A BLANK CHECK: CONSTITUTIONAL CONSEQUENCES OF PRESIDENT TRUMP'S ARPAIO PARDON

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ABSTRACT

On August 25, 2017, President Donald J. Trump issued the first pardon of his administration to Maricopa County Sheriff Joe Arpaio. The pardon was in response to Arpaio's conviction of criminal contempt by U.S. District Judge Susan Bolton. Judge Bolton found Arpaio to have flagrantly disregarded the previous ruling of United States District Judge G. Murray Snow. In 2011, Judge Snow charged Arpaio with civil contempt after Arpaio violated a preliminary injunction ordering him to stop racially profiling Latino drivers. The Department of Justice also found that the Maricopa County Sheriff's Office had engaged in discriminatory policing including racial profiling and illegal searches—violating both federal law and the Constitution. President Trump's pardon was issued before Arpaio was formally sentenced or granted appeal. An amicus brief filed by Erwin Chemerinsky on September 11, 2017, argues Trump's pardon is constitutionally invalid.

An executive pardon for a contempt of court charge was last explicitly addressed in the century-old case of Ex Parte Grossman. Trump's pardon deserves scrutiny because it undermines the separation of powers between the executive and judicial branches while also emboldening future disrespect for the rule of law. The Arpaio pardon is an attack on the judiciary as a whole, beyond a particular judge and his orders.

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In this note I first discuss the nature and limitations of the Executive's power to pardon contempt of court. Second, I analyze common law precedent for President Trump's action, focusing on the Ex Parte Grossman case. Third, I turn to executive contempt of Congress pardons, which demonstrate how another branch of government deals with intervention in its legal process. Finally, I examine Arpaio as a test case, analyzing the merits of the Chemerinsky brief and suggesting an alternative avenue for judicial recourse.

I. NATURE AND LIMITATIONS OF THE EXECUTIVE'S POWER TO PARDON CONTEMPT OF COURT

A. Types of Contempt of Court

Contempt of court is either a civil or criminal offense. Civil contempt of court occurs when the contemnor clearly and intentionally disobeys a court order. There are two types of civil contempt, direct and indirect. Disobeying a court order during a trial is a form of direct contempt, because the action occurs in front of the judge and the trial record serves as evidence of the offense. Noncompliance with an injunction is a form of indirect contempt because the actions occur outside of the courtroom and evidence must be presented to the judge to prove the offense. The focus of civil contempt is to further along judicial proceedings, coercing the contemnor to obey court orders. Sanctions are designed to compel compliance. In civil contempt proceedings, due process issues are rarely a concern because the contempt charges are related to a trial already underway. Because the sanctions for civil contempt are lifted when the disobedience stops, the contemnor *holds the keys* to his own cell.[1] Per *International Union v. Bagwell*, "[n]either a jury trial nor proof beyond a reasonable doubt is required."[2] Civil contempt is remedial, rather than punitive, and serves only the purpose of the party litigant.[3]

Criminal contempt of court occurs when a fine or imprisonment is deemed imperative to vindicate the authority of the court.[4] The

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[1] *See* Penfield Co. v. SEC, 330 U.S. 585, 590 (1947).

[2] Int'l Union v. Bagwell, 512 U.S. 821, 827 (1994). *See also* OFFICE OF THE U.S. ATTORNEYS', U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 754 (2009), https://www.justice.gov/usam/criminal-resource-manual-754-criminal-versus-civil-contempt.

[3] *See* Nye v. United States, 313 U.S. 33, 42 (1941).

