

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA, ET AL., Petitioners v. JOHN L.
BAGWELL, ET AL.

CASE NO: 92-1625

PLACE: Washington, D.C.

DATE: Monday, November 29, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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INTERNATIONAL UNION, UNITED :

MINE WORKERS OF AMERICA, ET AL., :

JOHN G. ROBERTS, JR., ESQ., Petitioners :

On behalf of the Respondents: No. 92-1625

JOHN L. BAGWELL, ET AL. :

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REBUTTAL ARGUMENT OF Washington, D.C.

LAWRENCE GOLD, ESQ. Monday, November 29, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

LAWRENCE GOLD, ESQ., Washington, D.C.; on behalf of the Petitioners.

JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of the Respondents.

PAUL BENDER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C., as amicus curiae, supporting the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 92-1625 the International Union,
5 United Mine Workers of America v. John L. Bagwell.

6 Mr. Gold.

7 ORAL ARGUMENT OF LAURENCE GOLD

8 ON BEHALF OF THE PETITIONERS

9 MR. GOLD: Mr. Chief Justice, and may it please
10 the Court:

11 This case grows out of a strike and ensuing
12 equity proceeding to enjoin various kinds of wrongdoing
13 and a series of contempt proceedings which have generated
14 huge fines. The essential first question posed by the
15 case is whether this -- these fines were criminal fines
16 which could only be imposed through criminal contempt and
17 through procedures which meet the requirements of criminal
18 due process, most particularly the right to jury.

19 This is not a new question in this Court, and we
20 rely on statements of the essential rules going back to
21 1911 in the Gompers case, and rules which have been
22 restated and reaffirmed as recently as the Fiat case in
23 485 U.S.

24 QUESTION: Mr. Gold, do you take the position
25 that the defendant has to continue to have an opportunity

1 to avoid payment of the fine in order for it to be
2 classified as civil?

3 MR. GOLD: We think that that is --

4 QUESTION: Is that a hard and fast test, in your
5 view, of this case?

6 MR. GOLD: We think that that is one of the
7 underlying points which leads to what we understand to be
8 the basic point when you're dealing with fines and
9 imprisonment.

10 QUESTION: But it's your position that that's a
11 requirement.

12 MR. GOLD: Yes.

13 QUESTION: How can that ever be coercive? I
14 mean, if a defendant can always avoid it by eventually
15 doing the act.

16 MR. GOLD: The -- when I say that it has to be
17 avoidable, what it -- what I understand the cases to say
18 is that in a situation in which a fine or a -- an
19 imprisonment is imposed in order to coerce an act, where
20 that is done to coerce a discrete affirmative act, there
21 is a sense in which the individual has -- to use the
22 phrase which runs from the beginning and the -- to the end
23 of these cases, has the keys to the prison or the -- to
24 his own strongbox in his hands, in a way which is
25 different from the situation in which there is a

1 prohibition and an alleged violation of the prohibition.
2 The effort is to secure a discrete act from the
3 individual.

4 QUESTION: Well, if your response is that it
5 also depends upon whether it's mandatory or prohibitory --

6 MR. GOLD: Yes.

7 QUESTION: -- I suppose in this case there were
8 both types of things involved.

9 MR. GOLD: Yes, and in that -- in that sense,
10 Justice O'Connor, the first of the arguments we make is
11 first because it raises the larger, more general question.
12 But it is, for our purposes, narrower in its effect than
13 the second argument we make on the effect of settlement.

14 QUESTION: Well, in this case, this very case,
15 do you say that the fines could be imposed insofar as they
16 applied to those things that the union was asked to do
17 separate and apart from violent acts?

18 MR. GOLD: Yes.

19 QUESTION: Uh-hum.

20 MR. GOLD: Yes. We acknowledge -- we take the
21 sweet with the sour in terms of the law as it's developed,
22 a law which distinguishes between the ability of the
23 courts to coerce discrete acts that provide a unique
24 benefit to the plaintiff and rules which have to do with
25 the statement of prohibitions in court orders and the

1 levying of fines or imprisonment for violating those
2 orders.

3 QUESTION: Mr. Gold --

4 QUESTION: Mr. Gold, how much of the law that
5 you're talking about is constitutional law which would be
6 imposed on the States by the con, and how much of it is
7 just Federal court law. I mean, Gompers, for example, was
8 a Federal court case.

9 MR. GOLD: The opinion in Gompers talks about
10 the rules being rules of constitutional import having to
11 do with, as the phrase in the case, substantive rights and
12 constitutional privileges. And certainly Hicks v. Fiat
13 comes out of the California courts and applies the same
14 rules and the pivotal case for our purposes here, Bloom v.
15 Illinois, is a constitutional case.

16 We understand the test or the general rule that is
17 stated in Gompers and reaffirmed in Hicks, to have three
18 wellsprings and to serve three purposes. First of all, it
19 captures the essence of the historic distinction between
20 criminal contempt and civil contempt. Secondly, it takes
21 proper cognizance, as Gompers says, of the substantive
22 rights and constitutional privileges at stake. And
23 finally, as Bloom emphasizes, it gives due weight to the
24 apprehensions about an unbridled contempt power that --

25 QUESTION: So you think that the Constitution

1 enjoins a distinction between the mandatory provisions of
2 an injunction and the, you know, prohibitive, prohibitory.
3 The -- I thought that distinction was pretty much
4 discounted.

5 MR. GOLD: I can only judge by our understanding
6 of the words in the U.S. reports. The distinction is one
7 which serves to demark the line between criminal contempt,
8 which is governed by criminal due process requirements.

9 QUESTION: But isn't it a fact, Mr. Gold, that a
10 court can turn anything from mandatory into prohibitory
11 just by a matter of phrasing?

12 MR. GOLD: I -- well, two -- two points on that,
13 Mr. Chief Justice. One, when we talk about mandatory and
14 prohibitory, as this Court has talked about, and it is the
15 distinction between prohibiting someone from acting in a
16 way which is harmful or wrongful and ordering someone to
17 act in a -- do particular discrete acts.

