History of Bail

Bail laws in the United States grew out of a long history of English statutes and policies. During the colonial period, Americans relied on the bail structure that had developed in England hundreds of years earlier. When the colonists declared independence in 1776, they no longer relied on English law, but formulated their own policies which closely paralleled the English tradition. The ties between the institution of bail in the United States is also based on the old English system. In attempting to understand the meaning of the American constitutional bail provisions and how they were intended to supplement a larger statutory bail structure, knowledge of the English system and how it developed until the time of American independence is essential.

In medieval England, methods to insure the accused would appear for trial began as early as criminal trials themselves. Until the 13th century, however, the conditions under which a defendant could be detained before trial or released with guarantees that he would return were dictated by the local Sheriffs.[x] As the regional representative of the crown, the sheriff possessed sovereign authority to release or hold suspects. The sheriffs, in other words, could use any standard and weigh any factor in determining whether to admit a suspect to bail. This broad authority was not always judiciously administered. Some sheriffs exploited the bail system for their own gain. Accordingly, the absence of limits on the power of the sheriffs was stated as a major grievance leading to the Statute of Westminster.[xi]

The Statute of Westminster in 1275 eliminated the discretion of sheriffs with respect to which crimes would be bailable. Under the Statute, the bailable and non-bailable offenses were specifically listed.[xii] The sheriffs retained the authority to decide the amount of bail and to weigh all relevant factors to arrive at that amount. The Statute, however, was far from a universal right to bail. Not only were some offenses explicitly excluded from bail, but the statutes' restrictions were confined to the abuses of the sheriffs. The justices of the realm were exempt from its provisions.

Applicability of the statute to the judges was the key issue several centuries later when bail law underwent its next major change. In the early seventeenth century, King Charles I received no funds from the Parliament. Therefore, he forced

some noblemen to issue him loans. Those who refused to lend the sovereign money were imprisoned without bail. Five incarcerated knights filed a habeas corpus petition arguing that they could not be held indefinitely without trial or bail. The King would neither bail the prisoners nor inform them of any charges against them. The King's reason for keeping the charges secret were evident: the charges were illegal; the knights had no obligation to lend to the King. When the case was brought before the court, counsel for the knights argued that without a trial or conviction, the petitioners were being detained solely on the basis of an unsubstantiated and unstated accusation. Attorney General Heath contended that the King could best balance the interests of individual liberty against the interests of state security when exercising his sovereign authority to imprison. The court upheld this sovereign prerogative argument.[xiii]

Parliament responded to the King's action and the court's ruling with the Petition of Right of 1628. The Petition protested that contrary to the Magna Carta and other laws guaranteeing that no man be imprisoned without due process of law, the King had recently imprisoned people before trial "without any cause showed." The Petition concluded that "no freeman, in any manner as before mentioned, be imprisoned or detained..." The act guaranteed, therefore, that man could not be held before trial on the basis of an unspecific accusation. This did not, however, provide an absolute right to bail. The offenses enumerated in the Statute of Westminster remained bailable and non-bailable. Therefore, an individual charged with a non-bailable offense could not contend that he had a legal entitlement to bail.

The King, the courts and the sheriffs were able to frustrate the intent of the Petition of Right through procedural delays in granting the writs of habeas corpus. In 1676, for example, when Francis Jenkes sought a writ of habeas corpus concerning his imprisonment for the vague charge of "sedition," it was denied at first because the court was "outside term," and later because the case was not calendared; furthermore, when the court was requested to calendar the case it refused to do so. In response to the rampant procedural delays in providing habeas corpus as evidenced by *Jenkes Case,*[xv] Parliament passed the Habeas Corpus Act of 1677. The act strengthened the guarantee of habeas corpus by specifying that a magistrate:

shall discharge the said Prisoner from his Imprisonment taking his or their Recognizance, with one or more Surety or Sureties, in any Sum according to their discretion, having regard to the Quality of the Prisoner and Nature of the offense, for his or their Appearance in the Court of the King's bench...unless it shall appear...that the Party (is)...committed...for such Matter or offenses for which by law the Prisoner is not Bailable.[xvi]

By requiring early designation of the cause for arrest, the Habeas Corpus Act provided a suspect with knowledge that the alleged offense was either bailable or not. The Statute of Westminster remained the primary definition of what offenses would be eligible for bail.

