

# CONTEMPT AUTHORITY

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## Learning Objectives

*As a result of this session, you will be better able to:*

- Define the 3 types of contempt
- Describe the procedures to be used in each contempt type
- Identify the defenses available to a contemnor
- List the elements contempt codes should include
- Discuss the pros and cons of holding non-Indians in contempt

## Contempt

- What do you think of when you hear “contempt”?

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## What Most of Us Know About Contempt



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## What Is Contempt?

Misbehavior during or disruption of a hearing

Act meant to embarrass, hinder or obstruct the court

Disrespect or disregard for the authority of the court

The willful disobedience of a Court order

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## What Is Contempt?

- Federal definition:
  - Misbehavior of any person in the presence of the court or so near thereto as to obstruct the administration of justice
  - Misbehavior of any of its officers in their official transactions (not attorneys)
  - Disobedience or resistance to the its lawful writ, process, order, rule, decree, or command
- Why look to the federal definition – Habeas Corpus

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## Why Do Courts Have This Power?

- Contempt is a power “necessary to the exercise of all others.”
  - U.S. v. Hudson, 7 Cranch 32, 34 (1812)
- “[T]he power of contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgements and decrees would be only advisory.”
  - Gompers v. Buck’s Store & Range Co., 221 US 418 (1911)

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## How Do Courts Get This Power?

- The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.
  - Ex parte Robinson, 86 US 505, 510 (1873)

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## Why Do We Care?

- Non-Indian defendants in VAWA criminal cases
- Dollar General case?
- More and more non-Indian litigants in Court

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## 3 Types of Contempt

- Direct – in the presence of the court or so near thereto
- Indirect – outside the presence of the court
  - Civil
  - Criminal

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## Direct – What Is It?

- In presence of the court or so near as to obstruct the administration of justice
- Insolent, disorderly, or disruptive behavior, noise or disturbance that interrupts proceedings
- Must be observed by the judge
- Does not need to be a party to any on-going case

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## Direct - Procedure

- Summary – no need for a hearing, may give opportunity to explain
- No need for notice
- Do not need to appoint attorney prior to sentencing
- If delayed to end of case, then need notice and a hearing – no necessity for summary proceeding
- Make findings – “I saw (or heard) the conduct constituting contempt and was committed in the actual presence of the court (or so near . . .). Recite facts.

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## Direct – Remedies

- Court discretion or by Code
- Can use fine and/or jail
- Usually a fine or short amount of jail

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## Direct - Exercise

- 1) A party walks out of the courtroom after a hearing and says to a member of the public: "That judge is a f\*\*king a\*\*hole." A court clerk overhears the comment, goes immediately into the courtroom and tells the judge. Can the party be held in direct contempt?
- 2) Right outside the courtroom is a parking lot. A person with a motorcycle is revving the engine very loudly. In the courtroom it is hard to hear and the clerk says it is interfering with the recording of the hearing. The judge sends the bailiff out to tell the person to quiet down. The noise gets louder still. Can the rider be held in direct contempt?

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## Civil - General

- Can arise out of a civil or criminal case
- Is coercive and remedial, not punitive
- Used to compel future compliance or to compensate for loss or damages caused by non-compliance
- Court has no interest other than seeing the rights of the complainant are protected
- Based upon an injury to the rights of one of the parties

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## Civil - General

- Used where there is a failure to comply with an order, subpoena or order to testify
- Coercive contempt – principal object is compliance
  - Must be able to purge – get rid of the condition
  - Carries keys to jail cell in own pocket
- Compensatory contempt – principal object is receipt of compensation (much like a tort action)
- Underlying order must be clear and definite and makes person aware of what to do or not to do
- Avoidable by obedience

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## Civil - Procedure

- Part of main case
- Imposed by ordinary civil proceeding upon notice and opportunity to be heard
- Usually started by Motion to Show Cause (Court or party)
- Motion must show:
  - Valid court order
  - Contemnor knew of order,
  - There is evidence of intent to disobey order or gross dereliction
  - Notice given to other party
  - Contempt is an appropriate remedy
- Preponderance of the evidence

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## Civil - Remedies

- Coercive
  - May be fine and/or jail time
  - Lasts indefinite time until compliance or case complete – but child support, etc.
  - Can be a forfeiture per day of non-compliance
  - No principal of proportionality - \$2.5 million fine; refused to pay and sat in jail for 14 years – released – lost coercive effect
- Compensatory
  - Based upon evidence of actual loss or damage
  - Can include court costs and attorney fees

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## Civil - Defenses

- No knowledge of order
- Order unclear
- Order has ended
- Order invalid – cannot relitigate
- Did not violate order
- Unable to obey
- Reasonable excuse for not obeying
- Evidence in mitigation

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## Civil - Exercise

- Zach was ordered to not have any contact with Hannah. Hannah has asked for a new hearing to modify the order. When the judge calls the case, the judge notices that Zach and Hannah are sitting together in the courtroom and walk up to the tables and sit together. Can Zach be held in civil contempt?
- Does he have any defenses?
- Is “contact” ambiguous? Number 1 meaning - Oxford – actual physical touching; Google - the act or state of touching. Number 2 – either communication or be in the presence of.

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## Civil - Exercise

- Zach is ordered not to hit Hannah. He hits Hannah. Can Zach be held in civil contempt?
- What remedies can we think of?
  - Coercive fine/jail until he agrees to no further disobedience
  - Any damages to or loss by Hannah.
  - If he drove his car to her house with the intent to hit her, can we seize the car?
  - If he threatens her with a gun can we seize the gun?
- Zach is ordered not to cut down Hannah's tree. He does. Can Zach be held in coercive contempt?
- Compensatory contempt?