18 QUESTION: Mr. Gold, in that respect, are you
19 saying -- are you saying that a stop order can never be
20 enforced except through a criminal contempt process.

21 MR. GOLD: No, Your --

22 QUESTION: There were examples given by your
23 opponent for -- in the brief. The Patco case was one, the
24 Operation Rescue injunctions were others. Can you say
25 under what circumstances a stop order can be enforced

1 without a criminal contempt proceeding? What is the
2 dividing line between when a stop order can be enforced
3 and when it requires a separate criminal contempt
4 proceeding?

5 MR. GOLD: Two -- two points, Justice Ginsburg.
6 First of all, we believe these distinctions that we're
7 discussing here, and which are labeled prohibitory and
8 mandatory and, as you say, involve stop orders, deal with
9 the question of fines and imprisonment. There are
10 other -- obviously, there are other ways to back up a stop
11 order, various kinds of compensatory and remedial orders
12 which are designed to provide the complaining party with
13 the rights and benefits that the order specifies.

14 Secondly, the stop order can be backed up by
15 various well crafted, affirmative orders which can be
16 enforced through coercive means under the established
17 tests.

18 QUESTION: Mr. Gold, are you --

19 QUESTION: Was Patco such a case?

20 MR. GOLD: Well --

21 QUESTION: Wasn't that a fine per day?

22 MR. GOLD: I'm not familiar with the particulars
23 of the Patco orders.

24 QUESTION: Well, do you take the position that
25 if the order -- an appropriate order is issued not to

1 strike, which is, in effect, to continue to work, that
2 that cannot be enforced with a coercive and still civil
3 fine for each day in which they refuse to return?

4 MR. GOLD: Yes, Your Honor. And whether it is
5 not to -- whether --

6 QUESTION: You take -- I'm sorry. You take the
7 position that that is not a -- that that enforcement is
8 not subject to a civil coercive fine?

9 MR. GOLD: Correct.

10 QUESTION: Suppose the judge says, go back to
11 work instead of, stop striking? Does that make a
12 difference?

13 MR. GOLD: The -- I think the answer is no.

14 QUESTION: Why? It seems to me one's
15 prohibitory, the other's -- the other's mandatory.

16 MR. GOLD: The underlying point is prohibitory.
17 It seems to -- and I would say --

18 QUESTION: Why do you say that? I don't
19 know -- I mean what the judge wants is to get these people
20 back to work. That's what the -- that's what the
21 plaintiff wants. He can put it either way: stop striking
22 or go back to work. And according to your analysis, one
23 can be enforced civilly, the other one can't. That
24 doesn't make much sense to me.

25 MR. GOLD: The -- I think it makes sense in

1 terms of the underlying theory of the distinction, Justice
2 Scalia. The -- in the same way as you've just stated, an
3 order -- instead of phrasing an order not to take action
4 which is injurious to the plaintiff, you can say only do
5 things which are beneficial to the plaintiff, or do not do
6 things. But the underlying point remains the same, and I
7 can only say that against a background where the criminal
8 law is a law of prohibition enforced through retribution
9 and deterrence, the test is a test which is as sound as
10 can be divined.

11 After all, Gompers itself was a boycott case.
12 The Court had no trouble distinguishing between
13 prohibiting boycotting activity, which could be phrased
14 affirmatively or negatively --

15 QUESTION: Well, Mr. Gold, it doesn't seem to me
16 that the mandatory prohibitory distinction upon which you
17 seem to think the whole case turns has any underlying
18 connection with the constitutional values that are at
19 stake here. I should have thought you could have devised
20 some other tests for us, such as whether or not the
21 sanction is prospective or retroactive, backward looking,
22 forward looking, ad hoc, something like that. But the
23 mandatory-prohibitory distinction, it seems to me, is
24 rooted, to be sure, in what we have said in the cases, but
25 that doesn't seem to resonate in any of the underlying

1 constitutional values that are at stake here.

2 MR. GOLD: Well, I think the argument for this
3 distinction is very much like the Churchillian argument
4 for democracy; it is superior to the alternatives.

5 QUESTION: Mr. Gold, does your -- does your case
6 rest on this? Justice Kennedy prefaced his comment with
7 that.

8 MR. GOLD: Our first argument most definitely
9 rest on what would --

10 QUESTION: But suppose -- suppose we reject this
11 distinction between not doing and doing. What are you
12 left with?

13 MR. GOLD: In terms of our first argument, we
14 are left with nothing other than the complete lack of any
15 principle differentiating content in the standard applied
16 by the Virginia courts and urged by the respondents.
17 According to them, whether the underlying order is
18 prohibitory or mandatory, whether it has the essence and
19 substance of traditional criminal law, whether it is
20 enforced by fines or imprisonment, so long as, quote, the
21 penalty is scheduled in advance, it is civil, and if it is
22 not, it is criminal.

23 The prohibitory-mandatory approach is an effort
24 to deal with a certain measure of overlap between the
25 purposes and effect of a, quote, coercive fine or a

1 coercive imprisonment, and a, quote, criminal fine or
2 criminal imprisonment, and recognizes that both have
3 elements of providing benefit to the plaintiff,
4 vindicating the authority of the law and providing
5 measures of retribution and deterrence. And if --

6 QUESTION: If the Court is unwilling to draw a
7 line between acting and not acting, what is the remainder
8 of your argument on why these particular fines should be
9 classed criminal?

10 MR. GOLD: Our view is that if that line is
11 rejected, then you have to go to the highest level
12 distinction, which is the distinction between proceedings
13 which are to vindicate the authority of the courts and the
14 law, versus proceedings which are to provide a definite
15 unique benefit to the plaintiff that is, in a real sense,
16 different from the overall effort to maintain peace and
17 social value.

18 QUESTION: Ex ante or ex post? I mean, ex ante
19 when the fines are announced, if you do this thing you
20 will pay a fine, they are for the benefit of the
21 plaintiff, to protect the plaintiff from the harm that
22 doing that unlawful thing would produce. But once the
23 acts are done, the plaintiffs have already been -- and
24 then the fine is imposed.