[4] *See* Shillitani v. United States, 384 U.S. 364, 370 (1966).

purpose of imposing criminal contempt sanctions is to punish for past failures to obey an order from the judiciary, not coercion.'"[5] Criminal contempt "is a crime in the ordinary sense"[6] and requires the same constitutional due process protections as normal criminal proceedings,[7] such as the right to receive notice of the charges, counsel, summary process, present a defense,[8] and proof threshold "beyond a reasonable doubt."[9] In general, if a criminal contempt case carries a penalty of more than six months in jail, the contemnor has the right to a jury trial.[10] Criminal contempt proceedings are independent proceedings from the initial case, where instead of two litigants, the public is on one side and the defendant on the other.[11]

B. Contempt is a Critical Judicial Power

Many late nineteenth and early twentieth century cases hold that unfettered contempt power is a critical component of judicial review. The Supreme Court in *Ex parte Robinson* declares that the power to punish for contempt **"**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.**"**[12] **"**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.**"**[13] *In re Nevitt* declares that the authority to punish disobedience and contempt by fine and imprisonment **"**is an attribute of judicial power as inherent and indispensable as a judge.**"**[14] The court in *Watson v. Williams* explains:

> The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been

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[5] Taberer v. Armstrong World Indus., 954 F.2d 888, 897 (3d Cir. 1992) (finding that the refusal to obey an order to appear may be punished through the imposition of criminal contempt sanctions).

[6] Bloom v. Illinois, 391 U.S. 194, 201 (1968).

[7] *See* Hicks v. Feiock, 485 U.S. 624, 632 (1988).

[8] *See* Cooke v. United States, 267 U.S. 517, 537 (1925).

[9] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

[10] *Bloom*, 391 U.S. at 197–200.

[11] *See* Bray v. United States, 423 U.S. 73, 76 (1975).

[12] *See, e.g.*, *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

[13] *Id*.

[14] *In re* Nevitt, 117 F. 448, 455 (8th Cir. 1902).

> regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.[15]

The 1987 Supreme Court case of *Young v. United States ex rel. Vuitton Et Fils S.A.*, held that:

> The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. . . . The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be 'mere boards of arbitration whose judgments and decrees would be only advisory.'[16]

Without the ability to hold persons in contempt, it would be substantially more difficult to prevent judicial proceedings from being reduced to non-binding advisory opinions. In the extreme, pardoning could effectively neuter the power of the bench and makes the judiciary subordinate to the interventions by the legislative and executive branches.

C. Pardon Power

The pardon power is found in Article II, section 2, clause 1 of the Constitution, which states, "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[17] Similar provisions are found in the constitutions of a majority of the states.[18] Whether

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[15] Watson v. Williams, 36 Miss. 331, 341 (1858).

[16] Young v. United States *ex rel.* Vuitton Et Fils S.A., 481 U.S. 787, 796 (1987) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450).

[17] U.S. CONST., art. II, § 2, cl. 1.

[18] *See* CROMWELL HOLMES THOMAS, PROBLEMS OF CONTEMPT OF COURT: A STUDY

these provisions grant the Executive power to pardon contempts of court has divided jurists and writers on the subject.[19]

There is relative consensus that the Executive has the ability to pardon a civil contempt of court but not a criminal contempt of court. Executive pardons for contempt of court can be traced back to English law. For centuries, the British sovereign has possessed the power to pardon those convicted of criminal contempt,[20] but not those in civil contempt cases.[21] In the United States, some nineteenth century courts found criminal contempt was not a "crime" or "offense" within the meaning of the Fifth and Sixth Amendments[22] and held the pardon power in Article II, Section 2, clause 1 of the Constitution did not apply, as it grants the President only the power to pardon offenses against the United States. The 1925 Supreme Court case of *Ex Parte Grossman,* however, firmly established in American law that the executive has the power to pardon contempt of court charges in criminal cases where the punishment is punitive and designed to deter similar conduct, but not in civil cases where the punishment is purely remedial.[23] A key rationale in *Grossman* was that criminal contempt of court proceedings raise due process concerns that the Executive can alleviate through his pardon.[24]

Grossman states that the pardon power is only useful if the

IN LAW AND PUBLIC POLICY 76 (1934).

[19] *Id.*

[20] *See, e.g.*, Thomas of Chartham v. Benet of Stamford, YB 6–7 Edw. 2, *reprinted in* 24 SELDEN SOCIETY 185 (1909).

[21] *See Ex parte* Hickey, 12 Miss. Dec. 751, 782 (1840).

