

Amendment is apparently inapplicable to postconviction release pending appeal, but the practice has apparently been to grant such releases.²⁸

EXCESSIVE FINES

For years the Supreme Court had little to say about excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record.²⁹ Justice Brandeis once contended in dissent that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct, because it imposed additional mailing costs which grew day by day, amounted to an unlimited fine that was an “unusual” and “unprecedented” punishment proscribed by the Eighth Amendment.³⁰ The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the Equal Protection Clause,³¹ thus obviating any necessity to develop the meaning of “excessive fines” in relation to ability to pay. The Court has held the clause inapplicable to civil jury awards of punitive damages in cases between private parties, “when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”³² The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, “the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense.”³³ The Eighth Amendment itself, as were antecedents of the clause in the Virginia Declaration of Rights and in the English Bill of Rights of 1689, “clearly was adopted with the particular intent of placing limits on the powers of the new government.”³⁴ Therefore, while leaving open the issues of whether the clause has any applicability to civil penalties or to *qui tam* actions, the Court determined that “the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”³⁵ The Court has held, however, that the Excessive Fines Clause can be applied in civil forfeiture cases.³⁶

²⁸ *Hudson v. Parker*, 156 U.S. 277 (1895).

²⁹ *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833).

³⁰ *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 435 (1921).

³¹ *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

³² *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

³³ 492 U.S. at 265.

³⁴ 492 U.S. at 266.

³⁵ 492 U.S. at 268.

³⁶ In *Austin v. United States*, 509 U.S. 602 (1993), the Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be