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## Criminal - General

- Can arise out of a civil or criminal case
- Punishment for past non-compliance
- Punitive
- Character
  - Quasi-criminal – several state courts
  - Criminal contempt is a crime in the ordinary sense
    - Bloom v. Illinois, 391 US 194, 201 (1968) – discusses procedures, not jurisdiction

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## Criminal - Procedure

- Separate and independent proceeding
  - Brought in name of gov't and prosecuted by gov't
  - Court can appoint independent prosecutor if gov't prosecutor refuses to prosecute
- Must be an original party, legally identified with the party (corporation or partnership), or aid and abet one of those two
- Must show wrongful intent
  - Contumacious, willful, or reckless state of mind
  - Volitional, done with the knowledge it violates order, even if a good motive
- Full criminal process

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## Criminal - Procedure

- Proof beyond a reasonable doubt
- Notice of charges
- Assistance of counsel
- Opportunity to present a defense – guilt and mitigation
- Cannot be compelled to testify against themselves
- Public trial
- Unbiased judge – may want to have different judge
- Double jeopardy does not apply
- If significant fine or jail over 6 months – right to a jury trial

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## Criminal - Defenses

- Ambiguous order
- Didn't violate
- Good faith inability to comply
  
- Not a defense
  - Good faith reliance on advice of counsel
  - Invalid order – must comply until overturned unless transparently unlawful or frivolous pretense to legality

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## Criminal - Remedies

- Fine and/or jail
- Determinate sentence
- No right to purge
- Remember – over 6 months – jury trial

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## Criminal - Exercises

- Can Zach be held in criminal contempt for hitting Hannah?
- Zach was not to harm the dog jointly owned by he and Hannah. Can he be held in criminal contempt?
- Zach was required to pay child support. He has paid sporadically. Can he be held in criminal contempt?
- Zach has been held in civil contempt twice before for failing to pay child support. On the third occasion can he be held in criminal contempt?

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## Contempt – Non-Indians

- Civil – if you have personal and subject matter jurisdiction over the underlying proceeding, then you should have jurisdiction for the purposes of civil contempt.
- Direct – Should not be a problem as long as done in the presence of the court or so near (best practice would be to give notice to stop the behavior).

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## Contempt – Non-Indians

- Criminal
  - Protection orders
    - “For purposes of this section, a tribal shall have full civil jurisdiction to enforce protection orders, including authority to issue and enforce any orders through civil contempt proceedings, . . .” 18 USC 2265 (e).
    - May also be a crime. If so, under federal statute 18 U.S. Code § 3691, defendant gets a jury trial unless the contempt is direct or if case is being brought by or for the United States
    - Could you use this for violations of those portions of the PO not covered by SDVCJ?

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## Criminal Contempt – Non-Indians

- 25 USC 1302(10) - deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
- 25 USC 1304(d)(3) - the right to a trial by an impartial jury
- Does this impact powers of criminal contempt?

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## Criminal Contempt – Non-Indians

- Can you not grant a jury trial if you can only penalize for under 6 months?
  - Congress reluctant to allow any jurisdiction
  - Supremes – Oliphant
  - Heightened procedures vs. no jurisdiction
- Should this be based upon the federal constitutional rule?
  - Uniform among Tribes but may give more rights than person would get under state law
- Should this be based on state law?
  - Non-uniform among Tribes but same rights as state law provides

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## Criminal Contempt – Non-Indians

- “[A]ll other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant. 25 USC 1304(d)(4)

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## Codes

- Purpose statement
  - Why have the power of contempt
    - Vindicate authority of the court
    - Control proceedings
  - Court has inherent authority to use contempt
  - Statute appropriate to guide courts in use of contempt powers
  - Must use the least possible power adequate to the needs of the Court and Tribe

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## Codes

- Define all three types of contempt
- List procedures for each
- List punishments/remedies for each
- When, how and who brings it?
- What happens when the case ends?
- Time between notice and hearing, any statute of limitations
- Power to appoint independent prosecutor

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## Judicial Bias

- May want a different judge to hear the case under any of the three types if:
  - Judge is personally embroiled in dispute or harbors marked personal feelings or is in an adversary posture with contemnor
  - Not just the conduct, but what is character of the judge's response?
  - If delayed to the end of the case, should another judge hear it?
- Be prudent

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## Learning Points

- Not the fact of jail or fine – look to character and purpose
  - Civil – remedial, for benefit of party
  - Criminal – punishment, vindication of authority of court
  - Direct – summarily restore order
- Civil – future compliance, compensation
- Criminal – punishment for non-compliance, compensation
- Use least possible power – consider civil before criminal

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## Learning Points

- “[J]udges should approach the possible exercise of this unique power with the same hesitant caution and wariness one would use in picking up a glowing ember. It must be used only rarely and with circumspection. “
  - SCHENCK v. STATE, 645 So.2d 71, 74 (Fl. Ct of App., 4<sup>th</sup> Dist., 1994)
- USE CAUTION – No federal habeas cases on contempt that we know of.


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## Resources

**CREATIVE CIVIL REMEDIES AGAINST NON-INDIAN OFFENDERS IN INDIAN COUNTRY**



Southwest Center for Law and Policy



- Judge: "Young lady, are you trying to show contempt for this court?"
- Mae West: "No, I'm doin' my best to hide it!"



SAFE TRAVELS!