Can a Presidential Pardon Trump an Article III Court's Criminal Contempt Conviction? *A Separation of Powers Analysis of President Trump's Pardon of Sheriff Joe Arpaio*

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ABSTRACT

James Madison once reflected that the great difficulty of government is to first enable it to "control the governed" and next "oblige it to control itself."[1] His most famous phrase "ambition must be made to counteract ambition," has shaped the checks and balances of our modern government.[2] Three separate branches of government granted equal powers and created to keep each other in check. To ensure this division, the Constitution vests specific powers to each individual branch of government. One specific power—the pardon power—the Framers bestowed solely to the President and made unreviewable by any other branch of government. Specifically, the Constitution reads that the President has the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[3] As precedent supports, and many scholars argue, the pardon power is quite broad. But surely the Founding Fathers did not envision the power to encroach on another branch's power? This paper explores the scope of the presidential pardon power in relation to the powers of an Article III court and argues that the President violates the separation of powers principle by pardoning an individual held in criminal contempt of court. It is particularly relevant to analyze this question as impeachment inquiries loom and scholars assess whether President Donald Trump has in fact overstretched his Article II powers. To analyze this constitutional question this paper centers around President Trump's pardon of Sheriff Joe Arpaio. It explores the intent of the Founding Fathers when creating the pardon power and then examines the criminal contempt power as an inherent and vital power of an Article III court. Next, it analyzes how the pardon of Sheriff Arpaio for criminal contempt is distinguishable from precedent because of its unconditionality, the President's intent, and the injunction underlying the contempt order. And lastly, it discusses whether a case that challenges the constitutionality of the presidential pardon is justiciable.

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1. THE FEDERALIST NO. 51 (James Madison).
2. *Id.*
3. U.S. CONST. art. II, §2, cl. 1.

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INTRODUCTION

Like many other provisions in the U.S. Constitution, the pardon power stems from our English heritage.[4] Historically, English Kings had almost unlimited power to pardon.[5] The power served as the sole instrument of justice, as the courts did not have the power to acquit.[6] When time came to draft the Constitution, Alexander Hamilton, Charles Pinckney, and John Rutledge fought for the inclusion of an executive pardon power to mirror that of the King's.[7] Specifically, they fought for a pardon power vested in the executive and only applicable towards federal offenses and convictions beside impeachment.[8]

There was considerable discussion surrounding this power. Roger Sherman of Connecticut tried to limit the power by requiring the consent of the Senate.[9] This motion was rejected by George Mason, who argued that the Senate already had too much power.[10] Moreover, the Founders debated whether "after conviction" should be included after "reprieves and pardons" in the clause, but James Wilson convinced the others that a pardon before conviction might be necessary to obtain the testimony of accomplices.[11] Thus, the Founders excluded the requirement that the pardon be granted solely "after conviction." There was also ample discussion by Edmund Randolph about amending the Articles to exclude cases of

4. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 475–509 (1977).

5. *Id*. at 476–79.

6. *Id*. Interestingly, Kings used the pardon power as a method of conscription for their frequent wars. Pardons could also be bought by the wealthy. *Id*. at 478

7. *Id*. at 501.

8. *Id*.

9. *Id*.

10. *Id*.

11. *Id*. at 502.

treason from the pardon power.[12] He argued that the power was too great to be entrusted in one man, because the President himself might be guilty of treason and the"traitors might be his own instruments."[13] George Mason agreed and further elaborated that the President might be involved in a scheme to "screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt."[14] However, James Iredell argued that the probability the President would commit such an act of treason against his own country would be "very slight." Therefore, it would not justify limiting, and thus weakening, the executive power.[15] Should the President be caught, Iredell argued, he would be subject to a trial and risk "damnation of his fame to all future ages."[16] Ultimately, the Founders decided to exclude treason from the list of unpardonable offenses.[17] Thus, the modern day pardon power does not require a Senate vote, is not contingent on a conviction requirement, and may be used to forgive treason.

Hamilton discussed the pardon power in Federalist 74, writing that one man would be "more eligible" as the "dispenser of the mercy of government" than a "body of men."[18] He explained that in "seasons of insurrection or rebellion," there are "critical moments" when a "well-timed offer of pardon" to the rebels would "restore the tranquility of the commonwealth."[19] He argued that the delay associated with having to consult with the legislature could cause the "golden opportunity" to "slip."[20] Hamilton saw the pardon power as a way of correcting the law's imperfections and as a remedy against injustices in criminal proceedings.[21] He believed that the criminal code was severe as it was often without exception.[22]

The debates surrounding the inclusion of the pardon power show the great deal of thought and revision the Framers put into its drafting. They intentionally included some limitations and excluded others. The resulting clause was intended to vest this expansive power in one person whom the Framers trusted would not betray the country—someone who would act to restore peace by extending mercy to those who demonstrate remorse.[23]

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12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*. at 503.
16. *Id*.
17. *Id*. at 504.
18. THE FEDERALIST NO. 74 (Alexander Hamilton).
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. U.S. DEP'T OF JUSTICE, PARDON INFORMATION AND INSTRUCTIONS (Oct. 22, 2018), https:// www.justice.gov/pardon/pardon-information-and-instructions [https://perma.cc/MK9W-N3XY] ("[A pardon is] a sign of forgiveness and is granted in recognition of the applicant's acceptance of responsibility for the crime and established good conduct for a significant period of time after conviction or release from confinement."). Sheriff Arpaio did not follow the Department of Justice's procedures. Carrie Johnson, *After Arpaio, 4 Answers To Questions About How Pardons Are Supposed To Work*, NPR: ALL THINGS CONSIDERED (Aug. 28, 2017) [https://perma.cc/3D95-HVGJ].

