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CONSTITUTIONAL LAW-RIGHT TO BAIL

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COMMENTS

CONSTITUTIONAL LAW—RIGHT TO BAIL—The Eighth Amendment of the Constitution provides that "Excessive bail shall not be required . . . ." This clause, as with all of the Bill of Rights, serves as a

limitation on the federal government.[1] From a very early date this provision has likewise established a boundary on the discretion of the federal courts in their exercise of criminal jurisdiction.[2] Although this Eighth Amendment provision is a protection against federal encroachment, it does not limit the powers of states,[3] arguments of individual Justices to the contrary notwithstanding.[4]

[1] STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§1858-1868 (1873); HAMILTON, THE FEDERALIST, No. 84 (1788); 2 KENT'S COMMENTARIES ON AMERICAN LAW, 12th ed., Lecture 24, pp. 5, 6 (1873); ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW §305 (1939); WEAVER, CONSTITUTIONAL LAW AND ITS ADMINISTRATION §307 (1946).

[2] Ex Parte Watkins, 7 Pet. (32 U.S.) 568 at 574 (1833), where the Court said, "The eighth amendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion." See also WEAVER, CONSTITUTIONAL LAW AND ITS ADMINISTRATION §307 (1946); ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW §321 (1939); and STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1903 (1873). Story in the last cited work remarked as to the Eighth Amendment that it "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. It was, however, adopted as a admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts."

[3] Barron v. Mayor of Baltimore, 7 Pet. (32 U.S.) 243 at 247 (1833), where Chief Justice Marshall said, "The People of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes." See also Collins v. Johnston, 237 U.S. 502 at 510, 35 S.Ct. 649 (1914); Pervear v. Commonwealth, 5 Wall. (72 U.S.) 475 at 480 (1866); McElvaine v. Brush, 142 U.S. 155 at 158, 12 S.Ct. 156 (1891); O'Neil v. Vermont, 144 U.S. 323 at 332, 12 S.Ct. 693 (1891); Ensign v. Pennsylvania, 227 U.S. 592 at 597, 33 S.Ct. 321 (1912), and STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1904 (1873).

[4] Some judges and writers give support to the proposition that the Due Process Clause of the Fourteenth Amendment incorporates the Bill of Rights completely, making the Eighth Amendment applicable to states. See O'Neil v. Vermont, 144 U.S. 323, 12 S.Ct. 693 (1891); Adamson v. California, 332 U.S. 46 at 74, 67 S.Ct. 1672 (1947), where Justice Black in his dissent declared that ". . . history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." Justice Murphy in a separate dissent joined in by Justice Rutledge stated, at 124, that "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment." See Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 STANFORD L. REV. 5 (1949); Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 STANFORD L. REV. 140 (1949); WEAVER, CONSTITUTIONAL LAW AND ITS ADMINISTRATION §307 (1946); and see generally, Kauper, "The First Ten Amendments," 37 A.B.A.J. 717 (1951); Green, "The Supreme Court, the Bill of Rights and the States," 97 UNIV. PA. L. REV. 608 (1949); and Justice Murphy's dissent, Prince v. Massachusetts, 321 U.S. 158 at 173, 64 S.Ct. 438 (1944).

In the recent Supreme Court decision of *Stack v. Boyle*,[5] this Court for the first time definitively summarized the federal right to bail under constitutional amendment and statutes. This case makes it desirable to formulate a statement of what the right consists of today, both in fundamental nature and in its application.[6]

I. *Defining the Right under the Federal Rules of Criminal Procedure*

The first elaboration of the federal "right to bail" came in the Judiciary Act of 1789.[7] This act was passed at the first session of the new Congress and provided unequivocally for bail as a matter of right in non-capital criminal cases, with discretion in the judges of specified courts to issue bail even where the crimes charged were punishable by death. The Judiciary Act of 1789 was actually passed by Congress prior to the Eighth Amendment, although both were enacted at the same session. Certainly the Judiciary Act took effect before the Eighth Amendment, which was not finally ratified until 1791. This makes it difficult to conclude categorically that the right to bail existing today had its origin in constitutional amendment or in statute.[8] However, whether such a right originated from legislative enactment or constitutional amendment, its existence is universally recognized in the federal courts today. In practical application, this recognition stems largely from the present counterpart of the Judiciary Act of 1789, namely, Rule 46 of the 1948 Federal Rules of Criminal Procedure as amended to 1951.

Echoing the provisions of the first Judiciary Act, the present Rule 46 declares, "A person arrested for an offense not punishable by death

[5] 342 U.S. 1, 72 S.Ct. 1 (1951).

[6] It is not within the scope of this comment to consider the theory advanced by some courts that a federal right to bail exists as a consequence of the Fifth Amendment, deprivation of which right would be a denial of due process of law.

[7] 1 Stat. L. 73 at 91 (1789), which states: "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be 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 circumstances of the offense, and of the evidence, and the usages of law."

[8] This historical fact certainly would seem to give weight to the argument propounded by Alexander Hamilton in THE FEDERALIST, No. 84 (1788), that the Eighth Amendment, along with the remainder of the Bill of Rights, was totally unnecessary to guaranty to the people the rights set forth. Unquestionably, the description of the right to bail today places the emphasis on the Federal Rules of Criminal Procedure and the cases relevant thereto, rather than on the Eighth Amendment fundamental guaranty. The importance of the Eighth Amendment is relegated largely to the question of "excessive bail," a literal application of the words of the amendment.

shall be admitted to bail." The significance of the word "shall" is seen when we consider the provision for bail in capital offenses. This provision limits the right in that, "A person arrested for an offense punishable by death *may* be admitted to bail" as a matter of discretion with the court or judge authorized to so admit. (Italics added.) Although this distinction appears succinct enough in definition, it is necessary to consider what limitations are placed on the actual application of the right.

