

FURTHER GUARANTEES IN CRIMINAL CASES

EIGHTH AMENDMENT

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

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, expressed 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

The history of the bail controversy in England is crucial to understanding why the ambiguity exists.⁴ The Statute of Westminster the First of 1275⁵ set forth a detailed enumeration of those offenses that were bailable and those that were not, and, though supplemented by later statutes, it served for something like five and a

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."

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.

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).

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).

⁵ 3 Edw. 1, ch. 12.