The pardon power has often been used consistent with its intended purpose. For example, President Andrew Johnson's blanket pardon of Confederate soldiers after the Civil War, over the objections of many Unionists, was designed to unite the country and "restore[] tranquility."[24] President Ford's pardon of former President Nixon after the Watergate scandal is viewed by many as a way of closing a chapter of government distrust and moving forward.[25] However, there have also been times where the pardon power was not used for public welfare but rather, for personal and self-motivated reasons. For example, President Clinton's pardon of his brother for federal drug charges and his pardon of the individuals involved in the Whitewater affair that implicated a real estate investment the President was personally involved in, may have been motivated by self-interest; similarily, President George H.W. Bush's pardon of Reagan administration officials involved in the Iran-Contra scandal, during which time President Bush was Vice President, may have also been motivated for personal reasons.[26] Nevertheless, these pardons were considered constitutional.[27]

Besides discussing the purpose of the pardon power, one question not clearly contemplated by the Framers is how the power interacts with the other branches of government. For example, the Framers did not debate the implications of a President pardoning a violation of a court ordered injunction meant to protect the public from harm. An injunction is usually meant to be immediate, as the conduct is so harmful that it cannot be continued throughout the duration of the case. That is why a violation of an injunction can lead to a conviction for criminal contempt of court. When the President pardons an individual with a criminal contempt conviction, not only is he saying that the court erred, but he is also stripping the court of its criminal contempt power, which is integral to the court's functioning. The pardon prevents the court from enforcing its orders and delegitimizes it. Moreover, the President is also signaling that the public harm the court assessed was not substantial enough to justify the conviction. Surely, the Framers did not intend the President to completely impair the court's inherent power to enforce its orders and render moot a court order that protects the public—especially if the harm constitutes an infringement of an individual right under the Constitution. Refusing to follow an injunction is against public interest because it allows the irreparable harm to continue. Thus, although pardons that are contrary to public welfare are constitutional, a pardon that interferes with the functions of another branch of government runs contrary to the separation of powers principle. The

24. Amnesty Proclamation of President Andrew Johnson (May 30, 1865); THE FEDERALIST NO. 74 (Alexander Hamilton).

25. "Surely we are not a revengeful people." Nixon has "already [been] condemned to suffer long and deeply in the shame and disgrace brought upon the office he held." Statement of President Gerald R. Ford Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary (Oct. 17, 1974). Perhaps, this is the "damnation for all ages" to which James Iredell referred.

26. Kenneth T. Walsh, *A History of Presidential Pardons*, U.S. NEWS & WORLD REP. (June 8, 2018, 6:00 AM), https://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history [https://perma.cc/X4QT-MN5P].

27. *Id.*

scenario described above represents the situation surrounding Sheriff Joe Arpaio's pardon.

On August 25th, 2017, President Donald Trump exercised his constitutional power and pardoned Maricopa County Sheriff Joe Arpaio. "America's Toughest Sheriff,"[28] was convicted just a month earlier for willfully violating a court order.[29] Federal District Court Judge Susan Bolton convicted the sheriff of criminal contempt for "knowingly violating" a federal judge's order for "failing to do anything to ensure his subordinates compliance" and by "directing them to continue to detain persons for whom no criminal charges could be filed."[30] The order she refers to stems from a lawsuit that the American Civil Liberties Union (ACLU) brought.[31]

In 2008, the ACLU sued the sheriff's office for racially profiling minority groups, particularly Latinos, during traffic patrols.[32] The ACLU suspected the sheriff's office of detaining individuals based solely on the suspicion that they were in the country illegally and were undocumented.[33] District Court Judge Murray Snow enjoined the sheriff's office from continuing this practice.[34] Judge Snow also ordered anti-bias training, a court-appointed monitor, and patrol cameras (along with other remedies)—which Arpaio failed to follow, arguing they were too vague for compliance. In response to Arpaio's rejection of the injunction, the court issued a civil contempt order.[35] After further evidence of order violations, Judge Snow referred the case to Arizona's U.S. Attorney's Office, and eventually to the U.S. Department of Justice, for prosecution.[36] In the new criminal proceeding, Judge Bolton convicted Sheriff Arpaio of criminal contempt of court for refusal to abide by the previous injunctions, even though Arpaio had left his position as sheriff by that time. The court found "beyond a reasonable doubt" that Judge Snow had issued a "clear and definite order" enjoining Sheriff Arpaio

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28. Sheriff Arpaio was nicknamed "America's toughest sheriff" for his policies while in office. For example, he created "tent cities," jokingly calling them "concentration camps." These "tent cities" often disproportionately affected Latinos. Valeria Fernandez, *Arizona's 'Concentration Camp': Why Was a Tent City Kept Open for 24 years?*, THE GUARDIAN (Aug. 21, 2017), https://www.theguardian.com/cities/2017/aug/21/arizona-phoenix-concentration-camp-tent-city-jail-joe-arpaio-immigration. [https://perma.cc/2D2F-5Q6A].

29. Colin Dwyer, *Ex-Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR (July 31, 2017), https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt. [https://perma.cc/ZD3V-WZYD].

30. *Id.*

31. *See* Ortega Melendres v. Arpaio, 598 F. Supp. 2d 1025 (D. Ariz. 2009).

32. Editorial Board, *The Arpaio Pardon*, WALL ST. J.: OPINION (Aug. 27, 2017), https://www.wsj.com/articles/the-arpaio-pardon-1503873081 [https://perma.cc/BD96-KV9V] [hereinafter Editorial Board].

33. *Id.*

34. *Id.*

35. *Id.*

36. The Attorney General declined to pursue the case because of conflicts of interest concerns. *See* Dennis Wagnar, *Justice Department to Decide on Sheriff Joe Arpaio Criminal Contempt Charges*, AZ CENTRAL (Aug. 26, 2016), https://www.azcentral.com/story/news/local/phoenix/2016/08/26/justice-department-probe-sheriff-joe–arpaio/89443454/ [https://perma.cc/9NSV-3JBK].

from detaining persons "without reasonable suspicion that a crime has been committed" and that the Sheriff had "willfully violated" the order.[37] Less than a month later, and before the sentencing hearing, President Trump pardoned Sheriff Arpaio.[38]

This situation was not what the Framers envisioned. The President's actions voided the enforcement power of the court and prevented its proper functioning. Although many consider the President's pardon power to be limitless, the criminal contempt power is so inherent to an Article III court that another branch cannot encroach upon it. Moreover, this case is different from precedent set in *Ex parte Garland* and in *Ex parte Grossman* because of the situation surrounding the conviction for contempt orders. Finally, despite potential practical limitations concerning justiciability, a plaintiff should be able to obtain judicial review depending on the relief sought and the injuries claimed.