The recent Supreme Court decision of *Carlson v. Landon*[9] dealt with the problem of whether or not bail in deportation cases can be said to fall within the definitions of the Federal Rules of Criminal Procedure as a protected right. In order to apply the Federal Rules of Criminal Procedure in any case, the first supposition would logically be that the problem is one of a criminal nature. In considering deportation we are met at the outset with the question of whether such deportation can be categorized as criminal in nature or non-criminal. Many courts have been confronted with this precise problem, and the decisions indicate a well-established rule that deportation proceedings are not criminal proceedings.[10] Therefore, since there is no inherent power in the United States courts to admit to bail, there is likewise none in deportation cases and they would thus not be within the purview of the Federal Rules of Criminal Procedure.[11] Since the Eighth Amendment applies only to criminal proceedings, it likewise has no application to proceedings for expulsion of an alien.[12] Further, there is no statutory authority vested in the United States courts as to granting bail in deportation cases. Therefore, the courts not having any power to grant bail in deportation cases, such power reposed in the Attorney General by Congress must be singularly his.[13] Justice Black's dissent in the *Carlson* case

[9] 342 U.S. 524, 72 S.Ct. 525 (1952).

[10] Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525 (1952), where the Court concluded: "Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution." See also extensive list of cases cited in Ex parte Perkov, (D.C. Cal. 1942) 45 F. Supp. 864 at 866.

[11] United States ex rel. Carapa v. Curran, (2d Cir. 1924) 297 F. 946 at 955; Ex parte Perkov, (D.C. Cal. 1942) 45 F. Supp. 864 at 866; and Chin Wah v. Colwell, (9th Cir. 1911) 187 F. 592 at 594, where the court said, "It is uniformly conceded that those courts [of the United States] can exercise no powers not vested in them by statute."

[12] Ex parte Perkov, (D.C. Cal. 1942) 45 F. Supp. 864 at 866; In re Chin Wah, (D.C. Ore. 1910) 182 F. 256 at 257; and Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525 (1952).

[13] Ex parte Perkov, (D.C. Cal. 1942) 45 F. Supp. 864 at 867; Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525 (1952); Internal Security Act of 1950, Chapter 1024, P.L. 831 (1 U.S.C. Cong. Service 1005 at 1006) (1950) §23: ". . . Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in discretion of the Attorney General (1) be continued in custody; or (2)

detailed his dissatisfaction with the conclusion of denying to aliens freedom under bail by what he termed, "the simple device of providing a 'not criminal' label for the techniques used to incarcerate." Justice Black concluded that "Imprisonment awaiting determination of whether that imprisonment is justifiable has precisely the same evil consequences to an individual whatever legalistic label is used to describe his plight."[14] Thus, under the latest Supreme Court determination, *Carlson v. Landon,* the only "right" to bail that an alien subject to deportation can assert is an attempt to call forth the discretion of the Attorney General.

II. *Limitations in Application of the Right*

A. *Purpose of Bail.* The object of bail prior to trial is to insure "the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect."[15] Following trial, bail serves to "secure the due attendance of the party accused . . . to submit to a trial, and the judgment of the court thereon."[16] The theory behind the federal statutes regarding bail is that a person accused of a crime need not absolutely be compelled to undergo imprisonment or punishment until he has been finally adjudged guilty in the court of last resort. Thus, he "may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."[17] Moreover, it has been declared not to be the function of bail to prevent the commission of crimes between indictment and trial.[18]

Since the purpose of bail is to give assurances to the court, and at the same time to allow the party accused his freedom, the achievement of this purpose will depend largely upon whether we are dealing with the period before conviction, or following conviction and pending review.

B. *Before Conviction.* As we have seen, the Judiciary Act of 1789 established bail as a matter of right in non-capital cases and

be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole."

[14] Carlson v. Landon, 342 U.S. 524 at 557, 72 S.Ct. 525 (1952).

[15] United States ex rel. Rubinstein v. Mulcahy, (2d Cir. 1946) 155 F. (2d) 1002 at 1004.

[16] Ex parte Milburn, 9 Pet. (34 U.S.) 704 at 710 (1835).

[17] Hudson v. Parker, 156 U.S. 277 at 285, 15 S.Ct. 450 (1895).

[18] United States v. Foster, (D.C. N.Y. 1948) 79 F. Supp. 422 at 423.

as a matter of discretion in capital offenses.[19] This provision, however, extended only to the period in the proceedings before conviction. The present Federal Rules of Criminal Procedure provide for the instances before and after conviction, and the right to bail existing prior to conviction is outlined in fundamentally the same terminology used in the very first provision of the Judiciary Act of 1789. The only requirement that has been added is that in cases punishable by death, bail may be granted with discretion, "giving due weight to the evidence and to the nature and circumstances of the offense."[20] It has been held by the courts that only the right to bail prior to trial is protected by the Constitution under the Eighth Amendment, and that this constitutional right is further limited to non-capital cases.[21]

In the interpretation of the right to bail prior to conviction in non-capital offenses, the cases are uniform in support of this right as one constitutionally guaranteed, although they are few in number.[22] This paucity is explainable, however, when it is recalled that from the time of the Judiciary Act of 1789 and the approximately contemporaneous Eight Amendment, it has been continually held to be a matter of constitutional *and* statutory right, beyond the discretion of the admitting authority in other than amount and limited details.

