

## Sec. 1—Judicial Power, Courts, Judges

tify before a grand jury. On appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing sentence.<sup>183</sup> Here, the purpose was to obtain answers to the questions for the grand jury, and the court provided for the defendants' release upon compliance; whereas, "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence."<sup>184</sup>

In *International Union, UMW v. Bagwell*,<sup>185</sup> however, the Court formulated a new test for drawing the distinction between civil and criminal contempt in certain cases. Henceforth, the imposition of non-compensatory contempt fines for the violation of any complex injunction will require criminal proceedings. This case, as have so many, involved the imposition of large fines (here, \$52 million) upon a union in a strike situation for violations of an elaborate court injunction restraining union activity during the strike. The Court was vague with regard to the standards for determining when a court order is "complex" and thus requires the protection of criminal proceedings.<sup>186</sup>

The Court has also recognized a second, but more subtle distinction between types of contempt, and that is the difference between direct and indirect contempt. Direct contempt results when the contumacious act is committed "in the presence of the Court or so near thereto as to obstruct the administration of justice,"<sup>187</sup> while indirect contempt is behavior that the Court did not itself witness.<sup>188</sup> The nature of the contumacious act, *i.e.*, whether it is direct or indirect, is important because it determines the appropriate procedure for charging the contemnor. As will be seen in the following discussion, the history of the contempt powers of the American judiciary is marked by two trends: a shrinking of the court's power

<sup>183</sup> 384 U.S. at 370.

<sup>184</sup> 384 U.S. at 370 n.6. *See Hicks v. Feiock*, 485 U.S. 624 (1988) (remanding for determination whether payment of child support arrearages would purge a determinate sentence, the proper characterization critical to decision on a due process claim).

<sup>185</sup> 512 U.S. 821 (1994).

<sup>186</sup> 512 U.S. at 832–38. Relevant is the fact that the alleged contempts did not occur in the presence of the court and that determinations of violations require elaborate and reliable fact-finding. *See esp. id.* at 837–38.

<sup>187</sup> Act of March 2, 1831, ch. 99, § 1, 4 Stat. 488. *Cf.* Rule 42(a), FRCP, which provides, "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." *See also* Beale, *Contempt of Court, Civil and Criminal*, 21 HARV. L. REV. 161, 171–172 (1908).

<sup>188</sup> *See* Fox, *The Nature of Contempt of Court*, 37 L.Q. REV. 191 (1921).