I. THE CRIMINAL CONTEMPT POWER IS INHERENT TO AN ARTICLE III COURT AND CANNOT BE RENDERED "PRACTICALLY INOPERATIVE"

Precedential court cases hold that Congress cannot legislate the criminal contempt power away completely.[39] These holdings are supported by statutes that mirror constitutional limitations and also by the unique and integral purpose of the criminal contempt power.

Courts have stated the pardon power is "inherent" to an Article III court and an "essential" enforcement arm to punish acts of disobedience—vital for the proper functioning of the judiciary.[40] The courts' inherent powers come from the "nature of their institution" rather than from statute.[41] These powers include "fine[s] for contempt," "imprisonment for contumacy," and actions for enforcing the observance of order as powers which "cannot be dispensed [of]."[42] These powers are necessary for the "exercise of all others."[43] If Congress cannot legislate away the criminal contempt power, the President cannot pardon it away either.

The Court took a strong stance on Congress' ability to encroach on the contempt power in *Michaelson v. United States ex rel. Chicago, St. P., M., & O. Ry. Co.*[44] In *Michaelson*, the petitioners contended that the Clayton Act materially

37. United States v. Arpaio, 2017 WL 3268180 (D. Ariz. 2017) (referring to Melendres v. Arpaio, 598 F. Supp. 2d 1025 (D. Ariz. 2009)).

38. Editorial Board, *supra* note 32.

39. *See* Young v. United States *ex rel*. U.S. Vuitton et Fils S.A., 481 U.S. 787, 799 (1987) ("[W]hile the exercise of the contempt power is subject to reasonable regulation, 'the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.'"); Michaelson v. United States *ex rel*. Chicago, 266 U.S. 42, 65 (1924) (stating criminal contempt power is inherent in all courts and "can neither be abrogated nor rendered practically inoperative.").

40. *See* United States v. Hudson, 11 U.S. 32, 34 (1812).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Michaelson*, 266 U.S. 42 at 65–66.

interfered with the inherent power of the courts when requiring a trial by jury in certain specified kinds of contempt.[45] The Court, in dicta, provided important language about the contempt power of courts.[46] It held that once a court has jurisdiction over a subject, it possesses the power to punish for contempt.[47] The Court then describes this power as "essential" to the administration of justice.[48] In the case of inferior federal courts, "it is not beyond the authority of Congress" to interfere with the inherent power of the courts but the interference cannot render the power "practically inoperative."[49] Thus, although the court's power can be limited it may not be "doubted."[50]

The Court continued to rely on *Michaelson* further legitimizing the inherent contempt power.[51] In *Young v. U.S. ex rel. Vuitton Et Fils*,[52] the court stated that "the ability to punish disobedience of judicial orders" is "essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches."[53] Thus, the Court seems to accept the criminal contempt power as integral to its ability to function.

On the other hand, Congress has the power to limit the lower court's structure and process under the power to "ordain and establish" inferior courts and the Necessary and Proper clause.[54] Specifically, in the Congressional Act of March 2, 1831, Congress limited the power of the circuit and district courts to punish for contempt to particular cases involving "misbehavior of persons in the presence of the court, or so to obstruct the administration of justice, the misbehavior of any officer of the court, and the disobedience or resistance by any officer of the court."[55] The Court in *Ex parte Robinson* held that the Act applies to the circuit and district courts because Congress created them, unlike the Supreme Court which the Constitution uniquely created.[56]

Today, 18 U.S.C. § 401 similarly defines and limits the contempt power of the court to the "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; and (3) Disobedience or resistance to its lawful writ,

45. *Id*. at 62.

46. The Court explicitly held that "the power to punish for contempt is inherent in all courts, has been many times decided and may be regarded as settled law." *Id*. at 65.

47. *Id*. at 65–66.

48. *Id*. at 65.

49. *Id*. at 66.

50. *Id*.

51. *See* Young v. United States *ex rel*. Vuitton et Fils S.A., 481 U.S. 787 (1987).

52. *Id*.

53. *Id*. at 794–97 ("As a result, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated.").

54. *See* U.S. CONST. art. I, § 1; U.S. CONST. art I, § 8.

55. Congressional Act of March 2, 1831, H.R. 103, 21st Cong. (2nd Sess. 1831); *Ex parte Robinson*, 86 U.S. 505, 510–11 (1873).

56. *Ex parte Robinson*, 86 U.S. 505, 510–11 (1873).

process, order, rule, decrees, or command."[57] The court prosecuted Sheriff Arpaio under the third category. The limitations in § 401 mirror constitutional limitations that prevent Congress from passing a statute that strips the courts of all their inherent criminal contempt power. The Court held that inherent powers come from the "nature of their institution," not from statute.[58] Furthermore, the judiciary is not accorded the same constitutional power as the other branches of government and relies on the integrity of their rulings.[59] Thus, a consistent interpretation of the limitations provided in § 401 is that the statute is essentially a codification of the inherent criminal contempt power of the courts.[60] If constitutional limitations did not bind Congress, it could have completely eliminated the power from the court, and court rulings would have no integrity. Lastly, these statutes have been known to be consistently vague, allowing the courts to act based on their own interpretations.[61] This entrustment of discretional power is another indication that the contempt power is predominantly committed to the judicial branch, and free from overpowering congressional guidance. Thus, although Congress creates inferior Article III courts and has the power to shape them, statutes and precedential cases show that Congress has the ability to limit the scope of their criminal contempt power but cannot take that power away altogether. The contempt power is "essential to the administration of justice," thus logically Congress cannot legislate away and seriously inhibit the judicial power.[62]

Lastly, the criminal contempt power is the only power the court has to hold individuals personally responsible for violating court orders, making it essential for the proper function of the court. The court has the ability to impose civil contempt fines and jail sentences, but that power is remedial. The Court has held that a President cannot pardon for civil contempt, which is the courts weaker enforcement order and thus, less integral to the court's functioning than criminal contempt conviction.[63] Civil contempt sanctions are intended to compel future compliance with a court order.[64] They are coercive and avoidable through obedience.[65] By contrast to civil contempt's remedial purpose, criminal contempt is

57. 18 U.S.C. § 401 (2002).

58. Hudson, 11 U.S. 32, 34 (1812).

59. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

60. RICHARD M. THOMPSON II, CONG. RESEARCH SERV., 7-5700, CAN THE PRESIDENT PARDON CONTEMPT OF COURT? PROBABLY YES 2 (2018).