25 MR. GOLD: I --

1 QUESTION: You could say at that point there's
2 nothing left but vindication of the court.

3 MR. GOLD: I think that, far better than I've
4 been able to do so far, that exposes the nature of the
5 problem. To say that if, ex ante, you enter an order, do
6 not harm the plaintiff, and say if you do, you will be
7 fined \$100,000 -- to say that that is a situation which is
8 different from the following: you enter an order saying
9 do not harm the plaintiff, actions are taken which harm
10 the plaintiff, a proceeding is begun in contempt, and a
11 fine of \$100,000 is imposed.

12 To say that those are different, the first
13 civil, the second has always been criminal, is to deny
14 that the criminal law, with the sentencing guidelines and
15 other statement, prior statements of both the norm and the
16 sanction, is somehow civil. And that, we think, leaves
17 the underlying constitutional values, which we have not
18 talked about, and I am only going to talk about for a
19 minute, completely unprotected.

20 After all, there are two social values here.
21 One, the basic social values which provide a heightened
22 degree of due process for the imposition of certain forms
23 of penalties. And secondly, the particular concern of the
24 contempt procedure, which is one which conflates all the
25 power of Government into a single individual which varies

1 in a way which is contrary to the whole notion of
2 protecting against improper incursions on liberty by
3 separating the powers of Government.

4 QUESTION: Well, what you speak of as the single
5 individual is, in fact, the court. And the court, in
6 fact, has a position in these cases which is different
7 from the court in a normal criminal case, or indeed from a
8 normal civil case. Because the court, in effect, has --
9 by issuing an injunction, has become an actor and, in
10 effect, has created a public stake which doesn't exist in
11 your two other extreme examples.

12 So there's nothing unreasonable, on the face of
13 it, to say that there should be a particular process, and
14 not necessarily a criminal one, to protect that -- that
15 third and different interest.

16 MR. GOLD: The history of the doctrine, to date,
17 has been, as we understand it, precisely the opposite,
18 Justice Souter. It has been the recognition that the fact
19 that the judge issued the order creates grave risks that,
20 in dealing with --

21 QUESTION: Oh, I will grant you that it does
22 create grave risks. But I'm saying -- all I'm saying is
23 that the existence of that risk is not dispositive,
24 because that risk is still, as it were, sort of the
25 unfortunate reflection of a third interest which does not

1 occur in the run of the mill criminal case or the run of
2 the mill civil case.

3 MR. GOLD: I'd like to move on to the second
4 argument. Before I do, let me simply say that if that's
5 true, there is no room for a criminal contempt. And it is
6 the starting point of every case in this Court, from
7 Gompers through Dixon, is that there is an area of --
8 called criminal contempt which must proceed under
9 constitutional due process standards.

10 Let me talk about the second question presented.
11 In the second question --

12 QUESTION: Can I ask you a question about the
13 second question?

14 MR. GOLD: Absolutely.

15 QUESTION: Is it your position that despite all
16 of the characteristics which exist that you say would make
17 this a criminal proceeding, it can be converted into a
18 civil proceeding so long as the State court announces when
19 it's imposes, of course, you know, even if you violate
20 these orders and incur liability for the fines, you'll be
21 able to settle? If you settle and the plaintiff is
22 willing to waive the fines, the fines will be waived, is
23 that enough to convert what might otherwise be a criminal
24 process, according to your analysis, into a civil?

25 MR. GOLD: The -- that characterization, I

1 think, is -- of the process is the respondents'. But in
2 terms of your point, we do believe that if you look at the
3 most general proposition, that criminal contempt is to
4 vindicate the authority of the law and the court, versus
5 civil contempt, which is to bring about the benefits of
6 the order to the plaintiff in a remedial fashion, then
7 law, any rule which says that the plaintiff is not master
8 of the case and cannot settle it and it is not inherent in
9 the case, that satisfaction to the plaintiff is not
10 enough, is a hallmark of criminal contempt, if there is no
11 other hallmark of criminal contempt.

12 QUESTION: And vice versa. I asked you the vice
13 versa question. Likewise, if the plaintiff can waive it,
14 it becomes civil.

15 MR. GOLD: We would not --

16 QUESTION: Or if you say A, you have to say B,
17 Mr. Gold, don't you?

18 MR. GOLD: Well, we would say that any case --
19 we would say that any case in which the plaintiff can
20 waive -- let me just put it in these terms. I hadn't
21 thought of it exactly as you said it, but it is true, from
22 Gompers on, that criminal contempt cannot be settled by
23 the putative private plaintiff, and in that sense I agree
24 totally with what you said.

25 QUESTION: Thank you, Mr. Gold.

1 Mr. Roberts, we'll hear from you.

2 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

3 ON BEHALF OF THE RESPONDENTS

4 MR. ROBERTS: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 The Virginia Supreme Court correctly determined,
7 in accord with every Federal court of appeals to have
8 considered this question, that contempt sanctions of the
9 sort at issue here are civil in nature. This Court has
10 explained that we should look to the substance of the
11 proceeding in classifying contempts as civil or criminal.

12 Here the defendant violated an injunction
13 repeatedly. The defendant was brought before the court
14 and the judge said you've violated this injunction, and to
15 get you to stop violating it and start complying with it
16 in the future, I'm going to fine you so much for every
17 future violation. These fines are prospective and you can
18 avoid them completely by complying with the injunction. I
19 hope this will deter future violations.

20 Now --

21 QUESTION: Mr. Roberts, if the fines hadn't been
22 prospective, then the enforcement of the injunction would
23 have had to have been through a criminal process with a
24 jury trial.

25 MR. ROBERTS: If the --

1 QUESTION: But everything turned on specifying
2 the fee schedule.

3 MR. ROBERTS: In general, I think that's
4 correct. You need to have a situation where the judge
5 specifies in advance a warning to the defendant to coerce
6 him. I think --

7 QUESTION: What are the constitutional values
8 that are served by that distinction?

9 MR. ROBERTS: The constitutional values that are
10 served is that your -- the Bill of Rights protections that
11 the union is saying it wasn't granted are applicable only
12 in a criminal proceeding, one brought to punish. If the
13 proceeding is not one brought to punish, it's not a
14 criminal proceeding and then those protections are not
15 applicable. The question instead is is the proceeding
16 coercive and remedial, as opposed to punitive.

