



Can the President Pardon Contempt of Court? Probably Yes.

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Few provisions in the U.S. Constitution grant the President an authority as free from legislative constraint as the [Pardon Clause](#). It vests the President “[plenary](#)” power to grant “Reprieves and Pardons” for “offences against the United States.” Plainly put, the President can “forgive” those facing criminal liability under federal law. While the pardon power has been wielded in numerous instances throughout American history, there is [limited case law](#) interpreting it. This lack of judicial guidance, coupled with [relatively limited discussion](#) of the pardon power at the Constitutional Convention in Philadelphia, has beget various unsettled legal questions concerning the pardon power’s scope and breadth. For instance, whether the President may issue a self-pardon has been the subject of [conflicting views and debate](#).

The contours of the pardon power have once again become a topic of public attention after President Trump issued the first pardons of his presidency. For instance, President Trump’s [pardon](#) of Sheriff Joe Arpaio has prompted questions as to whether the President can pardon someone who has been held in criminal contempt of court for violating a judicial order that involves the rights of private persons. Following the criminal conviction of Sheriff Arpaio for violating a [federal court order](#) to refrain from using race as a factor in making law enforcement decisions, President Trump issued Arpaio a “full and unconditional pardon.” A contemporaneous White House statement [declared](#) that, “Sheriff Joe Arpaio is now eighty-five years old, and after more than fifty years of admirable service to our Nation, he is worthy candidate for a Presidential pardon.”

Although [some have expressed](#) disagreement with the propriety of pardoning Arpaio, the [general consensus is](#) that Arpaio’s pardon was well within Trump’s Article II pardon authority; a consensus that seems bolstered by a federal district court’s rejection of a suit challenging the pardon’s validity. This Sidebar provides a brief background of contempt of court, explores the various arguments regarding whether a pardon can relieve an individual of criminal liability for contempt, and discusses potential congressional responses to the perceived abuse of the pardon power.

Contempt of Court

In [Federalist No. 78](#), Alexander Hamilton offered a famous formulation of the relative abilities of the three branches of the federal government to demand obedience to the lawful exercise of their constitutional functions. The Executive commands adherence to its orders through its law enforcement powers – which Hamilton referred to as the federal government’s “sword.” Congress, he noted, can

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require obedience through its appropriation power—its power of the “purse.” However, the Judiciary was not accorded a similar constitutional power: it wields neither the sword nor the purse. Instead, the courts rely primarily on the integrity of their rulings—bolstered by public opinion—to command respect to its orders. In the face of willful disregard of its judicial orders, a federal court can hold violators in [contempt of court](#)—a judicial power with a long history in [English and American law](#).

Although the line between the two can be blurry, contempt proceedings come in two flavors: civil and criminal. The Supreme Court has [observed](#) that it is “not the fact of punishment, but rather its character and purpose, that makes the difference between the two kinds of contempts.” For civil contempts, “the punishment is remedial and for the benefit of the complainant . . .” For criminal contempts, on the other hand, “the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions.” Although the criminal contempt power is considered an “[inherent](#)” authority of an American court of law, the power of federal courts to punish for contempt is regulated by statute. Specifically, [18 U.S.C. § 401](#) provides the primary source of contempt authority for federal courts. The statute authorizes criminal penalties for three types of contempt: (1) misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice; (2) interference with official duties of officers of the court; and (3) “disobedience or resistance to its lawful writ, process, order, rule, decree, or command.” Sheriff Arpaio was prosecuted and subsequently pardoned for the third category—disregard of a lawful court order—for refusing to comply with a [federal court order enjoining](#) him and officers in the Maricopa County Sheriff’s Office from employing unconstitutional law enforcement practices that relied on racial profiling of persons of Hispanic ancestry.

Does the Pardon Power Extend to Criminal Contempt of Court?

Upon being pardoned, Sheriff Arpaio requested that the U.S. District Court for the District of Arizona vacate his criminal conviction. Before Judge Susan Bolton addressed Arpaio’s motion, she first [assessed](#) the validity of the pardon. Because the Department of Justice did not contest its validity, the court accepted several amici curiae—or “friend of the court”—briefs to provide the judge adequate briefing. Amici [offered three](#) primary arguments against the validity of the pardon: (1) Arpaio’s contempt conviction was not an “offense against the United States” as required by the Pardon Clause; (2) pardons cannot be employed to affect the rights of private persons; and (3) a pardon for violating a court order would undermine the integrity of the judiciary, thereby transgressing the separation of powers.