61. Felix Frankfurter, *Power of Congress Over Procedure in Criminal Contempts in Inferior Federal Courts a Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1023–24 (1924). It is also interesting to note that Frankfurter regards the contempt powers as "inherent powers" of inferior federal courts just as the Court is about to rule on *Michaelson*.

62. Michaelson v. United States *ex rel*. Chicago, 266 U.S. 65–66 (1924); *See also* Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991) (reaffirming that the power to punish for contempt is inherent in all courts and the court is given the discretion to "fashion an appropriate sanction" for inappropriate conduct).

63. In re Nevitt, 117 F. 448, 455–56 (8th Cir. 1902).

64. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL §754 (2018).

65. *Id*.

meant to be punitive.[66] For example, while the sheriff is still in office, the court can issue a civil contempt order to force the sheriff to abide by the injunction. This is exactly what happened to Sheriff Arpaio when he was found to have defied the initial 2011 injunction.[67] Sheriff Arpaio argues, and still maintains, that the court order was unclear and his violation of the injunction was therefore unintentional.[68] Yet, the violation of the 2011 order led the U.S. Justice Department's Public Integrity Unit to bring a separate criminal contempt charge against Arpaio.[69] In this case, the criminal contempt power punished the Sheriff for disobeying the court order—something civil contempt could not do. Moreover, during the criminal trial Arpaio had retired from the Sheriff's office, thus, even the most aggressive use of the civil contempt power would not reach him, the only power that could punish him for disobeying the court order would be the criminal contempt power. That difference distinguishes criminal contempt from civil contempt and makes the criminal contempt power inherent to an Article III court.

Fines and penalties do not always hinder conduct. Thus, the court really has no choice but to convict and threaten specified jail time to enforce an order that it believes harms the public. Without this power, the "'judicial power of the United States' would be a mere mockery."[70] Criminal contempt of court was created to protect the rule of law, as a symbol of respect for the judicial process—a way of validating the strength of the court. Congress cannot take that power away, and therefore, neither can the President.

II. THE ARPAIO PARDON IS DISTINGUISHABLE FROM THE PRECEDENT IN EX PARTE GARLAND AND EX PARTE GROSSMAN

Individuals who support Sherriff Arpaio's pardon look to the precedent set in *Ex parte Garland* and *Ex parte Grossman* for a broad executive pardon power.[71] In *Garland*,[72] the question addressed by the Court was whether a law requiring a loyalty oath disclaiming past treasonous conduct to continue to practice as an attorney was inconsistent with the relief provided by President Andrew Johnson's pardon of Confederates. The case took place soon after the Civil War and the Court held in sweeping language that the President's pardon "extends to every offense known to the law and may be exercised at any time after its commission,

66. Bradley v. American Household Inc., 378 F.3d 373, 378 (4th Cir. 2004).

67. Dwyer, *supra* note 29.

68. *Id.*

69. Cecillia Wang, *How the People of Maricopa County Brought Down 'America's Toughest Sheriff'*, AM. CIV. LIBERTIES UNION BLOG (Aug. 3, 2017), https://www.aclu.org/blog/immigrants-rights/state-and-local-immigration-laws/how-people-maricopa-county-brought-down [https://perma.cc/A73E-DJ3T].

70. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911) ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.").

71. *Ex parte Grossman*, 267 U.S. 87, 120–21 (1925); *Ex parte Garland*, 71 U.S. 333, 380 (1866).

72. *Garland*, 71 U.S. at 336–37.

either before legal proceedings are taken, or during their pendency, or after conviction and judgment."[73] Furthermore, the effect of the pardon is to "wash away" and "extinguish" the legal consequences.[74] The Court made clear that Congress could not create a law that would punish an individual for a crime that was already pardoned. It was outside of Congress' power to place limits on the pardon power that would completely disable its effect.

The Court further elaborated on the scope of the pardon power in *Ex parte Grossman*.[75] Phillip Grossman was held in criminal contempt of federal court for violating an injunction by continuing to sell liquor during the prohibition era.[76] The Chicago District Court sentenced him to one year in the Chicago House of Correction and fined him $1,000.[77] President Coolidge pardoned Grossman on the condition that he pay the $1,000 fine.[78] Grossman paid the fine and was released, only to be committed by the District Court to the Chicago House of Correction to serve the sentence.[79] On appeal, the District Court was represented by special counsel of the Department of Justice. The appointment was made after the United States abandoned the representation, because the District Court acted against the request of the President.[80] Interestingly, the Attorney General of the United States submitted an amicus curiae brief arguing for the validity of the President's actions.[81] This situation presented a conflict of interest within the Justice Department that warranted the court to appoint an independent special counsel to represent the District Court.[82]

The special counsel had two main arguments against the presidential pardon. First, he argued that the President's power extends only to "offenses against the United States" and that does not include contempt of court. Second, that to construe the pardon power to include contempt of court would violate the separation of powers by taking away from the federal courts their "independence" and

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73. *Id.* at 380.

74. *Id.* at 343, 380 (explaining that a pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense").

75. *Ex parte Grossman*, 267 U.S. 87, 107 (1925).

76. *Id.*

77. *Id.*

78. *Id.* President Coolidge's actions were severely criticized by other Judges. *See "Judge Flays Pardons for Bootleggers*," MADERA TRIBUNE 1 (May 2, 1924).

79. *Ex parte Grossman*, 267 U.S. 87 at 107.

80. United States v. Arpaio, 887 F.3d 979, 981 (9th Cir. 2018). Now, the Federal Rule of Criminal Procedure 42(a)(2) grants the court the authority to appoint counsel. Here, Sheriff Arpaio asked the court to "vacate the verdict and all other orders" pertaining to the conviction. *Id.* at 980. The district court denied the vacatur and Arpaio appealed. The United States, in response to a request for the appointment of counsel to "defend the District Court's Order denying" the vacatur request refused to "defend the district court's order." *Id.* at 981. Further, the United States took "no position on whether the Court should appoint counsel to make any additional arguments." *Id.* The United States abandoned the defenses of the district court's decision with respect to the vacatur and as such, the court appointed a special counsel to receive a full briefing and arguments to defend the decision of the district court. *Id.*

81. *Ex parte Grossman*, 267 U.S. 87 at 108.