17 QUESTION: Well, why has it become -- why has it
18 become coercive just because you name the amount of money?
19 I mean is the difference between the judge saying if you
20 violate my order, I'm going to fine you \$1,000 a day, and
21 the judge saying if you violate my order, I'm going to
22 fine you something; I won't tell you now what it is, but
23 you're going to be fined for contempt of court?

24 MR. ROBERTS: It's not --

25 QUESTION: I mean they're both coercive, it

1 seems to me.

2 MR. ROBERTS: Well, they do have general
3 coercive aspects. It looks more remedial in the sense
4 that it is specified and focused on a particular
5 defendant. Because in the situation you posit, what the
6 judge is going to do after the violation is set the fine
7 based on the violation, look to the past. What he's doing
8 here is looking to the future. He's not saying you've
9 done terrible things and this is what you're going to pay.
10 He's saying I want to get you to stop doing those things,
11 and this is what I think it will take.

12 QUESTION: But the only difference is he makes a
13 speech to the defendant, as opposed, in effect, to deeming
14 that the defendant knows the criminal law.

15 MR. ROBERTS: No --

16 QUESTION: That seems to me a totally
17 formalistic distinction.

18 MR. ROBERTS: It's not a formalistic
19 distinction, Your Honor, in this respect; the general
20 criminal law does have deterrent effect. It applies to
21 everyone, a general deterrence. Here we're talking about
22 a specific defendant whose conduct is -- has risen to a
23 level that an injunction's been entered against him. It's
24 been narrowed down to that defendant. And when the
25 judge -- and that defendant then violates the order again.

1 And when the judge says this is what I think it will take
2 to take you to comply, that order is narrowed and coercive
3 in a far more focused sense than the criminal law is
4 deterrent.

5 QUESTION: I see -- I see it's narrowing, but
6 I'm not sure why its narrowing makes it coercive, and I
7 don't see what the extra element of coercion is.

8 MR. ROBERTS: Well, the extra element starts,
9 first, with the fact that there's been a violation of the
10 injunction already. This is not just the general citizen
11 walking the street who has the criminal law applied to
12 him. It's been focused on a particular individual, and
13 the judge has indicated to that individual specific
14 sanctions that will follow further violations.

15 QUESTION: Sure. But if a judge is sentencing
16 an individual for a violation of the criminal law and says
17 don't let me see you here again or I'll throw the book at
18 you, that doesn't convert the second proceeding, if he
19 does come back, into a civil proceeding, and I'm not sure
20 what the distinction is between that and what you're
21 proposing for us here.

22 MR. ROBERTS: Well, the distinction is the same
23 one that the Court has drawn between civil and criminal
24 statutes. Your argument, it seems, would undermine the
25 validity of civil penalties generally, but this Court has

1 upheld them. And it's upheld them because it's recognized
2 that the sanction in that case, in a civil penalty case,
3 serves a remedial objective. It's reasonably related to a
4 remedial objective and it's not explainable solely on the
5 basis of punitive values.

6 QUESTION: Mr. Roberts, can I ask just one other
7 question. What if, in addition to saying if you do so and
8 so you'll be fined \$100,000, the judge said, and you'll
9 spend 24 hours in jail?

10 MR. ROBERTS: Imprisonment has not been used
11 traditionally, Your Honor, in the sense of --

12 QUESTION: I understand. But what would your
13 answer be if the judge did say that?

14 MR. ROBERTS: That the imprisonment may well not
15 be valid. And the distinction is this; imprisonment has
16 typically been used in contempt where a situation is --
17 the coercive situation with a defendant could comply at
18 any point. Say you're in prison until you turn over the
19 documents. Now, if you wait 3 days to turn over the
20 documents, that's like the situation we have here. The
21 union, you're going to be fined until you start complying.
22 If they don't comply for 3 days, they incur those fines.

23 Now, the prisoner can't get back those 3 days,
24 but that doesn't make the proceeding criminal. Here, the
25 union can't get back the fines it has incurred for its

1 violations --

2 QUESTION: So in a domestic relations case, a
3 judge can say that for every time you go near the wife's
4 house in violation of this order, I'll fine you \$500.

5 MR. ROBERTS: If -- adding one feature that I
6 think -- again, that is present in this case and confirms
7 the remedial aspect, which is there has been violations of
8 a prior order. In other words, it's not simply this goes
9 with the injunction. There's a problem here before the
10 court that we have to remedy. The injunction isn't
11 working. You're violating it.

12 QUESTION: Well, what's -- is the basis for that
13 distinction just to vindicate the authority of the court
14 as opposed to bringing the dispute to an orderly focus
15 before the court? I can see if documents aren't being
16 produced or if the court's processes are somehow being
17 thwarted so that it cannot resolve the dispute, that it
18 may have to take these measures, but this seems to me an
19 ultimate order designed only to vindicate the court's
20 authority.

21 MR. ROBERTS: Not simply to vindicate the
22 court's authority, but to remedy the problem before the
23 court. The sanctions are announced in order to coerce the
24 defendant into complying with the court order. It is that
25 remedial aspect, a focused aspect, not simply the general

1 deterrent effect --

2 QUESTION: Mr. Roberts, why don't we take the
3 court at its word? And it said: "Courts of the
4 Commonwealth must have the authority to enforce their
5 orders by employing coercive civil sanctions if the
6 dignity of the law and public respect for the judiciary
7 are to be maintained." The court is there telling us its
8 concern with its own good and welfare, and it must
9 enforce -- impose these fines to promote public respect
10 for the judiciary.

11 MR. ROBERTS: Two -- a very important
12 distinction, Your Honor. That is talking about enforcing
13 the civil contempt fines once they have been imposed and
14 reduced to judgment. That is not the reason the judge
15 imposed these prospective sanctions in the first place.
16 The record is quite clear. The judge said this is to get
17 you to comply. He said I sincerely hope this will deter
18 future violations.

