could replace the Amendments' mandatory language with a "rebuttable presumption"<sup>165</sup> that the now mandatory pretrial release conditions will be applied *unless* a defendant can offer contrary evidence that they are not necessary.<sup>166</sup> The rebuttable presumption provision is the best of both worlds. On one hand, it furthers the AWA Amendments' purpose of protecting minors from alleged sex offenders. By shifting the burden of production from the Government to the defendant during the BRA's adversary hearing, public safety is still maximized because only defendants that can convincingly show a judge that the Amendments' pretrial release conditions are unnecessary will be free from their imposition. The rebuttable presumption is also consistent with the adversary hearing provided by the BRA, as a defendant will have a chance to show a judge why the AWA Amendments' pretrial release conditions are not necessary for his situation.

---

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See Spencer Magloff, *Obama Talks Law Enforcement on "America's Most Wanted,"* POLITICAL HOTSHEET—CBS NEWS.COM (March 4, 2010, 06:26 EST), [http://www.cbsnews.com/8301-503544\\_162-6267165-503544.html](http://www.cbsnews.com/8301-503544_162-6267165-503544.html) (describing how the President during his March 2010 appearance on the television show *America's Most Wanted* pledged to fully support the Adam Walsh Act).

<sup>165</sup> BLACK'S LAW DICTIONARY 1224 (8th ed. 2004). A "rebuttable presumption" is "[a]n inference drawn from certain facts that establish a prima facie case which may be overcome by the introduction of contrary evidence." *Id.*

<sup>166</sup> 18 U.S.C. § 3142(e)(2) (2006).

Furthermore, there is already a similar provision in the BRA under § 3142(e), in which a rebuttable presumption arises that a defendant should be detained if he has been convicted of certain offenses.<sup>167</sup> This provision was included in the original version of the BRA enacted in 1984, which was upheld as constitutional in *Salerno*.<sup>168</sup> In short, revising the Amendments so that a judge has some discretion and a defendant has an opportunity to explain why these pretrial release conditions are not necessary to ensure public safety protects the defendant's constitutional rights while ensuring that the government is able to regulate bail in a manner that maximizes public safety.

While the rebuttable presumption change would resolve the Due Process and Excessive Bail Clauses' constitutional problems that arise due to the Amendments' automaticity, some commentators have suggested that the BRA's rebuttable presumption provision is itself unconstitutional as a violation of due process.<sup>169</sup> Even if there is a strong argument in theory against the constitutionality of the BRA's rebuttable presumption provision, practically speaking it is unlikely that after more than twenty-five years any appellate court, let alone the Supreme Court, would address this issue. In fact, although the Court in *Salerno* did not address the constitutionality of the BRA's rebuttable presumption, in holding that the BRA was constitutional they implicitly approved it.<sup>170</sup> Changing the AWA

---

<sup>167</sup> *Id.* The section reads:

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

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

(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

<sup>168</sup> See *supra* note 33 and accompanying text.

<sup>169</sup> See, e.g., Susan M. Marcella, *When Preventive Detention is (Still) Unconstitutional: The Invalidity of the Presumption in the 1984 Federal Bail Statute*, 61 S. CAL. L. REV. 1091 (1988) (arguing that the BRA's presumption of dangerousness violates a defendant's constitutional rights to pretrial liberty); Robert S. Natalini, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225 (1985) (arguing that preventive detention resulting from a process in which the accused is presumed to be dangerous and bears the burden of rebutting that presumption is a deprivation of liberty without due process of law).

<sup>170</sup> The Court in *Salerno* explicitly upheld the constitutionality of 18 U.S.C. § 3142(e). *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception."). Thus, even though the rebuttable presumption provision was not

Amendments from being mandatorily imposed to being imposed with a rebuttable presumption would fix the Amendments' unconstitutionality and costliness, as well as their inconsistency with the rest of the BRA.

#### VI. CONCLUSION

Congress must take action and repeal or revise the AWA Amendments. Imposing mandatory pretrial release conditions on all defendants charged with sexual offenses against children is not only unconstitutional, as many courts have found,<sup>171</sup> but also inconsistent with the entire regulatory scheme of bail set forth in the BRA, and very costly. Rather than automatic imposition of pretrial release conditions, Congress should change the language of the AWA Amendments so that, consistent with § 3142(e), the defendant can avoid imposition of the AWA Amendments' now mandatory pretrial release conditions if he can demonstrate they do not need to be applied to him to ensure the public's safety. This is not only consistent with the BRA, but clearly constitutional and, most importantly, consistent with Congress' original intent in enacting the AWA Amendments—protecting the public from sexual predators.

---

explicitly mentioned as constitutional, the principle of the “greater includes the lesser” suggests it was implicitly upheld as such.

<sup>171</sup> See cases cited *supra* note 56.