82. Currently codified under General Powers of Special Counsel, 28 C.F.R. § 600.1 (2019).

"essential means of protecting their dignity and authority."[83] The Court unanimously rejected both arguments and held that Grossman could not be imprisoned.[84]

For their first point, special counsel argued that "offenses against the United States" can only be created by legislative acts and are not common law offenses.[85] Moreover, special counsel argued that the presidential pardon power is distinguishable and more limited than the King's pardon at common law because judges were his agents and acted in his name.[86] Lastly, special counsel argued that "offenses" should only include crimes and misdemeanors tried by jury and not contempts of the "dignity and authority" of the courts.[87]

The Court addressed the textual argument by analyzing the language of the Constitution by reference to its meaning "at the time of its adoption."[88] The Court held that the King always had the ability to pardon contempts of court just like other crimes and misdemeanors.[89] And thus, the word "pardon" as used by the Founders meant to be all encompassing of trials imposed "without a jury or upon indictment."[90] The Court then discussed that at common law there was a distinction between civil and criminal contempts. The former was seen as a measure "remedial and for the benefit of the complainant" and the latter was seen as a "punitive" sentence in the public interest to "vindicate the authority of the Court and to deter other like derelictions."[91] A pardon cannot stop a civil contempt order because it is not an offense against the United States. The Court then looked to the debates at the Constitutional Convention of 1787 and held the Framers intended the pardon power to distinguish offenses against the United States from offenses against the states.[92] The Court found it unlikely that the Founders "sub silentio" intended to narrow the scope of the pardon from one at common law.[93] Furthermore, British courts were independent from the King's control at the time the Constitution was ratified, thus, the Framers likely intended to model the pardon power similarly.[94] Limiting the language "offenses against the United States" to include only those created by legislative acts is not supported by history. Furthermore, nothing in the words of "offenses against the United States" excludes criminal contempt. Those held in criminal contempt have violated the laws of the United States and thus, actions resulting in criminal contempt must be

83. *Ex parte Grossman*, 267 U.S. 87 at 108.
84. *Id*. at 120.
85. *Id*. at 108.
86. *Id*.
87. *Id*.
88. *Ex parte Grossman*, 267 U.S. 87 at 109–10 (quoting *Ex parte Wells*, 59 U.S. 307, 311307 (1855)).
89. *Id*. at 110.
90. *Id*.
91. *Ex parte Grossman*, 267 U.S. 87 at 111.
92. *Id*. at 113.
93. *Id*.
94. *Id*.

offenses against the United States.[95] Moreover, the Court has extended general statute of limitations which forbids prosecution to criminal contempts after an allotted time period, indicating that contempt is considered an "offense."[96] "Offenses" is even more broad than "crimes," because contempt proceedings are not always provided the safeguards in the Bill of Rights that are ordinarily afforded to ordinary crimes.[97] Lastly, the Court pointed out that criminal contempts have been pardoned 27 times over 85 years without a controversy, thus pardons of criminal contempts are based on strong foundations.[98]

In response to the special counsel's second argument, the Court held that there was no separation of powers violation. The Court found that the Constitution "nowhere" expressly declares that the three branches of government must be kept separate and independent.[99] Although the branches have separate functions, they have the ability to check and balance each other.[100] The Court explained that under the "normal operation" of government, the executive can veto all legislation, the House and Senate can impeach the executive and members of the judiciary, and the executive can pardon all offenses after their commission.[101] In the extreme, the Senate can hold all appointments and confirmations, thus depriving the President of agents to take care that the laws be faithfully executed.[102] Therefore, the Constitution allows for branches of government to defeat the actions of one another.[103] Executive clemency exists to provide relief from "undue harshness" or "evident mistake" as the administration of justice by the courts is not necessarily "always wise or certainly considerate of circumstances which may properly mitigate guilt."[104] The Court viewed the pardon power as another "check" that was entrusted to the executive not to abuse it.[105] The Court elaborated that an abuse in pardoning contempts would "certainly embarrass courts" but it is questionable how much it would "lessen their effectiveness" than wholesale pardon for other offenses.[106] Moreover, the Court found it difficult to "conjure" that a President would be willing to "paralyze courts by pardoning all criminal contempts," the President could just "order a general

95. *Id*. at 115.

96. *Id*. at 116 (citing Gompers v. United States, 233 U.S. 604, 610 (1914)). The Court also discusses *Michaelson v. United States ex rel. Chicago*, 266 U.S. 42 (1924), and examines other uses of "offense" in the Constitution. *Id*. at 117. In Article I, Section 8 "offenses against the law of nations" and the Fifth Amendment forbidding double jeopardy also do not limit the meaning of meaning of "offense" in the pardon clause. *Id*. (citing U.S. Const. art. I § 8).

97. *Id*. at 117–18. Before the Constitution, courts would perform summary proceedings without a jury to punish disobedience of its orders.

98. *Id*. at 118–19.

99. *Id*.

100. *Id*. at 120.

101. *Id* at 119–120.

102. *Id*.

103. *Id*.

104. *Id*. at 120–21.

105. *Id*. at 121.

106. *Id*.

jail delivery."[107] The detrimental effect of excessive pardons of completed contempts would be "the loss of the deterrent influence upon future contempts."[108] But that effect is also present when the President pardons particular crimes.[109] Furthermore, the Court held that this difference does not justify reading criminal contempts outside of the pardon clause and "departing from its ordinary meaning confirmed by its common law origin and long years of practice and acquiescence."[110]

The Court instead provides an alternative for the "exceptional case" where an executive successively pardons recurring contempts in "recalcitrant neighborhoods"— impeachment. Moreover, the Court expressed concern that contempt is a power without many guarantees to protect the individual from unjust conviction, and there is a personal aspect when a judge's order is refused.[111] For these reasons, it also dismissed the separation of powers argument.

Although *Grossman* and *Garland* seem to establish that the President can pardon criminal contempt convictions, the Arpaio pardon presents facts that distinguish it from precedent. Specifically, the Arpaio case was an exercise of the court's inherent power, rather than Congress's power. Another distinction surrounds the purpose and effects of the pardon and how it changes the separation of powers analysis.