19 The passage Your Honor was reading from concerns
20 after this case, the union and the company had settled.
21 At that point does the court have to, as a matter of
22 Federal constitutional law, vacate the previously imposed
23 fines already reduced to judgment? And the answer is no,
24 because these are court orders and those are not at the
25 disposal of the parties. The --

1 QUESTION: But doesn't that show, if there was
2 ambiguity before, what the court conceived the character
3 of these fines to be?

4 MR. ROBERTS: No, Your --

5 QUESTION: It says I'm not vacating -- the court
6 says we're not vacating these fines because they relate to
7 the dignity of the court.

8 MR. ROBERTS: No, it's -- the trial court quite
9 clearly spelled out -- and they're set forth in our
10 brief -- whenever he imposed these sanctions, that this is
11 civil contempt, it is to get you to comply, if you comply
12 you will not incur any fines whatever. They did not
13 comply, they violated the order, and then the promised
14 sanction was imposed.

15 Now at that point the court's authority is
16 implicated. Is its fine going to be enforced or not, or
17 is it going to be something that the union and the company
18 can bargain about between themselves? To come in and say,
19 when the judge says I have entered sanctions fining you
20 this much, pay -- and the union is going to stand up and
21 say, well, no, Your Honor, we've sort of worked that out
22 between ourselves. At that point the court's authority to
23 enforce its previously imposed judgments is implicated.

24 QUESTION: Mr. --

25 MR. ROBERTS: That doesn't retroactively change

1 the character of the sanctions when they were announced.

2 QUESTION: Mr. Roberts, the answer you gave to
3 Justice Stevens a little earlier about an order that
4 imposes imprisonment instead of fines prospectively, it
5 seems to me to stand history on its head. The classic --
6 the classic contempt situation, civil contempt, is putting
7 somebody in jail. In fact, I don't know any of the older
8 cases in which civil contempt, coercing somebody to turn
9 over the key, is a fine. It's always jail and no fines.
10 Do you know any early cases that imposed fines?

11 MR. ROBERTS: Certainly. The United Mine
12 Workers decision from this Court -- this Court --

13 QUESTION: I said very early. I'm talking --
14 (Laughter.)

15 QUESTION: I'm talking about the development of
16 civil contempt in the common law, and the classic
17 situation is throwing somebody in jail until he coughs up
18 the information.

19 MR. ROBERTS: I don't --

20 QUESTION: And yet you told Justice Stevens,
21 well, if prospectively you put him in jail it's obviously
22 bad, although prospectively you can fine him and that's
23 just civil. But I think that -- that just inverts what
24 had been the rule at common law, that you could throw
25 somebody in jail. I don't know any rule at common law

1 that you could fine him.

2 MR. ROBERTS: Well, I don't disagree with you
3 that the classic case is putting someone in jail until
4 they comply with the court's order. But that doesn't mean
5 that the use of fines in this situation is invalid. As I
6 mentioned, fines were used this way in the United Mine
7 Workers case. And the one thing this Court has said --

8 QUESTION: Was the reason for that the necessity
9 of coercing corporate defendants as opposed to
10 individuals?

11 MR. ROBERTS: It's certainly a significant
12 factor, although perhaps the judge could have put the
13 union leaders in jail until the union complied with his
14 order. And he didn't do so for a simple reason. This
15 Court has announced, from its earlier cases, that in the
16 case of contempt, a court should use the least possible
17 power to the end proposed.

18 The judge, confronted with a situation of
19 nothing less than the breakdown of the rule of law in
20 Southwestern Virginia, thought that this was the least
21 incendiary and the most effective way to bring about
22 compliance with an injunction. Putting the union leaders
23 in prison may have been more dramatic, but may have
24 contributed to the problem rather than remedying it, which
25 was his primary objective throughout.

1 QUESTION: Do you know of any early -- the early
2 cases in the development of this civil contempt at common
3 law in which what the person in jail was required to do
4 before he could get out was something very -- maybe
5 there's no way it could have been something very complex.
6 It had to be something pretty simple, didn't it? He had
7 to turn over a document or sign a document or do something
8 like that.

9 It's very easy; you don't really need a jury to
10 figure out whether that's been done or not. And might not
11 that be the distinction? Might not that be why that was
12 allowed?

13 MR. ROBERTS: No, I don't think the distinction
14 is --

15 QUESTION: Because it was simple to tell,
16 whereas where the -- whether this has been violated or not
17 is very difficult to tell. I want a jury trial on it.

18 MR. ROBERTS: No, I don't think the distinction
19 has always been whether it was something easy to do or
20 hard to do, and it's certainly not that difficult to tell.
21 The one thing the court was clear about --

22 QUESTION: Easy to determine, not necessarily
23 easy to do. Easy to determine whether it's been done.

24 MR. ROBERTS: Well, it was easy to determine in
25 this case, because the one thing this circuit court judge

1 and his counterpart in the Federal court who was
2 addressing the same situation, both concluded is that the
3 union leadership had complete control over the conduct of
4 the strikers. There's nothing difficult about determining
5 whether or not the court's order had been complied with.
6 Certainly nothing difficult --

7 QUESTION: Whether there had been any violence?
8 Whether, you know -- you mean people don't come in and say
9 there was violence and other people say there wasn't
10 violence?

11 MR. ROBERTS: The question is not violence --

12 QUESTION: In the old common law, the classic
13 case, the judge says here's the document, Your Honor, let
14 me out of jail. He says, oh, yeah, I looked at the
15 document. Yes, you gave it to me. Out of jail. In this
16 case there's going to be debate about whether there was
17 violence, continued violence or not.

18 MR. ROBERTS: Well, there --

19 QUESTION: What's the judge going to do? He's
20 going to hear witnesses, I guess.

21 MR. ROBERTS: And he did. There was discovery.
22 There was examination and cross-examination of witnesses.

23 QUESTION: That didn't have to be done in the
24 old common law.

25 MR. ROBERTS: Well --

1 QUESTION: When you threw somebody in jail until
2 he coughed up the key or signed a document or delivered a
3 document.