Although the Habeas Corpus Act improved administration of bail laws, it provided no protection against excessive bail requirements. Even if a suspect was accused of a bailable offense and therefore was entitled to some bail, he could still be detained if the financial condition of release was exorbitantly high. As evidence of this abuse reached Parliament, it responded with the English bill of Rights of 1689. In the Preamble, the bill accused the King of attempting "to subvert...the laws and liberties of the kingdom: in the "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the Subjects."[xvii] The Bill of Rights proposed to remedy the situation by declaring "that excessive bail ought not to be required."[xviii] Thus, the precursor of the Eighth Amendment in the U.S. Constitution was drafted to prevent those accused of bailable offenses from unreasonable bail requirements. It did not alter the categories of bailable crimes found in the separate Statute of Westminster and certainly did not guarantee a right to bail.

The language of the English Bill of Rights was only one part of the bail system developed through many years of English law. As Caleb Foote has explained and this analysis recounts, English protection against unjustifiable detention contained three essential elements: first, offenses were categorized as bailable or not bailable by statutes beginning with Westminster I which also placed limits on which judges and officials could effect the statue; second, habeas corpus procedures were developed as an effective curb on imprisonment without specific changes; and third, the excessive bail clause of the 1689 Bill of Rights protected against judicial officers who might abuse bail policy by setting excessive financial conditions for release. English law never contained an

absolute right to bail. Bail could always be denied when the legislature determined certain offenses were unbailable. Most of the history of bail law after Westminster I was an attempt to improve the efficiency of existing law and especially to grant the suspect a meaningful chance to satisfy bail conditions when he had committed those offenses that the legislature had declared bailable.

In colonial America, bail law was patterned after the English law. While some colonies initiated their own laws which were very similar to English statutes, others simply guaranteed their subjects the same protections guaranteed to British citizens. When the colonies became independent in 1776, however, they could no longer simply insure the protections of English law. Accordingly, the colonies enacted specific bail laws. Typical of the early American bail laws were those enacted in Virginia perpetuating the bail system as it had evolved in England. Section 9 of Virginia's Constitution in 1776 declared simply that "excessive bail ought not to be required…"[xix] This constitutional provision was supplemented in 1785 with a statute which eliminated judges; discretion to grant bail by specifying that: those shall be let to bail who are apprehended for any crime not punishable in life or limb...But if a crime be punishable by life or limb, or if it be manslaughter and there be good cause to believe the party guilty thereof, he shall not be admitted to bail."[xx] Thus the Virginia laws closely paralleled the English system. Statutes defined which offenses were bailable while the Constitution protected against abuses of those definitions. In fact, the clause in the Virginia Constitution was identical to the one in the English Bill of Rights which had been included to prevent judges from unreasonable holding those accused of bailable offenses by setting bail so high as to be unobtainable. Other State constitutions similarly proscribed excessive bail for bailable offenses in order to prevent this method of thwarting the bail laws passed by the legislatures: for example, section 29 of the Pennsylvania Constitution of 1776 provided that "Excessive bail shall not be exacted for bailable offenses."[xxi]

With James Madison designated to prepare an initial draft for Bill of Rights n 1789, the Virginia constitution, often referred to as the Virginia Bill of Rights, became the model for the first ten amendments that passed congress in 1789 and were ratified in 1791. The Eighth Amendment in this Bill of Rights was taken virtually verbatim from Section 9 of the Virginia Constitution and provided that "Excessive bail shall not be required..." The only comment on the clause during

the congressional debates was made by the perplexed Mr. Livermore: "The clause seems to have no meaning to it, I do not think it necessary. What is meant by the term excessive Bail…!"[xxii]

Indeed, it seems the drafters thought relatively little about the meaning of the bail clause; the clause was so rooted in American and English history that to most, the meaning was obvious. Like the identical clause in the English Bill of Rights and the Virginia Constitution, the Eighth Amendment bail provision was intended to prohibit excessive bail as a means of holding suspects accused of offenses deemed bailable by Congress.