First, Arpaio's offense was violating Section 3 of 18 U.S.C. § 401.[112] But the statute only provides guidance as to when the court can use the contempt power, Congress has not defined the violations as crimes against the United States and thus, a criminal contempt should not be considered a federal "offense." This is a weak argument because *Grossman* specifically discussed that not all offenses against the United States are those that are legislated but also ones created by common law, which includes criminal contempt convictions. The Court dove into the history of the pardon power and determined that it does encompass inherent powers as well. The stronger distinguishing characteristic about the Arpaio pardon rests on its factual differences and the implications on the separation of powers.

The pardons made in *Grossman* and *Garland* were arguably in the public's best interest.[113] Garland was pardoned, along with other Confederates, in hopes of unifying the country after the Civil War. Similarly Grossman was pardoned

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107. *Id.* It is material to note that Justice Taft was previously President and thus understandably, a strong supporter of executive power and presidential integrity.

108. *Id.*

109. *Id.*

110. *Id.* (highlighting that the pardon power by the President of criminal contempt has been practiced for more than "three-quarters of a century and there has been no abuse to invoke a test in the federal courts.").

111. *Id.*

112. 18 U.S.C. § 401 (2002).

113. Lastly, as the Court in *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) explained, the ultimate authority of the pardon power is that "the public welfare will be better served by inflicting less than what the judgment fixed." Pursuant to that purpose, the actions of the President inflict more harm.

because the President truly believed that having to pay a $1,000 fine, which correlates roughly to a $14,000 fine today, and a one-year jail sentence to be too extreme for selling liquor against an already unpopular prohibition. Thus, the intent of the President was not to undermine the judicial system, or even substitute his judgment for that of the court's, but to show mercy pursuant to the Framer's vision of the pardon power. The intent is questionable in the Arpaio pardon. Specifically, there is personal benefit to the President in pardoning Arpaio. It seems as though President Trump used his power to protect people who supported his restrictive immigration agenda. Through this pardon, the President encourages sheriffs and other individuals to act boldly, and even illegally, to further his agenda. Furthermore, when the President granted the pardon he stated that "throughout his time as Sheriff, Arpaio continued his life's work of protecting the public from the scourges of crime and illegal immigration."[114] The purpose for the pardon is material to the separation of powers discussion because it distinguishes it from the "normal operation of government" discussed in *Grossman*, because the intent of the pardon is to specifically undermine the power of another branch rather than to show mercy. President Trump substituted his judgment for that of the court's in determining that there was no violation of the initial injunction.[115] The pardon power was not intended as a way to allow the President to bypass the court system to implement his policies. Furthermore, in other instances, President Trump has shown disrespect for the authority and legitimacy of the court of the kind the Court could not "conjure" in *Grossman*.[116] Surely, if there was evidence that the President sought to weaken the judiciary, then the Court's farfetched scenario, that a President would be "willing to paralyze courts," would suddenly feel more like a reality and the separation of powers would be integral to protecting the integrity of the court. In that situation, it is foreseeable that even Justice Taft would be concerned about the separation of powers and the power of the court to convict for criminal contempt. In essence, the Arpaio pardon was not granted for an overly harsh penalty or to correct a mistake but with the intent to "deprive the judiciary of the means to vindicate the authority of the courts."[117]

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114. Joshua A. Geltzer, *Judge Bolton Should Let Someone Make the Argument Against Vacating Joe Arpaio's Conviction*, LAWFARE (Sept. 9, 2017, 2:30 PM), https://perma.cc/E223-4DKX.

115. *Id*. In *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court famously held that "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." Under this reasoning, President Trump cannot have the final say over a criminal contempt by substituting his own judgment over the court's when he states factually that Arpaio did nothing wrong.

116. *See, e.g*., Donald Trump (@realDonaldTrump), TWITTER, (Feb. 4, 2017, 5:12 AM), https://perma.cc/PY2Q-SN38 ("The opinion of this so-called judge"); Eli Rosenberg, *The judge Trump disparaged as "Mexican" will preside over an important border wall case*, WASH. POST, Feb. 5, 2016 (stating that Judge Gonzalo Curiel was not going to be impartial because he was "Mexican").

117. Brief of Certain Members of Congress as Amici Curiae in Opposition to Defendant's Motion for Vacatur and Dismissal with Prejudice at 3, United States v. Joseph M. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072 (9th Cir. June 1, 2018).

Furthermore, impeachment would be an implausible remedy as a system to police the pardon power. Impeachment is contingent on whether the actions of the President are considered "treason, bribery, or other high crimes and misdemeanors."[118] It is extremely unlikely given the impeachment precedent that the Arpaio pardon, or really any other pardon, would be considered an impeachable offense—the President exercised a vested power and used his discretion in granting the pardon. However, if one can show that the systematic pardons are an "abuse of violation of some public trust," then perhaps the abuse of pardons could be an impeachable offense.[119] There would have to be a showing that the president neglected his duty or abused his power—a standard hardly ever met. Although impeachment is a legally possible option, it is an unrealistic remedy. If the only way to police this power is through the impeachment process or an amendment to the Constituion, then a narrow exception to the impeachment power seems like a more plausible solution. The impeachment process is akin to undoing an election and is an extreme remedy, which explains why it is rarely pursued against Presidents. It has only been initiated in cases of perjury, obstruction of justice, and violation of a federal law. The pardon power lies outside of those previously exercised categories. Lastly, Congress always has the option of pursuing a constitutional amendment to limit the scope of the pardon power. This option is also extremely unlikely considering Congress's reluctance to pass amendments. An exception to the pardon power based on the separation of powers principle is a more reasonable option.

Another important distinguishable characteristic is the nature of the injunction Sheriff Arpaio violated. His crime was flouting a court order to stop a practice of holding people in detention solely based on their appearance. In that sense the Arpaio pardon is truly unique, because he was convicted for disobeying an enforcement order protecting private rights, distinguishable from Grossman who was held in contempt for violating a court order that forbade him to sell liquor because it was not in the public interest. Although violating prohibition laws could also be regarded as disregarding a constitutional protection, it is different than a violation of individual liberties because of the direct harm to the individuals and the inability for the victims to prevent it. Grossman sold liquor to individuals who wanted to buy it. These factual differences show why the contempt power is so integral to the functioning of the court. The court will not have the ability to protect the private rights of the individuals if it cannot issue a criminal contempt conviction to prevent the harm from continuing when all other measures have failed. The inherent power underlying criminal contempt distinguishes those convictions from excessive pardoning of other convictions, as discussed in *Grossman*.