Like most near "absolutes," however, there are necessarily exceptions even to this right. One court discussed a limitation in the following language: "The United States statutes with regard to admitting to bail in criminal proceedings are based upon the idea that a person accused of crime shall be admitted to bail until adjudged guilty by the court last resorted to by him. However, this right is not absolute under all circumstances, and may be forfeited. While one who once flees the jurisdiction of the court while under bail is not for that reason to be forever barred from being admitted to bail

[19] Supra note 7.

[20] Federal Rules of Criminal Procedure, 18 U.S.C.A., Rule 46(a)(1) (1951).

[21] United States v. Motlow, (7th Cir. 1926) 10 F. (2d) 657 at 659, where the court concluded, "The Eighth Amendment provides that 'excessive bail shall not be required.' This implies, and therefore safeguards, the right to give bail at least before trial." Also, see the recommendation to district judges by the conference of the senior circuit judges, held in June 1925, upon the call of the Chief Justice of the United States, under Act of September 14, 1922 (42 Stat. L. 838), where the judges summarized, "The right to bail before conviction is secured by the Constitution to those charged with violation of the criminal laws of the United States." JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES (1925).

[22] Hudson v. Parker, 156 U.S. 277 at 285, 15 S.Ct. 450 (1895); United States v. Motlow, (7th Cir. 1926) 10 F. (2d) 657 at 659; and Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1 (1951).

on another and different accusation of crime, public policy forbids that he be again admitted to bail in the same cause."[23] Thus, we see that even the constitutionally protected right to bail in non-capital cases prior to conviction may be forfeited by an accused in the same or even in collateral proceedings. In an earlier federal decision, however, it was suggested that such a forfeiture ought to be measured by the punishment that might be meted out in the event of conviction, and if nominal, the prisoner should be admitted to bail in spite of his having fled while under bail, for imprisonment pending trial would be unreasonable.[24]

A second important limitation on this right arises when the accused is unable to meet the amount set as bail. Of course, the amount must comply with restrictions against excessive bail, as we shall see in the later discussion of this phase of the problem, but assuming it has been justly fixed, what of the accused who cannot meet it? One very recent federal decision involving a non-capital offense concluded that, "A person arrested upon a criminal charge, who cannot give bail has no recourse but to move for trial."[25] Even further, in a decision in which the convicted party sought by motion to vacate a sentence on the basis of a denial of right to bail, the court concluded that the convicted party had "not even allege[d] that he could have raised bail if bail had been set."[26] It is doubtful if the court intended this statement as broadly as it might appear, or that such a burden would be placed on an accused in every case. These cases do indicate, however, that a right to bail will be conditioned on the accused's being financially able to meet the amount of bail, whatever it may be, so long as it is reasonable.

There is an interesting twilight zone between the procedural positions before and after trial. This is the time during the trial, and the question arises as to whether or not a *right* to bail exists even in non-capital cases in the course of such proceedings. Although the authority is slight, it has been held that a defendant accused of a non-capital felony is not entitled as a matter of right to bail during his trial, the federal district judge concluding that, "the decisions of

[23] In re Lamar, (D.C. N.J. 1924), 294 F. 688 at 689. The court concluded that the proceedings before them were merely collateral to those from which the accused took flight, but that they were an outgrowth thereof, and the accused having "violated his expressed obligation to appear and abide the judgment of the court admitting him to bail, . . . will not be given another opportunity to abuse the like obligation."

[24] Lee's Case, (C.C. Pa. 1865) 15 Fed. Cas. No. 8,180.

[25] United States v. Rumrich, (6th Cir. 1950) 180 F. (2d) 575 at 576.

[26] United States v. Maher, (D.C. Me. 1950) 89 F. Supp. 289 at 295.

the Supreme Court and statutes . . . clearly contemplate that the defendant admitted to bail 'before trial' may be taken into the custody of the court, and held subject to its order during the trial."[27] Although the Supreme Court has not dealt specifically with the question, the case of *United States v. Hudson* gives support to the conclusion of the above district court in the following language dealing with the interpretation of the provisions passed by Congress on bail: "Where that [legislative] intent is expressed to the extent it is here, and there stops, the conclusion naturally follows that Congress did not intend that the right of bail could be granted in any other cases than those that it has provided for by express enactment."[28] Thus, from these interpretations placed upon the question of whether or not a right exists to bail during the course of trial, it would seem that at best it is within the doubtful penumbra of judicial discretion and does not exist as any inherent right.

In interpreting the discretionary right to bail prior to conviction in capital offenses, a number of interesting cases have arisen in elucidation of what the limits of discretion shall be. It is clear that continuously from the time of the earliest legislative intent expressed in the Judiciary Act of 1789, the right has been one merely of discretion, and nothing more. The only variable has been in the penalty attached to certain crimes, bringing them within or without the definition of capital or non-capital offenses. An example of one such evolution is seen in the crime of treason. The Pennsylvania District Circuit Court held in 1795 in the case of *United States v. Stewart* that, "the circumstances must be very strong, which will, at any time, induce us to admit a person to bail, who stands charged with High-Treason."[29] The Supreme Court in the same year admitted an accused to bail, though the charge was "High-Treason."[30] After a congressional act was passed in 1862, giving the federal courts authority, in their discretion, to impose fines and imprisonment, instead of death, as punishment for treason, the question was put definitively at rest.[31] A rule which would apparently be followed in federal courts generally, even in capital offenses, was expressed in an 1813 decision, where the judge concluded that a prisoner, even though charged with piracy, would be admitted to bail if he were suffering from a disease