4 MR. ROBERTS: I don't know that the old common
5 law had a situation where there was such widespread
6 organized flouting of a court injunction. I'm not aware
7 of that situation coming up. And the question is in such
8 a situation, is the court powerless to use its civil
9 contempt powers to enforce compliance with its orders; is
10 its only recourse punishment later on?

11 Take the situation of a company that's dumping
12 dioxin in the city water supply, and an injunction is
13 issued and the company is still doing it. The union would
14 say that all that the court can do is somewhere down the
15 road punish the company for that.

16 QUESTION: Well, Mr. Roberts, that's not quite
17 right. At page 27 of your brief you point out some
18 specific commands that the judge gave: "Place a
19 designated supervisor or captain at each picket site," and
20 such.

21 MR. ROBERTS: That's correct.

22 QUESTION: Now, that sort of thing, you could
23 tell whether the man was there or not.

24 MR. ROBERTS: Well, yes, Your Honor, that's
25 right. There were four specific elements in the

1 injunction that were affirmative under the union's viewing
2 it --

3 QUESTION: That -- those penalties for that sort
4 of thing are not at issue here, are they?

5 MR. ROBERTS: Well, not from what my brother has
6 said this morning, I gather they're not, no, because they
7 meet his affirmative prohibitory test. But --

8 QUESTION: As I understand it, the penalties are
9 for things like somebody threw a rock, and the union says
10 it was a stranger or he didn't have authority to do it or
11 he was violating orders or something like that which, as
12 Justice Scalia suggests, requires some kind of a
13 evidentiary hearing, discovery, to find out whether it
14 happened. But whether they posted a supervisor at the
15 corner of State and Madison, that's not a factual problem.

16 MR. ROBERTS: Let me -- let me clarify my answer
17 to your earlier question. Fines were imposed for
18 violations of those affirmative obligations. I understood
19 my brother to say that he didn't disagree that those could
20 not -- I mean, could be imposed during civil proceeding.

21 QUESTION: Oh, I was going to ask that. I think
22 he does -- he was just -- he was just talking about part
23 one of his case. I think he thinks part two of his case
24 washes those out as well.

25 MR. ROBERTS: Well --

1 QUESTION: That is, those were settled out of
2 it.

3 MR. ROBERTS: Well, then let me talk about part
4 two. His argument on part two is that the parties can
5 agree between themselves to settle the case, and that that
6 precludes the court from imposing the fines that had
7 already been reduced to judgment. That is a question of
8 State law, how the mootness rules apply. The Virginia
9 Supreme Court has provided the definitive answer to that
10 question of State law. Gompers doesn't control, not only
11 for the reason that it's an issue of State law, but --

12 QUESTION: Mr. Roberts, why would somebody
13 regard that as going to mootness instead of revealing what
14 the character of these proceedings were? In other words,
15 if it's on the criminal side, then it's certainly not moot
16 just because the parties settled. So why isn't the
17 mootness for this really a misnomer? If the case is still
18 alive, it's because it has a criminal character.

19 MR. ROBERTS: Well, the Gompers Court, in
20 considering the same question in the Federal context,
21 analyzed it in mootness terms. We have a situation where
22 a case has been settled and the question is the
23 consequence of that on particular judgments. It seems to
24 me a classic case of mootness.

25 Justice Stevens, I think I did not answer your

1 question. The affirmative provisions in the order were
2 violated and fines were imposed for those. My point is
3 that it is a difficult, if not impossible task to draw a
4 distinction between the affirmative and the prohibitory.

5 Take the recent situation out in Los Angeles,
6 the police sickout. An injunction was entered there to
7 end that. It could have said return to work or it could
8 have said stop the sickout: affirmative or prohibitory.
9 And you can't look to the status quo to figure out in
10 substance which it was, because some of the officers would
11 be sick one day and some the next. The distinction is
12 completely manipulable and is not the test that this Court
13 has adopted.

14 Finally, I would note briefly that in their
15 papers the union argues for a remand to reconsider the
16 excessiveness of the fines, although it has not been
17 mentioned this morning. They have two arguments:
18 substantive due process and the Eighth Amendment. The
19 Eighth Amendment argument was waived; it wasn't decided by
20 the Virginia Supreme Court.

21 QUESTION: Well, Mr. Roberts, it was, of course,
22 raised in their application to the State court. It's hard
23 to say that it was waived. They didn't spend a lot of
24 time on it, but what if we have to reach it, as I think we
25 probably do?

1 MR. ROBERTS: Well --

2 QUESTION: Has this Court ever said the
3 Excessive Fines Clause is incorporated?

4 MR. ROBERTS: It has not. It would --

5 QUESTION: And do you think we should? Is it
6 appropriate that we do that?

7 MR. ROBERTS: The question was specifically left
8 one in Browning Ferris. It would seem odd to have to
9 address that profound constitutional question in a case
10 where the issue was not raised. They did not, if I may,
11 raise the question in their application. The Virginia
12 Supreme Court has a questions presented practice similar
13 to that of this Court. The Eighth Amendment or the words
14 Excessive Fines Clause do not appear in their questions
15 presented.

16 Thank you, Your Honor.

17 QUESTION: Thank you, Mr. Roberts.

18 Mr. Bender, we'll hear from you.

19 ORAL ARGUMENT OF PAUL BENDER

20 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

21 MR. BENDER: Mr. Chief Justice, and may it
22 please the Court:

23 This Court's cases have steadily recognized, and
24 I think everybody in this case agrees, that the
25 traditional use of civil contempt to coerce a recalcitrant

1 party or witness into doing something that the court wants
2 them to do, traditionally by putting him in jail until he
3 does it, more recently by fines that accumulate until he
4 or she does it, that that's constitutional, whether done
5 in a State or Federal court.

