

to curtail excessive bail without guaranteeing a right to bail, or whether the phrase “excessive bail” was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States that 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

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).

¹⁶ “That all prisoners shall beailable 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.

¹⁷ “All persons shall beailable, 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. 52 n.

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 § 33 (1789).

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, §§ 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. §§ 3141–56. Amendments contained in the Bail Reform Act of 1984