[27] United States v. Rice, (C.C. N.Y. 1911) 192 F. 720 at 721.
[28] (D.C. Ark. 1894) 65 F. 68 at 76.
[29] 2 Dall. (2 U.S.) 343 at 345 (1795).
[30] United States v. Hamilton, 3 Dall. (3 U.S.) 17 at 17 (1795).
[31] An interesting example of interpretation of this provision is to be found in Case of Davis, (C.C. Va. 1867-1871) 7 Fed. Cas. No. 3, 621a.

which might be ultimately dangerous if the accused were continued in confinement.[32]

The present Title 18 of the U.S.C.A. embodying the Federal Rules of Criminal Procedure, as previously stated, provides that any court or judge authorized to admit to bail may so admit a person arrested for an offense punishable by death, if it is deemed discreet, "giving due weight to the evidence and to the nature and circumstances of the offense." Thus, it is clear that the accused in such a case has no right to bail unless the court or judge involved exercises his discretion.[33] Likewise, as in the case of the right to bail in non-capital offenses, the accused's expectations of receiving bail will be greatly lessened by his having forfeited bond and fled the jurisdiction in a previous, though unrelated, action. It would seem to be doubtful if bond would in any case be granted to an accused who has fled the jurisdiction in the same or collateral proceeding while under bail for a capital offense. Here, as in non-capital cases, even where discretion has been exercised in the behalf of an accused, the lack of funds necessary to giving bail will deny to the accused his freedom.[34]

C. *After Conviction.* Neither the Judiciary Act of 1789 nor the the Eighth Amendment included within their respective scopes the problem of bail after conviction has occurred and review is pending. Bail has been so frequently granted after conviction, that the erroneous impression has grown up that it is allowed as a matter of right. Such is certainly not the state of the law, and the case of *Ex parte Harlan* most nearly summarizes the entire body of federal decisions on the subject of bail after conviction in the following language: "It is needless to say that there is no constitutional right to bail in any case, after conviction. After all that has been said and written on the subject, the only rule which can be deduced from the authorities is that bail should be granted or denied as best effects exact justice between the government and the defendant according to the character and urgencies of the instant case, determined in the light of the principles of the common law as affected by the enactments of Congress."[35] The cases are nearly unanimous in their accord with the conclusion that there is no constitutional right to bail in post-conviction cases,[36] the question being

[32] United States v. Jones (C.C. Pa. 1813) 26 Fed. Cas. No. 15,495.
[33] Ex parte Monti, (D.C. N.Y. 1948) 79 F. Supp. 651 at 654.
[34] United States v. Rumrich, (6th Cir. 1950) 180 F. (2d) 575 at 576.
[35] (C.C. Fla. 1909) 180 F. 119 at 135, affd. 218 U.S. 442, 31 S.Ct. 44 (1910).
[36] In re Williams, (D.C. Cir. 1924) 294 F. 996; United States v. Simmons, (C.C. N.Y. 1891) 47 F. 575 at 577; United States v. Motlow, (7th Cir. 1926) 10 F. (2d) 657

one of discretion based upon such determinations as "severity of the punishment, the nature of the offense of which the defendant stands convicted, the health of the prisoner, the character of the evidence, the good faith back of the assignments of error, the public welfare, the conduct of the accused after indictment and up to and including the time of his sentence, as well as many other matters."[37] Courts have stated that this discretion ought to be exercised with much liberality in the case of misdemeanors, but that the rule should be otherwise where the defendant has been found guilty of a felony, and it may be said that the cases would seem generally to bear out such a theory in actual application.[38]

The question of post-conviction bail is provided for in Title 18 of the U.S.C.A. within the Federal Rules of Criminal Procedure, where it is set forth that, "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court." This rather positive procedure was first promulgated by the United States Supreme Court in May 1934, to take effect September 1934, after such power had been given to the Court by Congress in an Act of February 24, 1933,[39] although bail for certiorari was not expressly mentioned. The only change made in the most recent 1948 Revision of the Criminal Code

at 662; United States v. St. John, (7th Cir. 1918) 254 F. 794 at 796; 6 CORPUS JURIS 965 (1916); and see the recommendation to District Judges by the conference of the senior circuit judges, held in June, 1925, upon the call of the Chief Justice of the United States, and under Act of September 14, 1922 (42 Stat. L. 838) in which the following was concluded: "The right to bail after conviction by a court or a judge of first instance or an intermediate court or a judge thereof is not a matter of constitutional right. The acts of Congress make provision for allowance of bail after conviction by courts and judges to release the convicted defendant upon the exercise of their judicial discretion, having in mind the purpose of the federal statutes not to subject to punishment any one until he has been finally adjudged guilty in the court of last resort. But the judicial discretion of the federal courts and judges in granting or withholding bail after conviction should be exercised to discourage review sought, not with hope of new trial, but on frivolous grounds merely for delay. Application for bail should be made to the trial judge in the first instance." JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES (1925). The Supreme Court in McKane v. Durston, 153 U.S. 684, 14 S.Ct. 913 (1894), refused to lend its support to a rather ingenious argument advanced by counsel that post-conviction bail was a right guaranteed by §2, Article IV of the Constitution ("The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states"), the Court declaring that such privileges and immunities enjoyed by the citizens of one state, under its Constitution and laws, are not the measure of the privileges and immunities to be enjoyed as of right by a citizen of another state, under its Constitution and laws.

