# 8th Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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## EXCESSIVE BAIL

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 1 "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept." 2 These two contrasting views of the "excessive bail" provision, uttered by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment. 3

Crucial to understanding why the ambiguity exists if not to its resolution is knowledge of the history of the bail controversy in England. 4 The Statute of Westminster the First of 1275 5 set forth a detailed enumeration of those offenses which were bailable and those which were not, and, though supplemented by later statutes, it served for something like five-and-a-half centuries as the basic authority. 6 Darnel's Case, 7 in which the judges permitted the continued imprisonment of persons merely upon the order of the King, without bail, was one of the moving factors in the enactment of the Petition of Right in 1628; 8 the Petition cited Magna Carta as proscribing detention of persons as permitted in Darnel's Case. The right to bail was again subverted a half-century later 9 by various technical subterfuges by which petitions for habeas corpus could not be presented, and Parliament reacted by enacting the Habeas Corpus Act of 1679, 10 which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high it could not be met, and Parliament responded by including in the Bill of Rights of 1689 11 a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights, 12 was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention, 13 and was introduced verbatim by Madison in the House of Representatives. 14

Thus, in England the right to bail generally was conferred by the basic 1275 statute, as supplemented, the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679, and protection against abridgement through the fixing of an excessive bail was conferred by the Bill of Right of 1689. Habeas corpus was here protected in Article I, Sec. 9, of the Constitution and the question is, therefore, whether the First Congress knowingly or inadvertently provided only against abridgement of a right which they did not confer or protect in itself or whether the phrase "ex cessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States which had its origin in a provision of the Massachusetts Body of Liberties of 1641, 15 guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions, 16 this guarantee was contained in the Northwest Ordinance in 1787, 17 along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789, 18 enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

Long unresolved was the issue of whether "preventive detention"--the denial of bail to an accused, unconvicted defendant because it is feared or it is found probable that if released he will be a danger to the community--is constitutionally permissible. Not until 1984 did Congress authorize preventive detention in federal criminal proceedings. 19

The Court first tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles. 20 Then, in United States v. Salerno, 21 the Court upheld application of preventive detention provisions of the Bail Reform Act of 1984 against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence. "[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release." 22 Instead, "the only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." 23 Detention pending trial of "arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement. 24

Bail is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest. 25 If the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more." 26 To challenge bail as excessive, one must move for a reduction, and if that motion is denied appeal to the Court of Appeals, and if unsuccessful then to the Supreme Court Justice sitting for that circuit. 27 The Amendment is apparently inapplicable to post conviction release pending appeal but the practice has apparently been to grant such releases. 28

**Footnotes**

[Footnote 1] Stack v. Boyle, 342 U.S. 1, 4 (1951). Note that in Bell v. Wolfish, 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[Footnote 2] Carlson v. Landon, 342 U.S. 524, 545 (1952). Justice Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." Id. at 556.

[Footnote 3] The only recorded comment of a Member of Congress during debate on adoption of the "excessive bail" provision was that of Mr. Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 Annals of Congress 754 (1789).

[Footnote 4] Still the best and most comprehensive treatment is Foote, The Coming Constitutional Crisis in Bail: I, 113 U. Pa. L. Rev. 959, 965-89 (1965), reprinted in C. Foote, Studies on Bail 181, 187-211 (1966).

[Footnote 5] 3 Edw. 1, ch. 12.

[Footnote 6] 1 J. Stephen, A History of the Criminal Law of England (London: 1883), 233-43. The statute is summarized at pp. 234-35.

[Footnote 7] 3 How. St. Tr. 1 (1627).

[Footnote 8] 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by Darnel's Case, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on habeas corpus to effectuation of the right to bail. Id. at 69.

[Footnote 9] Jenkes' Case, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[Footnote 10] 31 Charles 2, ch. 2. The text is in 2 Documents on Fundamental Human Rights 327-340 (Z. Chafee ed., 1951).

[Footnote 11] I W. & M. 2, ch. 2, clause 10.

[Footnote 12] 7 F. Thorpe, The Federal and State Constitutions, H. R. Doc. No. 357, 59th Cong., 2d Sess. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[Footnote 13] 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 658 (2d ed. 1836).

[Footnote 14] 1 Annals of Congress 438 (1789).

[Footnote 15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." Reprinted in 1 Documents on Fundamental Human Rights 79, 82 (Z. Chafee ed., 1951).

[Footnote 16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, The Federal and State Constitutions, H. Doc. No. 357, 59th Congress, 2d sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. Id. at 3089.

[Footnote 17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 Journals of the Continental Congress 334 (1787), reprinted in 1 Stat. 50 n.

[Footnote 18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein. . . ." 1 Stat. 91 Sec. 33 (1789).

[Footnote 19] Congress first provided for pretrial detention without bail of certain persons and certain classes of persons in the District of Columbia. D.C. Code, Sec. Sec. 23-1321 et seq., held constitutional in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), cert. denied, 455 U.S. 1022 (1982). The law applies only to persons charged with violating statutes applicable exclusively in the District of Columbia, United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1978), while in other federal courts, the Bail Reform Act of 1966, as amended, applies. 80 Stat. 214, 18 U.S.C. Sec. Sec. 3141-56. Amendments contained in the Bail Reform Act of 1984 added general preventive detention authority. See 18 U.S.C. Sec. 3142(d) and (e). Those amendments authorized pretrial detention for persons charged with certain serious crimes (e.g., crimes of violence, capital crimes, and crimes punishable by 10 or more years' imprisonment) if the court or magistrate finds that no conditions will reasonably assure both the appearance of the person and the safety of others. Detention can also be ordered in other cases where there is a serious risk that the person will flee or that the person will attempt to obstruct justice. Preventive detention laws have also been adopted in some States. Parker v. Roth, 202 Neb. 850, 278 N.W. 2d 106, cert. denied, 444 U.S. 920 (1979).

[Footnote 20] Schall v. Martin, 467 U.S. 253 (1984).

[Footnote 21] 481 U.S. 739 (1988).

[Footnote 22] Id. at 753.

[Footnote 23] Id. at 754.

[Footnote 24] Id. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals).

[Footnote 25] Stack v. Boyle, 342 U.S. 1, 4 -6 (1951).

[Footnote 26] United States v. Salerno, 481 U.S. at 754 .

[Footnote 27] Id. at 6-7.

[Footnote 28] Hudson v. Parker, 156 U.S. 277 (1895).