The bail clause in the Eighth Amendment was only one part of the American bail structure.[xxiii] As in England, the American system also includes guarantees against imprisonment without informing the suspect of his crime. The Sixth Amendment to the Constitution, like the English Habeas Corpus Act of 1678, insures that when arrested, a man "be informed of the nature and cause of the accusation" thereby enabling him to demand bail if he has committed a bailable offense. The final part of the American bail structure and the element upon which the Constitution provisions are based is the statutory codification of justice officials' power concerning bail and the categorization of crimes into bailable and nonbailable offenses. The Constitution merely guarantees that excessive bail may not be employed to hold suspects who by law are entitled to bail; similarly the Sixth Amendment enables prisoners to know if they are in fact entitled to bail under the law; it does not give them any right to bail already existing in the law. Thus, the legislature and not the constitution is the real framer of bail law; the constitution upholds and protects against abuse of the system which the legislature creates. This principle was well understood by the Framers of the Bill of rights. In fact, the same Congress that proposed the Eighth Amendment also formulated the fundamental bail statute that remained in force until 1966. This was accomplished in 1789, the same year that the Bill of rights was introduced, when Congress passed the Judiciary Act. The Act specified which types of crime were bailable and set bounds on the judges' discretion in setting bail. Following the tradition of State laws developed during the colonial period which in turn were based on English law,[xxiv] the Judiciary Act stated that all noncapital offenses were bailable and that in capital offenses, the decision to detain a suspect before trial was left up to the judge:

{U}pon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases 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 therein, regarding the nature and circumstance of the offense, and of the evidence, the usages of law.[xxv]

The sequence of events in the First Congress pertaining to American bail policy is critical to an understanding of the Framers of the Eighth Amendment and the Judiciary Act of 1789. Only a few days after final passage of the Bill of Rights in Congress on September 21, 1789, and before its final adoption, the First Congress passed the Judiciary Act of 1789 on September 29, 1789. In fact, these two legislative measures were debated almost concurrently. Considerable debate time was consumed in the House of Representatives over the issue of which should be enacted first, the bill creating a federal judiciary and federal judicial procedures or the amendments to the Constitution. Eventually Madison's point of view that the Bill of Rights should take precedence so that "the independent tribunals of justice will consider themselves...the guardians of those rights"[xxvi] prevailed. But the same day the House completed the Bill of Rights it proceeded to perfect the Judiciary Act of 1789 which was already approved by the Senate. The two legislative proposals passed each other going and coming between the House and the Senate. This historical footnote illuminated significantly the context in which these measures were debated. They were almost considered simultaneously. Often representatives argued that changes in one measure were unnecessary because the other provided ample protection for vital rights.[xxviii]

This context suggests strongly that the First Congress acted very purposefully in substantially adopting the English system of tripartite protection against bail abuses. The Eighth Amendment prohibition against excessive bail meant that bail may not be excessive in those cases where Congress has deemed it proper to permit bail. The Congress then enacted the Judiciary Act defining what offenses would be bailable. Habeas corpus protection was afforded by Article I of the Constitution.

The argument that the excessive bail clause guarantees a right to bail by necessary implication and that the provision forbidding excessive bail would be

meaningless if judges could deny bail altogether in some cases is clearly not valid in this historical context. The same Congress which drafted the Eighth Amendment enacted the Judiciary Act which specifically denied a right to bail to individuals charged with capital offense.

In the context of its legislative history, the Eighth Amendment is illuminated by reading it in conjunction with the Judiciary Act of 1789. The First Congress adopted the Amendment to prevent judges from setting excessive bail in cases prescribed as bailable by Congress. The same legislators then enacted a bill prescribing which offenses would be bailable. The Eighth Amendment, therefore, is not self-executing. It requires legislation creating legal entitlements to bail to give it effect. Recognizing this, the First Congress provided almost simultaneously the legislation that gave the Amendment effect. The First Congress did not choose a strange legal arrangement; it chose precisely the system most familiar to these former English citizens. The First Congress recognized that the Amendment was not intended to limit congressional discretion to determine the cases for which bail would be allowed, but was designed to circumscribe the authority of courts to ignore or circumvent that congressional policy with excessive bail requirements.

The Judiciary Act of 1789 did not differentiate between bail before and after conviction. Not until 1946 in the Federal Rules of Criminal Procedure was this distinction clearly made. Rule 46 made the 1789 Act's language the standard for release, but left release after conviction pending an appeal or application for certiorari to the judge's discretion regardless of the crime.

In 1966 Congress enacted the first major substantive change in federal bail law since 1789. The Bail Reform Act of 1966 provides that a non-capital defendant "shall...be ordered released pending trial on his personal recognizance" or on personal bond unless the judicial officer determines that these incentives will not adequately assure his appearance at trial.[xxviii] In that case, the judge must select the least restrictive alternative from a list of conditions designed to guarantee appearance. That list includes restrictions on travel, execution of an appearance bond (refundable when the defendant appears), and execution of a bail bond with a sufficient number of solvent sureties. Individuals charged with a capital offense or who have been convicted and are awaiting sentencing or appeal are subject to a different standard. They are to be released unless the judicial officer has

"reason to believe" that no conditions "will reasonably assure that the person will not flee or pose danger to any other person or to the community."