[37] United States v. St. John, (7th Cir. 1918) 254 F. 794 at 796; see comparable language in United States v. Delaney, (D.C. N.J. 1934) 8 F. Supp. 224; and see generally supra note 36.

[38] In re Williams, (D.C. Cir. 1924) 294 F. 996 at 998. See also 6 CORPUS JURIS 965 (1916).

[39] 47 Stat. L. 904 (1933).

and the Federal Rules of Criminal Procedure, insofar as bail upon review is concerned, was the addition of a provision for bail pending certiorari.[40] Thus, Rule 46(a)(2) is clearly an incorporation of the test set up by Justice Butler in *United States v. Motlow*,[41] where it was declared that appeals "taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court" are such as to allow petitioners to bail. This was further elaborated in a 1950 decision following the establishment of the present test embodied in Rule 46(a)(2), where the court summarized, "The question may be 'substantial' even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable. An appellant, though guilty beyond question, may have been denied the kind of trial that even a traitor to our country is entitled to under the Constitution and laws. Those are situations where bail pending appeal should be granted."[42] Thus, "two requisites must be met in order to justify the enlargement of a defendant on bail pending appeal. First, it must appear that the case involves a substantial question of law. Second, it must appear that the case is one in which, in the discretion of the Court, it is proper to grant bail."[43] Although these judicial interpretations are of considerable aid in the determination of when "substantial" questions requiring appellate consideration exist, it is clear that considerable discretion will remain in the admitting officer or court as to when such a qualification has been met.

Some of the applications of the rule to the actual cases are seen in the following decisions in which the courts have denied bail, declaring that no substantial question existed. These cases indicate typical situations where adequate facts did not exist to precipitate an exercise of discretion by the judge or court. Probably the first case to consider

[40] Federal Rules of Criminal Procedure, 18 U.S.C.A., Rule 46(a)(2) (1951).

[41] (7th Cir. 1926) 10 F. (2d) 657 at 662, where the court through Justice Butler held, "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but if taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court, then petitioners should be admitted to bail."

[42] D'Aquino v. United States, (9th Cir. 1950) 180 F. (2d) 271 at 272.

[43] United States v. Burgman, (D.C. D.C. 1950) 89 F. Supp. 288 at 289.

the Supreme Court's newly-promulgated rule was *United States v. Delaney*, although the decision was handed down a few months prior to the effective date of the new 1934 provision. The court concluded that the defendant's conviction for income tax evasion was "inevitable" and applied the "substantial question" test in denying bail, holding that, "Courts, both the United States, and in the states, had previously these same and similar aids to mental digestion."[44] The court in *United States v. Schuermann* held that where the evidence strongly supported the conviction of the defendant, and the principal objection to the court's rulings was the failure to charge, absent a proper and timely request, that defendant's failure to testify did not create a presumption of guilt, the appeal did not submit a substantial question for appellate determination.[45] In *United States v. Burgman* bail was denied by the court, declaring that a substantial question of law had not been shown to exist, for the acts involved therein had been held to constitute treason under comparable facts of another federal decision.[46] The court in *Coppersmith v. United States* concluded that the charge made by the lower court to the jury had submitted the case fairly to the jury under correct rules of law, and so the present appeal alleging error in such charge did not show a substantial question justifying admitting to bail.[47] Although arising prior to the present wording of Rule 46(a)(2), the case of *Lewis v. United States* would arrive at the same conclusion under the "substantial question" test as it did in 1927, denying bail where the defendant's motion for new trial, after he had been sentenced on plea of guilty on the ground of mental irresponsibility, was supported only by affidavits in the nature of conclusions, not made by an alienist.[48] Thus, having found that no substantial question existed in any of these fact situations, the courts and judges did not find it necessary to exercise their discretion in determining the circumstances of the particular party seeking bail.

Once the court or judge has found that a substantial question exists, the problem then becomes whether or not bail should be allowed

[44] (D.C. N.J. 1934) 8 F. Supp. 224 at 227; and see Kitrell v. United States, (10th Cir. 1935) 76 F. (2d) 333, decided shortly after the rule was adopted.

[45] (D.C. Mo. 1948) 79 F. Supp. 250 at 251.

[46] (D.C. D.C. 1950) 89 F. Supp. 288 at 289.

[47] (4th Cir. 1949) 176 F. (2d) 353 at 354.

[48] (8th Cir. 1926) 14 F. (2d) 111 at 112. See also United States ex rel. Estabrook v. Otis, (8th Cir. 1927) 18 F. (2d) 689, for it is a certainty that here also the judge would have denied bail on the premise, at least, that no substantial question existed. The petitioner had been convicted of the offense of causing poison to be delivered by mail to a judge with intent to injure and kill him, in violation of United States statutes, and the court refused a writ of mandamus requiring bail be given.

to this particular defendant. Although language of such cases as *United States v. Motlow*[49] and *Bridges v. United States*[50] would seem to indicate that bail exists as a matter of right wherever a substantial question is found, the better rule derived from the plain meaning of Rule 46(a)(2) would leave reasonable discretion in every case to the judge or court. This is the approach taken by the court in *Williamson v. United States*,[51] where Communists were admitted to bail pending certiorari to the Supreme Court. Whether we label the defendant's claim to bail as one of right or as a matter of judicial discretion, such bail will be denied, it appears from the cases, wherever the defendant has been convicted of murder or some other atrocious offense and there is serious danger that if he is admitted to bail he will commit another offense of a comparable nature before his case can be heard and decided by the appellate court.[52] Also, bail will be refused where defendant's character, the circumstances surrounding his person, and the gravity of his offense are such that he would be likely to forfeit his bail and escape if he were allowed bail.[53] Bail has been denied where the defendant failed to exercise proper diligence in prosecuting his appeal,[54] but in the absence of this and the two prior conditions detailed, bail is generally granted. Examples of the serious crimes in which bail has been allowed, even after conviction, are treason,[55] assault with intent to kill,[56] embezzlement,[57] smuggling,[58] and conspiracy to violate the Smith Act.[59]

[49] Supra note 41.