6 The question in this case, as -- I think the
7 central question in this case, as Justice Ginsburg
8 mentioned at the outset of the argument, is with
9 prohibitory injunctions, where do we draw the line between
10 those which are constitutional and those which are not?
11 That there are constitutional rules I think is reflected
12 in this Court's decision in Hicks, which was a State case
13 and which mentioned that there are constitutional rules.

14 QUESTION: Well then, what are those rules? Is
15 it a matter of the Due Process Clause and is it
16 procedural?

17 MR. BENDER: I think it's a matter of due
18 process and I think it is procedural, yes. The
19 Government's position in this case is that in addition to
20 the traditional use of civil contempt in the coercive
21 manner I just mentioned, there are at least two other
22 areas where civil contempt has traditionally been used and
23 which this Court should recognize as being constitutional
24 uses of civil contempt.

25 One the Court has explicitly recognized over and

1 over again, and that is that civil contempt can be used in
2 civil litigation to compensate a party for damages done to
3 that party by the other party who violates the injunction.

4 QUESTION: Well, Mr. Bender, let me interrupt
5 you for a moment. You say a constitutional use of civil
6 contempt, but it's quite possible to read our cases, is it
7 not, as saying that the distinction between -- there is a
8 constitutional decision between criminal contempt and
9 civil contempt, because criminal contempt requires the
10 invocation of certain procedural safeguards, like a jury
11 trial? But I don't read that as connoting that there's
12 some constitutional limitation on civil contempt at all.

13 MR. BENDER: It may not be, and it may be that
14 any time a judge announces that he is proceeding by way of
15 civil contempt and that the penalties are going to be
16 imposed civilly, that that's constitutional. Even --

17 QUESTION: Well, is it just a matter of how the
18 judge characterizes it? Isn't there something that we
19 can -- you can describe and say if you have that, it's got
20 to be criminal?

21 MR. BENDER: Yes. I think it's easier to look
22 at it in terms of some things which, if they're present,
23 it's clear that you can operate civilly. And I think this
24 case falls within one of those categories.

25 QUESTION: How about describing what falls on

1 the other side of the line when --

2 MR. BENDER: Well, essentially, what falls on
3 the other side of the line are prohibitory, if there is
4 another side of the line. And I think as Chief Justice
5 Rehnquist points out, it's conceivable that this Court
6 could hold that any time a judge characterizes the
7 proceedings as civil, they should be treated -- that
8 should be treated as constitutional.

9 There are benefits to the --

10 QUESTION: Well, what do you with the old
11 distinction between a judge can act on the spot if a
12 contempt is committed in the judge's presence, but if it's
13 not in the judge's presence, then it has to be enforced
14 through a criminal procedure?

15 MR. BENDER: I think even --

16 QUESTION: Do we wipe that out and say if the
17 judge calls it civil, it's civil?

18 MR. BENDER: My own view is that there is a core
19 of contempt which must be treated criminally. And within
20 that core, I would think, are acts which are malum in se,
21 the kinds of acts which have traditionally been treated
22 criminally by the law. And, clearly, I think within that
23 category would be punishments like going to jail for
24 committing such an act.

25 QUESTION: So your definition of criminal

1 contempt is an act that's malum in se?

2 MR. BENDER: No, it's not a definition. It's --
3 I don't think --

4 QUESTION: Is there a definition of criminal
5 contempt?

6 MR. BENDER: Yeah, and I think it is -- I think
7 it's better to put it the other way around, that there are
8 at least two categories of cases --

9 QUESTION: Well, we'll take it either way.

10 MR. BENDER: All right. I think there are at
11 least two categories of cases where civil contempt can be
12 used by a court. One is where it's used to compensate one
13 of the parties. If I -- if I, as a judge, enjoin you not
14 to cut down your neighbor's trees, and you nevertheless go
15 ahead and cut down your neighbor's trees, one thing the
16 judge can do, I think, is to award your neighbor civil
17 contempt damages, compensatory damages for what you did.

18 And that shouldn't -- that shouldn't surprise
19 us. It's very similar to tort damages. On tort
20 proceedings which are civil, you can have even punitive
21 damages. So the use of civil contempt in that situation,
22 the Court has recognized over and over again that the
23 compensatory use of civil contempt is also constitutional.

24 There's a second category which I think is
25 closer to this case, and which is, I think, the leading

1 example of it, is the National Labor Relations Board's use
2 of civil contempt. As this Court has recognized over and
3 over again, there are areas of regulation of conduct that
4 the Government may proceed in civilly rather than
5 criminally. The Court's OSHA cases show that, for
6 example. As I said, the Court's National Labor Relations
7 Board cases show that most prominently.

8 Where the Court has said, for example, in
9 Republic Steel, the Act is essentially remedial; it does
10 not carry a penal program. It is perfectly constitutional
11 for a legislature to decide to regulate something civilly,
12 and labor relations are one of the prime areas where that
13 is possible. So the National Labor Relations Board could
14 constitutionally be given the power itself to levy civil
15 penalties for violations of the Act.

16 QUESTION: So the Board, in effect, can do just
17 what you were saying or suggesting the judge might be able
18 to do at the beginning, and that is to say we're telling
19 you right now that when we coerce, it's civil coercion.
20 And that announcement, that labeling is sufficient.

21 MR. BENDER: Congress' labeling, I think,
22 clearly is sufficient. If Congress says, as it has to the
23 Board, we want you to act civilly rather than criminally.
24 And there are lots of reasons why Congress might want to
25 do that.

1 QUESTION: What if -- what if a judge announces
2 this labeling and he says, look, I'm not going to mix
3 myself up in this labor dispute or this custody dispute.
4 I'm simply going to issue the order, and at some point
5 it's going to be resolved, but I'm telling you right now
6 that if you do not do what I order you to do, or if you
7 fail or if you do what I order you not to do, when it's
8 all over I'm going to levy fines on the following fine
9 schedule, and they're -- they're going to be -- they're
10 just going to be civil fines, I'm telling you that right
11 now. Is that sufficient to give it a conclusively civil
12 character?

13 MR. BENDER: I think it clearly is in a
14 situation where the legislature has said that that's the
15 way the Government wants to proceed.