Amici first argued that Arpaio’s contempt conviction was not an “offense against the United States” as required by the text of the Pardon Clause. To prevail, amici needed to distinguish the Prohibition-era case, [Ex Parte Grossman](#), which appears, at least at first blush, to support the Arpaio pardon. In *Grossman*, a federal court issued an injunction prohibiting the defendant from further engaging in bootlegging activities in violation of the National Prohibition Act. After the defendant was found in violation of the injunction for selling liquor on his premises, he was prosecuted for contempt of court. Subsequently, he was pardoned by the President, who commuted his sentence to a fine.

To distinguish *Grossman* from Arpaio’s case, amici argued that to qualify as an “offense against the United States,” the law in question must be traced to Congress’s constitutional power to define crimes against the United States. The Arpaio case, amici argued, was based not on an exercise of Congress’s power, but instead on an exercise of the court’s “inherent power” to protect their processes and ensure obedience to its rulings. Although the district court issued its contempt order under a federal statute, [18 U.S.C. § 401](#), amici asserted that the statute is merely a codification of this inherent power of the courts to enforce their orders. According to amici, Arpaio was prosecuted under the judiciary’s authority to protect its own proceedings and not under a federal statute passed by Congress, and therefore his contempt order was not an “offense against the United States” that was pardonable under the terms of the Pardon Clause. Without explicitly assessing this proposition, Judge Snow [asserted](#) that she was “bound by the Supreme Court’s decision in *Grossman* that a criminal contempt of a court order is an offense against the United States.”

Next, amici argued that while contempts to vindicate the public interest, like in *Grossman*, are subject to pardons, those to protect the rights of private individuals—like Arpaio’s case—are not. Before the Arpaio case, there appears to have been no reported judicial assessment of the validity of a pardon for criminal contempt in a case arising from the judiciary’s enforcement of orders protecting *private rights*. Nonetheless, the district court rejected this public/private distinction, stating that although “the criminal contempt pardoned here [was] for a willful violation of a preliminary injunction that affected constitutional rights, a more significant issue than the willful violation of the injunction against selling alcohol in *In re: Grossman*” this difference was not a sufficient basis “to refuse to follow the Supreme Court’s holding.”

The third argument proffered against Arpaio’s pardon was grounded in concerns about the separation of powers and the independence and integrity of the judiciary to enforce its orders. In a brief submitted to the district court, various Democratic members of Congress [argued](#) that a presidential pardon for contempt represents “an encroachment on the independence” of the judiciary. The brief asserted that Trump did not grant the pardon to undo an overly harsh penalty or to correct a mistake in the criminal justice system, but to “deprive the judiciary of the means to vindicate the authority of the courts.” Judge Bolton did not squarely address this separation of powers argument either during the hearing on the validity of the pardon or in her written opinion.

However, a similar separation of powers argument was raised and rejected in *Grossman*. There, the High Court was unpersuaded that permitting pardons for criminal contempts [would](#) “tend to destroy the independence of the judiciary and violate the primary constitutional principle of a separation of the legislative, executive and judicial powers.” While the Court upheld the presidential pardon against this separation of powers argument, Chief Justice Taft’s opinion raised the prospect that excessive use of the pardon for contempt of court could water down the deterrent effect produced by the threat of contempt. Responding to potential abuses of the pardon power, the Chief Justice Taft cautioned against giving the Pardon Clause itself a narrow construction. Instead, he suggested that impeachment was the better remedy for “[e]xceptional cases” where the President employed “successive pardons of constantly recurring contempts in particular litigation”

Amici [tried to appeal](#) the validity of Arpaio’s pardon to the U.S. Court of Appeals for the Ninth Circuit, but the appellate court deemed the appeal too late under the [Federal Rules of Appellate Procedure](#). Nonetheless, amici have renewed their argument in briefs to the Ninth Circuit, positing that under [Title 28 of the U.S. Code](#) the appellate courts may still declare the pardon invalid.

As demonstrated by the Arpaio case, prevailing case law interpreting the President’s pardon power makes it exceedingly difficult to challenge the validity of a pardon as beyond the scope of this authority. Moreover, Congress has very limited authority to regulate the scope and breadth of the Pardon Clause, including which types of crimes are subject to pardons. This would preclude Congress from removing criminal contempt offenses from the ambit of the pardon power. As suggested in *Grossman*, to the extent Congress disagrees with the exercise of the pardon power, either in general practice or in specific instances, it may rely on its own institutional authority—such as impeachment or oversight—rather than seeking to alter the pardon power itself. Alternatively, Congress can shape the contours of the Pardon Clause by offering amendments to the provision under its authority to offer constitutional amendments.

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