[50] (9th Cir. 1950) 184 F. (2d) 881 at 884. See also D'Aquino v. United States, (9th Cir. 1950) 180 F. (2d) 271 at 272.

[51] (2d Cir. 1950) 184 F. (2d) 280 at 281. See also Rossi v. United States, (8th Cir. 1926) 11 F. (2d) 264.

[52] Rossi v. United States, (8th Cir. 1926) 11 F. (2d) 264 at 265; United States ex rel. Estabrook v. Otis, (8th Cir. 1927) 18 F. (2d) 689. See also 3 STANFORD L. REV. 167 (1950).

[53] Rossi v. United States, (8th Cir. 1926) 11 F. (2d) 264 at 265; Moder v. United States, (D.C. Cir. 1932) 62 F. (2d) 462, and see 3 STANFORD L. REV. 167 (1950).

[54] Jones v. United States, (4th Cir. 1926) 12 F. (2d) 708 at 710; but see Baker v. United States, (8th Cir. 1944) 139 F. (2d) 721, where the court held that an election of an accused to begin serving sentence did not constitute a waiver of his right to apply for bail pending an appeal.

[55] D'Aquino v. United States, (9th Cir. 1950) 180 F. (2d) 271.

[56] Hudson v. Parker, 156 U.S. 277, 15 S.Ct. 450 (1895).

[57] McKnight v. United States, (6th Cir. 1902) 113 F. 451.

[58] United States v. Nardone, (2d Cir. 1939) 106 F. (2d) 41.

[59] Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1 (1951); Williamson v. United States, (2d Cir. 1950) 184 F. (2d) 280; and Bridges v. United States, (9th Cir. 1950) 184 F. (2d) 881 at 882, where the government in this latter case sought to revoke bail on the ground that defendant was pursuing "a course of conduct and activities dangerous and detrimental to the public welfare and inimical to the safety and national security of the United States."

D. *Amount of Bail.* Whether we are considering bail prior to conviction or following, it may readily be seen that the amount set as bail is a question initially in the discretion of the judge or court from whom bail is sought.[60] This discretion is always to be tempered by the requirement of the Eighth Amendment that, "Excessive bail shall not be required. . . ." Likewise, Title 18 of the U.S.C.A., Rule 46(c), very specifically covers the amount of bail in the following words: "If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice 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." This latter statutory provision impliedly allows for the fact that only in non-capital cases prior to conviction is the right to bail protected by the specific provisions of the Eighth Amendment,[61] for the provision is that the conditions of Rule 46(c) will attach, "if the defendant is admitted to bail." Therefore, since all cases other than non-capital cases prior to conviction fall outside the purview of the Eighth Amendment, the party seeking bail must first prevail upon the court to exercise its discretion in the granting of bail, and then persuade it to fix the amount of bail low enough to allow the defendant to take advantage of it. However, once the judge or court has determined that bail shall be granted in a particular case, the decisions indicate that the amount will be controlled by the limits of the Eighth Amendment and by Rule 46(c) of the Federal Rules of Criminal Procedure.[62]

[60] Ex parte David Taylor, 14 How. (55 U.S.) 3 (1852); Connley v. United States, (9th Cir. 1930) 41 F. (2d) 49 at 50; United States v. Mule, (2d Cir. 1930) 40 F. (2d) 503 at 503, where the court said, "With the amount fixed for bail, while it appears to us rather high, we will not interfere. It is a matter peculiarly within the discretion of the District Judge, of which he is in the best position to deal." See also United States ex rel. Rubinstein v. Mulcahy, (2d Cir. 1946) 155 F. (2d) 1002; Waite, "Code of Criminal Procedure: The Problem of Bail," 15 A.B.A.J. 71 at 75 (1929) (amount of bail).

[61] Supra note 21.

[62] Bennett v. United States, (5th Cir. 1929) 36 F. (2d) 475 at 477, where the court said in a petition for bail pending appeal, "The amount of bail bond in a criminal case is largely determined by the ability of the defendant to give it, and what would be a reasonable bond in a given case can usually best be determined by the trial judge, because of his familiarity with the facts and the financial ability of the defendant to give security. Excessive bail is forbidden by the Eighth Amendment. What would be a reasonable bail in the case of one defendant may be excessive in the case of another." See also United States v. Brawner, (D.C. Tenn. 1881) 7 F. 86; United States v. Motlow, (7th Cir. 1926) 10 F. (2d) 657 at 659; United States ex rel. Rubinstein v. Mulcahy, (2d Cir. 1946) 155 F. (2d) 1002; Barrett v. United States, (6th Cir. 1925) 4 F. (2d) 317; and Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1 (1951).