Moreover, it is worth emphasizing that Grossman did not get off scot-free—he still had to pay the $1,000 fine. Sheriff Arpaio's pardon was unconditional. The

118. U.S. CONST. art. II, § 4.
119. THE FEDERALIST NO. 65 (Alexander Hamilton).

conditional pardon in *Grossman* suggests that it was more a commutation of the crime than a full pardon. Thus, the case was decided in that particular light. The precedent in *Grossman* can be argued as not controlling because the Court has never had the opportunity to decide on an unconditional pardon for a violation of a criminal contempt conviction. The terms of the pardon are material because it reflects the purpose and intent that bears weight on the separation of powers analysis. Moreover, the Taft Court that decided *Grossman* was the same Court who held in *Michaelson* that Congress cannot legislate away and render "inoperative" the court's criminal contempt power.[120] It is plausible that if Grossman was completely pardoned for the violation, the Court would determine that the action would render inoperative the contempt power to make the outcome consistent with its prior ruling.

Finally, it is important to consider the broad policy implications of the pardon as well.[121] As mentioned above, the President can use the pardon power to encourage individuals to disobey court orders. An interesting historical example provides insight into the consequences of pardoning for criminal contempt over discriminatory practices. In 1962, both the Governor and Lieutenant Governor of Mississippi violated a court's preliminary injunction to allow James Meredith to attend the University of Mississippi.[122] The Fifth Circuit requested the Department of Justice bring criminal contempt charges against those officials and others involved in violating the injunction.[123] While the case was pending, the Mississippi officials allowed Meredith and other African Americans to attend the University.[124] Had the President pardoned the officials, it would have sent a clear message to other segregationists that court orders could be ignored. This example illustrates how the repercussions of a pardon can be severe. The president has signaled to other law enforcement that he supports a tough immigration policy and will pardon individuals for willfully defying a court order. This further damages the integrity of the court's orders.

Thus, there are some distinguishable differences in the Arpaio pardon that the holding in *Grossman* does not address. Furthermore, the Court in *Grossman* found it unlikely that a President would intend to harm the judiciary through the pardon power. As James Madison prophesized, the great difficulty of government is for it to control itself. If a country is represented by an executive who intends to weaken the judiciary and acts on that intent, there is a strong signal that there is a

120. Michaelson v. United States *ex rel*. Chicago, 266 U.S. 42, 62 (1924).

121. Schick v. Reed, 419 U.S. 256, 266 (1974) (upholding the president's power to turn a death sentence into life in prison but adding that "considerations of public policy and humanitarian impulses support an interpretation of that power . . . which does not otherwise offend the Constitution.").

122. Meredith v. Fair, 328 F.2d 586, 589 (5th Cir. 1962).

123. United States v. Barnett, 330 F.2d 369 (5th Cir. 1963).

124. Jennifer Rubin, *Legal challenge to Arpaio pardon begins*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/blogs/right-turn/wp/2017/08/30/legal-challenge-to-arpaio-pardon-begins/?utm_term=.45ebd338795c [https://perma.cc/5RMS-JLTE].

violation of the separation of powers and a reasonable response would be for the Court to limit the President's pardon power.

III. POTENTIAL JUSTICIABILITY HURDLES FACING PARDONS FOR CRIMINAL CONTEMPT

Lastly, we consider whether a case challenging the scope of the pardon power would even be justiciable by the court. For a claim to be justiciable there needs to be a case or controversy, the individual pursuing the suit needs to have standing, the case must be ripe for review, and the court should have the ability to adjudicate it. If the individuals harmed by Sheriff Arpaio's actions were to pursue a case challenging the validity of the presidential pardon, it would present a ripe "case or controversy" because the individuals were injured by the Sheriff's disregard to the initial court injunction prohibiting discriminatory practices. Rather, the hurdles lie in determining if the case presents a political question and if the plaintiffs have standing to challenge the pardon.

To determine whether the court can adjudicate a case or controversy, it examines whether the issue presents a political question. The nonjusticiability of a political question is "primarily" a function of the separation of powers that the court determines on a "case-by-case" basis.[125] The court looks to whether the action of a branch exceeds the authority it has been committed.[126] Under *Baker v. Carr*,[127] the Court presents six different scenarios that would yield a claim as a political question, and thus, nonjusticiable. A political question is found if there is:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department or; (2) a lack of judicially discoverable and manageable standards for resolving it or; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion or; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government or; (5) an unusual need for unquestioning adherence to a political decision already made or; (6) the potential of embarrassment from multifarious pronouncements by various departments on one question.[128]

These six factors are generally condensed and examined in three separate inquiries: textual commitment of the controversy, lack of a judicially manageable standard, and need for unquestioning adherence or initial policy decision.[129] The Court held that unless one of the above formulations is "inextricable" from the case, then there should be no dismissal of the case on justiciability grounds.[130] The Court tends to avoid labeling many cases as political questions, as it

125. Baker v. Carr, 369 U.S. 186, 210–11 (1962).
126. *Id.* at 211.
127. *Id.*
128. *Id.* at 217.
129. *See generally* Nixon v. United States, 506 U.S. 224 (1993).
130. *Id.*

generally narrows the cases it can adjudicate and prevents the Court from revisiting controversies in the future without overturning precedent.

In order for the Court to find a controversy to be textually committed, it must first interpret the text and determine to what extent the issue is committed.[131] Here, it is arguable that the pardon power is textually committed to a coordinate branch of the political department. The scope of the power is clearly granted to the President as it only appears in Article II, with two specific situations excluded from clemency—state crimes and impeachment.[132] But as precedent shows, the court is willing to accept questions challenging the scope of the pardon power and have traditionally reviewed them.[133] Moreover, in cases where the Court found a controversy nonjusticiable for being textually committed, the petitioner challenged a branch's implementation of a process solely granted to that particular branch.[134] Here, a challenge to the Arpaio pardon is distinguishable from precedent cases. First, the clause lacks sweeping exclusive language like "sole" to give "exclusive interpretive authority" to the President.[135] It only states that the President "shall have Power," distinguishable from other parts of the Constitution where the Founders specifically gave exclusive power.[136] Furthermore, a challenge to the pardon is not a challenge to the process or implementation, but rather questions the scope of the power. The scope, though described in the Constitution, does not render it textually committed because of potential ambiguity in the meaning of "offenses against the United States." The Court often takes cases to determine the scope of authority, even though described in the Constitution.[137] Lastly, the pardon power does not fall within the foreign affairs and executive war powers that the Court held to be particularly susceptible to being political questions.[138] Thus, it is unlikely that a question like this one would be found to be nonjusticiable based on the first *Baker* factor.