> The power to pardon is, by English writers, styled the most amiable prerogative of the crown. It was contemporary with the first memorials of the law. In its extent, it reached to all offences against the crown, or the public. It does not reach to cases where private justice is connected with the prosecution of offenders.

Id. (citations omitted)""; THOMAS, *supra* note 18, at 76.

[22] *See, e.g.*, Eilenbecker v. Dist. Court of Plymouth Cty., 134 U.S. 31, 33–34 (1890) (finding that the "Supreme Court of Iowa's" finding was "in conflict with and contrary to the provisions of both Articles V and VI of the amendments to the Constitution of the United States."). *See also* Jones v. Mould, 132 N.W. 45, 49 (Iowa 1911) (finding that the constitutional provision of due process applies "only to charges of crime" and contempt is not a crime though it is "generally spoken of as a quasi-crime").

[23] *See Ex parte* Grossman, 267 U.S. 87, 111–12 (1925).; *See also* Paul M. Butler, "*Contempt and Executive Power to Pardon*," 4 NOTRE DAME L. REV. 548, 549 (1929) (stating that the United States Supreme Court "decided that the pardoning power of the President under the Constitution extends to criminal contempts of court.").

[24] *See* Grossman, 267 U.S. at 117–18.

person wielding it has "full discretion to exercise it."[25] Since the Constitution enumerates the pardoning power, "its limitations, if any, must be found in the Constitution itself."[26] Limiting this power would require a constitutional amendment.[27] A statute, such as the military code, is therefore irrelevant. In *Vincent v. Schlesinger*, the D.C. district court ruled that Congress is unable to subject the presidential pardon process to the procedural requirements of the Administrative Procedure Act.[28] Even generally applicable statutes have been found invalid if, when particularly applied, they serve the purpose of regulating an exclusively executive power.[29]

Some Supreme Court cases discuss the unique nature of the executive pardon in the contempt context. *Biddle v. Perovich* references *Grossman* as evidence that a pardon "is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[30] *Solesbee v. Balkom* argues that the pardon power is part of "the Crown's prerogative of mercy" and an "exercise of grace."[31] *Myers v. United States* uses *Grossman* to support the idea that the American executive retains many of the powers of the Crown,[32] and a footnote of *Pennekamp v. Florida* cites the case as evidence that the separation of powers was designed to prevent the exercise of arbitrary power and "save the people from autocracy."[33]

A. Separation of Powers Concerns Raised by Contempt of Court Pardons

Future Supreme Court Justice Felix Frankfurter, writing in a 1924 Harvard Law Review article, eloquently describes the fundamental separation of powers concerns with executive

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[25] *Id.* at 121.

[26] Schick v. Reed, 419 U.S. 256, 266 (1974) ("[U]nbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments . . . [and] cannot be modified, abridged, or diminished by the Congress.").

[27] *Id.* at 265–66.

[28] Vincent v. Schlesinger, 388 F. Supp. 370, 374 (D.D.C. 1975).

[29] *See*, *e.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 465, 485 (1989) ("[I]nfringed unduly on the President's Article II power. . . .").

[30] Biddle v. Perovich, 274 U.S. 480, 486 (1927).

[31] Solesbee v. Balkcom, 339 U.S. 9, 20 (1950), *abrogated by* Ford v. Wainwright, 477 U.S. 399, 412 (1986).

[32] Myers v. United States, 272 U.S. 52, 118 (1926), *overruled by* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

[33] Pennekamp v. Florida, 328 U.S. 331, 356 n.4 (1946).

intervention with judicial or congressional contempt decisions.[34] He explains that:

> At the bottom of our problem lies the doctrine of the separation of powers. That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind "the separation of powers" is fear of the absorption of one of the three branches of government by another. . . . [T]he specific power of the President to grant pardons does not invalidate . . . acts of amnesty.[35]

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[34] 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, 1011, 1018 (1924).

> Plainly, we have here one of those vexing constitutional issues which are always presented, when it is sought to stereotype familiar practices into constitutional necessities out of phrases of undefined vagueness. . . . There opens up a vista of possibilities full of portents for those to whom the vitality of, and public confidence in, the inferior Federal courts are indispensable to a well-ordered national life.