The court in *United States ex rel. Rubinstein v. Mulcahy* made a noteworthy summarization of the federal decisions interpreting what will be considered to be within the pale of a "reasonable amount" when it concluded, "The reasonableness of the amount is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint . . . under the circumstances surrounding each particular accused. [cases cited]. Consideration should be given to the seriousness of the crime charged, the past record and recent action of the accused as bearing upon his good faith in appearing for trial and his financial ability to procure bail."[63] Although these same considerations would confront an admitting authority irrespective of whether his decision is to be made prior to trial or after conviction, nonetheless, it would seem that less reason exists for liberality in establishing the amount of bail in cases following conviction than before. This conclusion is supported by a number of cases which described the defendant's petition for bail after conviction as one deserving of less consideration for an exercise of discretion than a petition made before conviction. This is generally explained on the basis of the absence at this point of the formerly existing presumption of innocence, for the burden would now rest upon the accused to show error in his conviction.[64] Such would seem to be further borne out by the provision of Rule 46(a)(2) that discretion be exercised only where a "substantial question" exists for the determination of the appellate court.

Of course, as we have seen, so long as the bail allowed is reasonable, the defendant gains nothing by asserting that he is financially unable to meet the amount set.[65] Such inability would superficially appear to indicate, except in the case of a wholly impecunious party, that poor judgment was exercised in the fixing of the amount of bail in the first instance. But, on the other hand, the purpose of bail, insofar as it is to secure the presence of the defendant, would be apt to be defeated by an extremely flexible standard of "reasonable bail," for in every case where the defendant is largely without security to give bail, there would be little likelihood of his feeling compelled to remain in the jurisdiction if little or nothing were at stake.

It may readily be seen that the question of the amount in the first instance is such as to address itself exclusively to judicial discretion

[63] (2d Cir. 1946) 155 F. (2d) 1002 at 1004.

[64] United States v. St. John, (7th Cir. 1918) 254 F. 794 at 796; Garvey v. United States, (2d Cir. 1923) 292 F. 591.

[65] Supra notes 25 and 26.

and to the sense of justice of the authority empowered to fix the amount. Although bail has nominally been granted, it is conclusively determined that an excessive amount in effect denies bail to the defendant, and is thus within the express prohibition of the Eighth Amendment and of Rule 46(c) of the Federal Rules of Criminal Procedure.[66]

Recently, a number of significant cases have arisen in the federal courts dealing with the question of excessive bail. In *United States ex rel. Rubinstein v. Mulcahy*[67] the court was faced with the problem of whether or not bail in the amount of $500,000 was excessive under an indictment charging violation of the Selective Service Act by a naturalized citizen of Portugal. It was concluded that bail ought not to have been higher than $50,000, absent additional showing of facts, in spite of the ability of the defendant to furnish the larger amount.

In *Stack v. Boyle*[68] twelve petitioners were arrested on charges of conspiring to violate the Smith Act[69] and their bail was first established in amounts from $2,500 to $100,000. At a subsequent time, the district court fixed the pre-trial bail in the uniform amount of $50,000 for each petitioner. The only evidence submitted by the government in support of such an amount was a certified record showing that four other persons previously convicted under the Smith Act in another district had forfeited bail,[70] although there was no evidence relating these persons to petitioners. The Supreme Court held that bail had not been fixed by proper methods and that the motion to reduce bail had been improperly denied.[71] Chief Justice Vinson stated, "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 con-

[66] United States v. Motlow, (7th Cir. 1926) 10 F. (2d) 656 at 659; Barrett v. United States, (6th Cir. 1925) 4 F. (2d) 317 at 319; United States ex rel. Rubinstein v. Mulcahy, (2d Cir. 1946) 155 F. (2d) 1002 at 1004; and Stack v. Boyle, 342 U.S. 1 at 5, 72 S.Ct. 1 (1951).

[67] (2d Cir. 1946) 155 F. (2d) 1002.

[68] 342 U.S. 1, 72 S.Ct. 1 (1951).

[69] 18 U.S.C. (Supp. IV, 1951) §§371, 2385.

[70] The conviction referred to was that affirmed in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951), although Chief Judge Denman in Spector v. United States, (9th Cir. 1952) 193 F. (2d) 1002 at 1007, notes that these four persons who fled bail while released on $20,000 bail during appeal, had not fled when released before trial on bail of $5,000 each.

[71] It is of interest to note that subsequently the bail in this case was reduced from $50,000 for each petitioner to $10,000 for seven of them and $5,000 for the others. See Spector v. United States, (9th Cir. 1952) 193 F. (2d) 1002 at 1005.

spiracy 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," in violation of the Eighth Amendment and Rule 46(c) of the Federal Rules of Criminal Procedure.[72] Justice Jackson commented that "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. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it 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."[73]

In the recent case of *Spector v. United States*[74] the court had before it an appeal from a district court where defendants' motions for reduction of $50,000 pre-trial bail (in a case involving indictment for conspiracy to violate the Smith Act) had been denied. This denial followed the reversal in the case of *Stack v. United States*[75] of a similar order of the same district judge, denying reduction of $50,000 bail to defendants, although the Supreme Court in *Stack v. Boyle*[76] had held that on the evidence in the case, the $50,000 bail fixed for each of the defendants was excessive. The district court judge stated that he was unable to see what error he had made in the former case, to which the court of appeals responded, "The short of the matter is that the trial judge has failed to follow the Supreme Court decision in the *Stack* case, 72 S.Ct. at page 4. The holding was that in the cases there dealt with bail should not be higher than that normally fixed for offenses carrying like penalties, in the absence of showing of special circumstances requiring larger bail. No such special circumstances were shown, yet bail was again fixed at $50,000, the amount which the Supreme Court said 'cannot be squared with the statutory and constitutional standards for admission to bail.'" This would certainly appear to establish conclusively the rule set forth in *Stack v. Boyle*.

