

## The Breakfast Club

### Constitutional Minute for 11 Jul 2023

#### Right #23: Protection from excessive bail and fines

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

Section 9 of the 1776 Virginia Declaration of Rights reads: *“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”*<sup>1</sup> Look familiar? It should come as no surprise that as Virginia ratified the Constitution, they suggested adding this amendment.

And these words were also familiar to America’s Founders: *“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”* These words come from the English Bill of Rights of 1689.<sup>2</sup> As everyone should know by now, there were no copyright laws in 1788 and plagiarism as we now call it, was common. Sometimes sources were cited, usually not.

The only real difference in these three versions is James Madison’s substitution of “shall not” for “ought not.”

Yes, excessive fines were a common problem in Merry Old England since judges had no legal guidelines to work from. Judges had a nasty habit of setting high bail to avoid having to release a notorious defendant on a writ of habeas corpus. Occasionally, we still see this practice in use in the United States. America’s founders instead wanted to keep both bail and fines manageable for the accused/convicted and judges and juries today have a lot of guidance to work from.

[Title 19.2, chapter9](#) of the Code of Virginia covers Bail and Recognizances. But there is no constitutional right to bail in this state (and eight others), only a protection that bail, if granted, cannot be excessive. Bail can generally be denied in these nine states for a defendant charged with a felony if the prosecuting authority provides convincing evidence that there would be no conditions the court could impose that would reasonably protect the safety of other persons and/or the community if the defendant were released.<sup>3</sup>

In 1951 (*Stack v. Boyle*), the Supreme Court declared that a bail amount would be “excessive” under the Eighth Amendment if it were “higher than is reasonably calculated” to ensure the defendant’s appearance at trial. That’s helpful, right?

Moving on to fines.

According to [Article VII, Section 8](#) of the Virginia Constitution, “all fines collected for offenses committed against the Commonwealth” are deposited in the Literary Fund. What is the Literary Fund, you ask?

*“The Literary Fund is a permanent and perpetual school fund established in the Constitution of Virginia. Revenues to the Literary Fund are derived primarily from criminal fines, fees, and forfeitures, unclaimed and escheated property, unclaimed lottery winnings and repayments of prior Literary Fund loans. The Literary Fund provides low-interest loans for school construction, grants under the interest rate subsidy program, debt service for technology funding, and support for the state’s share of teacher retirement required by the Standards of Quality.”<sup>4</sup>*

Pfizer Corporation recently agreed to pay a \$1.3 billion criminal fine to the US government as part of a settlement agreement to resolve allegations that it had illegally promoted the painkiller Bextra and other drugs. Was this fine excessive? That’s billion with a “B.”

But this enormous fine pales in comparison with the \$16.65 billion fine Bank of America paid in 2013 to settle federal and state charges that it misled investors about the quality of the mortgage-backed securities it was selling, leading to the largest “bubble” collapse in history (so far).

But even BOA’s enormous fine can’t “shake a stick” at the whopping £330 billion (\$419 billion) in compensation Tokyo Electric Power Company (Tepco) was ordered to pay to victims of 2011's Fukushima disaster. It should be noted that this enormous fine did not put Tokyo Electric Power Company out of business.

Fines are Biblical (see Deuteronomy 22:19, 1 Kings 22:39, 2 Kings 23:33 and Amos 2:8) but restitution was the preferred penalty for property crimes such as theft ([Exodus 22:4](#)).

For further reading:

Sorry, I could find no books whatsoever to recommend on this subject.

Next week: Right #24: Protection from cruel and unusual punishment.

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<sup>1</sup> <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>

<sup>2</sup> [https://avalon.law.yale.edu/17th\\_century/england.asp](https://avalon.law.yale.edu/17th_century/england.asp)

<sup>3</sup> <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-state-constitutional-right-to-bail>

<sup>4</sup> <https://www.doe.virginia.gov/programs-services/school-operations-support-services/facility-construction-maintenance/literary-fund-loans>