16 QUESTION: Even though there's nothing --
17 nothing left to converse -- to coerce.

18 MR. BENDER: Yes. Yeah, the National Labor
19 Relations Board does that all the time.

20 QUESTION: Mr. Bender, there -- there are
21 scholars who think that that was a great mistake, our line
22 of decisions which allowed administrative agencies, at the
23 direction of Congress or not, to avoid the right to jury
24 trial by imposing civil crime -- so-called civil
25 penalties. And I don't know that we want to extend that

1 to a creation by a district judge. It's serious enough to
2 allow its creation by a legislature.

3 MR. BENDER: I don't think you do either to a
4 creation by a district judge. But this case involves a
5 State doing it, and as the Court said in Hicks, if a State
6 characterizes its procedures as civil, the Court ought to
7 defer to that unless it's clearly shown that they aren't
8 civil in character.

9 QUESTION: Mr. Bender, suppose the State didn't
10 have the civil party in this case. Suppose the mine
11 owners hadn't sued for an injunction, but there's all this
12 violence that's very dangerous for the community going on,
13 and so the State of Virginia wants to stop it; what kind
14 of proceeding would you have to have?

15 MR. BENDER: I think the State could do what the
16 Federal Government has done and decide to deal with that
17 kind of a behavior in a strike situation civilly rather
18 than criminally, and pass a statute authorizing a State
19 agency, and I think authorizing the agency to go to court
20 for enforcement of its orders, to operate civilly rather
21 than criminally, because that's the kind of thing where
22 that choice is available.

23 This case is more difficult than that because in
24 this case the State doesn't have a statute like that. But
25 the judge said at the outset that he was proceeding

1 civilly; I think trying to do it in the same way the
2 National Labor Relations Board --

3 QUESTION: Since he didn't have a statutory
4 regime like that, the characterization of this case as
5 civil, then, depends on the existence of a civil party.

6 MR. BENDER: Yes.

7 QUESTION: And if that's so, then when the civil
8 party departs and says I'm through, then how can the State
9 continue to maintain that it's civil?

10 MR. BENDER: The government can be a civil
11 party, and the State in this case, or the judge in this
12 case treated -- and so did the Virginia Supreme Court,
13 treated the governments, the county and the State, as
14 being parties to the case. That's unusual, but I don't
15 think it's unconstitutional. And so I think what the
16 judge did here was treat the governmental entities as
17 civil parties, and he decided he was proceeding by way of
18 civil procedures in the same way the National Labor
19 Relations Board proceeded against exactly the same strike
20 by way of Federal civil proceedings. And --

21 QUESTION: A real party in interest or the --
22 the State isn't named as a party.

23 MR. BENDER: That's true. I agree with you,
24 it's extremely unusual. I don't think it would happen in
25 Federal court. But that's not the question in this case.

1 The question in this case is whether it's constitutional
2 for the State to do that.

3 Has the State passed the line? And the Court
4 said in Hicks that there are constitutional rules, but we
5 don't find the State has violated them unless it's
6 extremely clear that the State has violated them. And the
7 question for the Court in this case is whether it is that
8 extremely clear?

9 QUESTION: And our model of constitutionality is
10 going to be civil fines by administrative agencies.

11 MR. BENDER: That is a constitutional way of
12 using civil contempt, yes. And since it has been -- it
13 has been happening and used by the Federal Government for
14 many, many years, I don't think you can say that the State
15 is automatically disentitled to do that. The question in
16 this case is whether the State has done things in enough
17 of a similar way? And there are a number of similarities
18 here. The affirmative nature of some of the injunctions
19 is part of it.

20 QUESTION: Thank you, Mr. Bender.

21 Mr. Gold, you have 3 minutes remaining.

22 REBUTTAL ARGUMENT OF LAURENCE GOLD

23 ON BEHALF OF THE PETITIONERS

24 MR. GOLD: Thank you, Your Honor.

25 Let me begin by responding to the last point Mr.

1 Bender makes -- made, and call the Court's attention to
2 page 13 of our reply brief and Note 9. There is nothing
3 in any of the Virginia court decisions or opinions which
4 treats the State or the counties as parties. It was the
5 court itself becoming a party through a special master --

6 QUESTION: The Labor Board doesn't have to
7 announce in advance what the fines will be, which is,
8 assertedly, what distinguishes this and makes it civil
9 contempt, right? The Labor Board can just say you don't
10 do this, and if you do it I will impose a civil fine.

11 MR. GOLD: Right. And --

12 QUESTION: And that's what we're going to extend
13 to district judges, I assume.

14 MR. GOLD: Well, beyond that -- that point, with
15 which I agree insofar as it's a debater's point rather
16 than a prediction, the fact of the matter is that 100
17 people could disagree which way you deter most
18 effectively: by saying, as Justice Souter did, if you do
19 what I have prohibited you from doing, there will be very
20 serious penalties, or saying the maximum penalty would be
21 \$100,000. To say that one is an indicia of a remedial
22 intent and the other of a punitive, retributive intent, as
23 we attempt to argue, just will not wash.

24 Beyond that, let me say that unless -- there are
25 two things that I would like to emphasize that my brother

1 said. Mr. Bender began by talking about compensatory
2 relief. We have stated in every paper filed that the
3 provision of compensatory relief, generously conceived, is
4 the province of civil contempt. We're talking about
5 noncompensatory fines, payable to the State, growing out
6 of a private lawsuit, or imprisonment.

7 Secondly, Mr. Roberts, unless I mistake him,
8 suggested that there's a line between wrongs that are
9 malum in se and other wrongs. What the underlying wrongs
10 here alleged were violence, vandalism, and so on. And
11 finally, it is of the essence that the issues to be
12 decided were not issues of the kind that were in the
13 history of equity: provide these papers, do this, do that.
14 The union argued that such wrongs as were --

15 QUESTION: Thank you, Mr. Gold. Your time has
16 expired.

17 The case is submitted.

18 (Whereupon, at 10:59 a.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. V.

JOHN L. BAGWELL, ET AL.

CASE 92-1625

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