

CAN BAIL BE DENIED?

Congressman Livermore speaks to the excessive bail provision at its adoption:

**“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.”**

LET’S TAKE ANOTHER ELL JOURNEY!!!



**STACK v. BOYLE
SUPREME COURT OF THE UNITED STATES
342 U.S. 1
November 5, 1951**

OPINION: Chief Justice Vinson...Indictments have...[charged] the twelve petitioners with conspiring to violate the Smith Act...Bail was fixed...in the...amount of \$50,000 for each petitioner.

Petitioners moved to reduce bail on the ground that bail as fixed was excessive under the Eighth Amendment. In support of their motion, petitioners submitted statements as to their financial resources, family relationships, health, prior criminal records, and other information. The only evidence offered by the Government was a certified record showing that **four persons previously convicted under the Smith Act...had forfeited bail**. No evidence was produced relating those four persons to the petitioners in this case...**From...1789 to the present...**, federal law has unequivocally provided that a person arrested for a **non-capital offense shall be admitted to 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.

Where does the ever popular “presumption of innocence” phrase come from?
Do you believe a typical juror begins a criminal trial presuming innocence?
We’ll get there...just hold on!

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty...Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant. In this case petitioners are charged with offenses under the Smith Act and, if found guilty, their convictions are subject to review with the scrupulous care demanded by our Constitution. Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than \$10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. **To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted.**

Rule 46 (c) of the Federal Rules of Criminal Procedure provides: “If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the...court...will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.”

If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved. In the absence of such a showing, we are of the opinion that the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail...

CONCURRENCE: Justice Jackson/Frankfurter...The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense **not punishable by death**: "A person arrested for an offense not punishable by death shall be admitted to bail..." before conviction.

Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice...[T]he duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. But the judge is not free to make the sky the limit, because the Eighth Amendment to the Constitution says: "Excessive bail shall not be required..."

Congress has reduced this generality in providing more precise standards, stating that "...the amount thereof shall be such as in the judgment of the...court...will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

...It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46 (c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character and relation to the charge -- elements Congress has directed to be regarded in fixing bail -- I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance...

But the protest charges, and the defect in the proceedings below appears to be, that, provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction. Thus, the amount is said to have been fixed not as a reasonable assurance of their presence at the trial, but also as an assurance they would remain in jail...[This] is contrary to the whole policy and philosophy of bail. This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount. I think the whole matter should be reconsidered... in the traditional spirit of bail procedure...

The first fixing of bail...is a serious exercise of judicial discretion. But often it must be done in haste -- the defendant may be taken by surprise, counsel has just been engaged, or for other reasons the bail

is fixed without that full inquiry and consideration which the matter deserves. Some procedure for reconsideration is a practical necessity, and **the court's power over revocation or reduction is a continuing power which either party may invoke as changing circumstances may require.** It is highly important that such preliminary matters as bail be disposed of with as much finality as possible in the District Court where the case is to be tried. It is close to the scene of the offense, most accessible to defendant, has opportunity to see and hear the defendant and the witnesses personally, and is likely to be best informed for sound exercise of discretion. Rarely will the original determination be disturbed, if carefully made, but if the accused moves to reduce or the Government to revoke bail, a more careful deliberation may then be made on the relevant evidence presented by the parties, and if the defendant or the Government is aggrieved by a denial of the motion an appeal may be taken on the record as it then stands...