The 1966 Act thus created a presumption for releasing a suspect with as little burden as necessary in order to insure his appearance at trial. Appearance of the defendant for trial is the sole standard for weighing bail decision. In noncapital cases, the Act does not permit a judge to consider a suspect's dangerousness to the community. Only in capital cases or after conviction is the judge authorized to weigh threats to community safety.

This aspect of the 1966 Act drew criticism particularly in the District of Columbia where all crimes formerly fell under the regulation of Federal bail law. In a considerable number of instances, persons accused of violent crimes committed additional crimes while released on their own personal recognizance. Furthermore, these individuals were often released again on nominal bail.

The problems associated with the 1966 Bail Reform Act were considered by the Judicial Council committee to study the Operation of the Bail Reform Act in the Distract of Columbia in May 1969. The committee was particularly bothered by the release of potentially dangerous noncapital suspects permitted by the 1966 law and recommended that even in noncapital cases, a person's dangerousness be considered in determining conditions for release. Congress went along with the ideas put forth in the committee's proposals and changed the 1966 Bail Reform Act as it applied to persons charged with crimes in the District of Columbia. The District of Columbia Court Reform and Criminal Procedure Act of 1970 allowed judges to consider dangerousness to the community as well as risk of flight when setting bail in noncapital cases. The 1970 Act contained numerous safeguards against irrational application of the dangerousness provisions. For instance, an individual could not be detained before trial under the act unless the court finds that (1) there is clear and convincing evidence that he falls into one of the categories subject to detention under the act, (2) no other pretrial release conditions will reasonably assure community safety, and (3) there is substantial probability that the suspect committed the crime for which he has been arrested.

This last finding was an overzealous exercise of legislative precaution. The Justice Department testified that the burden of meeting this "substantial probability" requirement was the principal reason cited by prosecutors for the failure over the last 10 years to request pretrial detention hearings under the

statute. Such a standard also had the effect of making the pretrial detention hearing a vehicle for pretrial discovery of the Government's case and harassment of witnesses. Moreover, the District of Columbia Court of Appeals in its *Edwards*[xxix] decision strongly suggests that the probable cause standard consistently sustained by the Supreme Court as a basis for imposing "significant restraints on liberty" would be constitutionally sufficient in the context of pretrial detention.

x□xi□[xii] Edw. 1. C. 15 In additional to capital offenses, the list included "Thieves openly defamed and known" those "taken for House-burning feloniously done," or those taken for counterfeiting and many other non-capital offenses.□[xiii] "Five Knights Case" or "Proceedings on the Habeas Corpus" brought by Sir Thomas Darnel. 3 St. Fr. 1 (1627).□[xiv] William Duker, "The Right to Bail: An Historical Inquiry" 64, 42, Albany L. Rev. 33 (1977).□xv□[xvi] 81 Car. 2 c. 2.□[xvii] W. & M. st 2 c. 2 preamble clause 10.□[xviii] 1 W. & M. st. 2 c. 2. Rights clause 10.□[xix] 7 American Charters 3813 (F. Thorpe ed.. 1909)□[xx] 12 Va. Stat. 185-86 (W. Hening ed.. 1823)□[xxi] 7 American Charters 3813 (F. Thorpe ed..1909)□[xxii] 1 "Annals of Congress" 754 (1789).□[xxiii] Caleb Foote, "The Coming Constitutional Crisis in Bail." 113 Pennsylvania L. Rev. 959. At 968 (1965). Hermine Herta Meyer, "The Constitutionality of Pretrial Detention,: 60 Georgetown L. Rev. 1139 (1972).□[xxiv] Duker. Supra note 14 at 77-83□[xxv] The Judiciary Act of 1789, 1 Stat. 73, 91.□[xxvi] 1 "Annals of Congress" 428, 462 (1789)□[xxvii] Id. At 448.□[xviii] the Bail Reform Act of 1966, 18 U.S.C. 3146 et seq.□[xxix] United States v. Edwards, No. 80-294 (D.C. App. May 8, 1981) (slip opinion). Petition….