We find in the decision of *United States v. Field*[77] a possible explanation for this ever increasing number of cases which have considered the problem of excessive bail. Defendants were trustees of

[72] 342 U.S. 1 at 5, 72 S.Ct. 1 (1951).
[73] 342 U.S. 1 at 10, 72 S.Ct. 1 (1951).
[74] (9th Cir. 1952) 193 F. (2d) 1002.
[75] (9th Cir. 1951) 193 F. (2d) 875.
[76] 342 U.S. 1, 72 S.Ct. 1 (1951).
[77] (2d Cir. 1951) 193 F. (2d) 92.

the Bail Fund of the Civil Rights Congress of New York, which had been surety for the defendants that had fled bail in *Dennis v. United States*.[78] Defendants in the *Field* case were convicted of contempt for failing to answer certain questions and produce certain books and records of the Bail Fund after they had forfeited bail for the fugitive officers of the Communist Party who had been convicted of violation of the Smith Act in the *Dennis* case. Among the arguments advanced by the defendants in this unsuccessful appeal was that "excessive bail" under the Eighth Amendment would limit and fix a surety's obligation to the face amount of bail as originally established, or in effect that a charge of crime could be commuted into some stated sum of money, payment of which would terminate the defendant's and the surety's responsibility. Hence, defendants contended, this payment would free the surety from any responsibility for answering any further inquiries about the Bail Fund. Circuit Judge Clark concluded, "Such a monetary evaluation of crime is definitely at variance with the settled principle that bail is to be only in such amount as 'will insure the presence of the defendant,' and, if pursued logically, will seriously prejudice the furnishing of bail pending trial, particularly in the case of crimes against the government's existence, where an amount so determined is sure to be high. Indeed, the many appeals now developing concerning high bail are perhaps a consequence of the vigorous pressing of such contentions which may already have weakened the traditional value of a bail bond with responsible surety." Although this decision has many interesting implications, it is doubtful if it would militate in any way against the conclusions reached in the subsequent case of *Stack v. Boyle*.

From these cases it may be seen that in the absence of special circumstances warranting bail in a larger amount, such bail will be limited to an amount no higher than that normally fixed for offenses carrying like penalties, even though it is shown that the defendant was capable of furnishing a larger amount. However, the *Field* case would seem to stand for the proposition that the bail duty is to be enforced in such a manner as to insure the presence of the defendant, not as a substitute for his appearance, for the latter theory would "seriously prejudice the furnishing of bail . . . ."

E. *Method of Bringing to Issue.*[79] Where, as in *Stack v. Boyle*,

[78] 341 U.S. 494, 71 S.Ct. 857 (1951).

[79] Justice Jackson in Stack v. Boyle, 342 U.S. 1, 71 S.Ct. 1 (1951), gives an excellent discussion as to which judges and courts have the power to grant bail in cases before and

the defendant wishes to challenge bail as having been unlawfully fixed, what procedure must he pursue to bring such a question to issue? It is clear that in the outright refusal of bail, habeas corpus may be used to secure admittance to such bail,[80] and the initial refusal of bail is considered to be a "final decision" allowing for immediate appeal.[81] However, on the question of the reasonableness of bail, *Stack v. Boyle* is conclusive that habeas corpus is not, at least in the absence of extraordinary circumstances, the proper procedure for so doing. The Supreme Court agreed that habeas corpus was an appropriate remedy for one held in custody in violation of the Constitution, but concluded that "the District Court should withhold relief in this collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted." What appears to be a most helpful statement of the proper procedure to be followed was given by the Court in the following language: "The proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order denying such motion." The petitioners in *Stack v. Boyle* did make motion for reduction of bail, but they did not take an appeal from the order of the district court denying their motion and instead made claims under the Eighth Amendment in application for writs of habeas corpus. The original motion to reduce bail not only invoked the reasonable discretion of the district court fixing bail, the Supreme Court held, but also challenged the bail as violative of statutory and constitutional standards. Since there was no discretion with respect to reducing excessive bail, the Court concluded that the order denying the motion to reduce bail was appealable as a "final decision" of the district court.[82]

III. *Conclusion*

The number of recent decisions dealing with problems directly or correlatively concerned with bail indicate that it is a matter of increasing importance. The effect of the decision by the Supreme Court in *Stack v. Boyle* is certain to have considerable influence in shaping subsequent thinking in the federal courts as to the federally protected "right to

after conviction under the present Federal Rules of Criminal Procedure and the United States Criminal Code.

[80] Ex parte Perkov, (D.C. Cal. 1942) 45 F. Supp. 865 at 866; Ex parte Bollman, 4 Cranch (8 U.S.) 75 (1807).

[81] Lewis v. United States, (8th Cir. 1926) 14 F. (2d) 111, and see Stack v. Boyle, 342 U.S. 1 at 12, 72 S.Ct. 1 (1951).

[82] 28 U.S.C. (1946) §1291.

bail." It also appears probable that the point of greatest expansion in the concept of the right to bail will stem from the cases arising under the Smith Act or under any other attempt by Congress to control Communist activity within the confines of the United States. Wholesale forfeiture of bail bond in Communist cases, though such an eventuality seems unlikely, certainly would require a redefinition of what is "excessive" under the Eighth Amendment and Rule 46(c) of the Federal Rules of Criminal Procedure. Lastly, in view of the arbitrary power presently reposed in the Attorney General, it may be hoped that a more just procedure will be established for allowing bail in deportation cases than that indicated in *Carlson v. Landon.*

Robert L. Sandblom, S.Ed.