Another concern about whether the pardon power is a political question is the lack of a judicially manageable standard. This situation relates closely to the first factor.[139] Specifically, if there is a lack of a manageable standard, then it is likely that the text is committed.[140] Here, a court would have a judicially manageable standard—it can vacate a presidential pardon that infringes on the court's

131. *Id*.; *See also* Powell v. McCormack, 395 U.S. 486, 519 (1969).

132. U.S. CONST. art. II, § 2, cl.1.

133. *Ex parte Grossman*, 267 U.S. 87, 107–08 (1925); *Ex parte Garland*, 71 U.S. 333, 380 (1866).

134. Nixon v. United States, 506 U.S. 224, 229–33 (1993) (Petitioner Nixon argued that his impeachment trial needed to be in front of the whole Senate. The Court disagreed and held that the particular language and structure of the Article 1, § 3, cl. 6 granted sole discretion to the Senate to try impeachment cases.).

135. *Id*. at 241.

136. Particularly, art. I, § 3, cl. 6 and art. I § 2, cl. 5.

137. *See, e.g*. United States v. Nixon, 418 U.S. 683 (1974); *eg*. Gravel v. United States, 408 U.S. 606 (1972).

138. Baker, 369 U.S. at 211–17.

139. Nixon, 506 U.S. at 224.

140. *Id*. at 228–29.

criminal contempt power. The court would not have to review the pardon for purpose, but rather it can completely disallow the pardon because it violates the separation of powers principle. It is material to consider, however, that the courts are in a unique position to decide this issue. The court would have to review the importance of its own contempt power and would likely find the power as inherent and vital to its proper functioning.[141] Without criminal contempt, a court injunction is an order with no bite.

The other *Baker* factors require the court to consider prudential concerns, as to whether there is an "unusual need for unquestionable adherence" or a need for an "initial policy decision" to actions already made.[142] This case would not present any particular conflicts that suggest unquestionable adherence or demonstrate "lack of respect" or "embarrassment from multifarious pronouncements."[143] The potential embarrassment would be to allow the President to purposefully undermine the court's integrity.

Another issue that could prevent justiciability of the pardon is lack of standing. Standing depends on the injury the plaintiff is claiming. In the initial case, the plaintiffs had standing to sue Sheriff Arpaio for discriminatory practices. Their injury was concrete and particularized, traceable to government action, and redressible by the court.[144] Because the criminal contempt conviction grew out of the original case, the plaintiff's should also have standing to argue that the pardon should be disregarded because it purports to continue to harm the plaintiffs. The pardon voids the criminal contempt conviction and thus allows the Sheriff to continue the discriminatory practices. However, by the time the pardon was granted, Arpaio had already left the Sheriff's office. Thus, one might argue that the plaintiff's injury now is no longer "actual" but speculative.[145] But the fact that the action is just a continuation of the original case that had standing permits the initial plaintiffs to pursue the case. However, a plaintiff that is not party to the original case would likely not have standing to challenge the pardon. It would be difficult to show how the pardon for criminal contempt would create an "injury in fact" when the plaintiff was not a member of the original proceeding and Arpaio is no longer Sheriff. Furthermore, should the plaintiff ask for injunctive relief, such as the pardon to be voided, the plaintiff would have to show a "real and immediate threat" that the discriminatory practices would occur again and harm the plaintiff in the same way.[146] This is an extremely high threshold to meet and a court is unlikely to find standing.

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141. *Ex parte Grossman*, 267 U.S. at 122. The Court mentioned in *Grossman* that it was in a unique position but, as previously discussed, ultimately did not rule in favor of the district court's argument that the pardon should be vacated.

142. Baker, 369 U.S. at 217.

143. *Id.*

144. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990).

145. *Id.* at 894.

146. City of Los Angeles v. Lyons, 461 U.S. 95, 102–03 (1983).

Thus, new challenges to the pardon outside the original case would likely not pass constitutional standing requirements.[147]

Although there are some potential challenges to justiciability of a case like the Arpaio pardon, the Court has in the past accepted questions regarding the scope of the pardon power and the original plaintiffs have standing to challenge it in this case.

CONCLUSION

Alexander Hamilton described the role of the pardon power as a way of tempering the "severity" of the criminal system.[148] Without "an easy access to exceptions" in favor of the "unfortunate," justice would "wear a countenance too sanguinary and cruel."[149] The pardon is an act of mercy and "grace" and was created to restore peace and protect the public.[150] Pardoning an individual for willfully violating a criminal contempt order that harms the public, not only disrespects the authority of the court, but also violates the separation of powers principle. The criminal contempt power, different from civil contempt, is an inherent Article III court power because it cannot be completely stripped away by Congress and is integral to the functioning of a court. Because the power is inherent, the President should not be able to pardon it. Moreover, the Arpaio pardon is distinguishable from precedent in *Ex parte Garland* and *Ex parte Grossman*, which is why those precedents should not be used to completely dismiss challenges to the scope of the pardon power. Finally, the court has traditionally viewed the Presidential pardon power as a justiciable question, and if the case is brought by the initial plaintiffs, there would be constitutional standing. The Arpaio pardon presents a separation of powers issue that is unlike any precedent pardon the Court has addressed. Courts should reassess the scope of the executive pardon and protect the criminal contempt power of the Article III court.

147. The Arpaio pardon was appealed by *amici*, who provided briefs to Judge Bolton to help her assess the validity of the pardon. *Amici* then appealed Judge Bolton's decision to grant the pardon to the Ninth Circuit, but the case was dismissed because it was not timely filed. The court never had the opportunity to discuss the standing issue. RICHARD M. THOMPSON II, CONG. RESEARCH SERV., 7-5700, CAN THE PRESIDENT PARDON CONTEMPT OF COURT? PROBABLY YES 2 (2018).

148. THE FEDERALIST NO. 74 (Alexander Hamilton).

149. *Id.*

150. United States v. Wilson, 32 U.S. 150, 160 (1833).