Id. at 1011.

[35] *Id.* at 1012 (referencing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 34, 86, 138–39 (Max Farrand ed., Yale Univ. Press 1911) (1787). *See id.* at 1012 n.10

> Madison after a review of the historical basis of Montesquieu's doctrine, summarized the matter: "From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." This limited, orthodox meaning of the doctrine was repeated by Story, using almost verbatim Madison's words.

Id. (internal citation omitted) (first quoting THE FEDERALIST NO. 47 (Alexander Hamilton), then citing JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 63 (1833)).

The *In re Nevitt* decision was also concerned about executive encroachment, asking:

> Is there any provision of the constitution of the United States which grants this inherent and essential attribute of judicial power, or the authority to control its exercise, to the executive? . . . [H]ad the executive the power, if he chooses to exercise it, of drawing to himself all the real judicial power of the nation which the constitution vested in express terms in the courts, by means of his supreme control of the inherent and essential attribute of that power, — the authority to punish for disobedience of the orders of the courts? These questions seem to suggest their answers.[36]

The decision of *In re Aiken County* in the D.C. Circuit went so far as to say: "[t]he Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers."[37] This breadth is also what makes it particularly worrisome in regards to judicial contempt. If, as Justice Taft warns in *Grossman*, the president continually pardons the same actions, the executive is fundamentally removing the entire purpose of judicial action in the first place—stopping and remedying illegal activity. Pardons are, by their very nature, an intervention of the executive into the affairs of the judiciary. When this power is unfettered, Frankfurter's warning of absorption may become reality.

Contempt was discussed as an important power implicit in the Constitution separation of powers scheme. Member of the first Supreme Court bar, and author of a comprehensive treatise on Constitutional law, Joseph Story wrote regarding Congress in 1833:

> It is remarkable, that no power is conferred to punish for any contempts committed against either house; and yet it is obvious, that, unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions. For instance, how is either house to conduct its own deliberations, if it may not

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[36] *In re* Nevitt, 117 F. 448, 456–57 (8th Cir. 1902).

[37] *In re* Aiken County, 725 F.3d 255, 264 (D.C. Cir. 2013).

> keep out, or expel intruders? If it may not require and enforce upon strangers silence and decorum in its presence? If it may not enable its own members to have free ingress, egress, and regress to its own hall of legislation? And if the power exists, by implication, to require the duty, it is wholly nugatory, unless it draws after it the incidental authority to compel obedience, and to punish violations of it.[38]

He continues, citing Blackstone:

> It is a privilege, not of the members of either house; but, like all other privileges of congress, mainly intended as a privilege of the people, and for their benefit. Mr. Justice Blackstone has, with great force, said, that "laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, &c.,[sic] results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal."[39]

Beyond the importance of the contempt power, Story's contemporary William Rawle wrote that "It is a maxim in the practical application of government, that the public functionaries should be supported in the full exercise of the powers entrusted to them. Attempts to bribe or to intimidate them constitute offences against the public."[40] George Paschal, another member of the Supreme Court Bar, wrote in 1808 that "the power to punish for contempt is inherent in all legislative assemblies" and "all courts have a right to protect themselves from insult and contempt, without which right of self-protection, they could not discharge their high and important duties."[41]

It is worth noting that the power of a court to punish contempts

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38 STORY, *supra* note 35, at § 842.

39 *Id.* at § 843.

40 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 47 (2d ed. 1829).

41 GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES: DEFINED AND CAREFULLY ANNOTATED §§ 48–49 (1868).

may be historically disingenuous.[42] Looking at early British law, the power of the chancellor to punish disobedience is tied to the court as a proxy extension of the king:

> The chancellor had no direct power over property or persons, and no control over any executive officer, sheriff, constable, or bailiff. The decree of his court derived its force from the fact that it was granted by the keeper of the king's seal, and was executed by means of a writ sealed with that seal. The force of this writ did not depend on its being formally served by an officer having power to serve civil process. Any messenger could convey the writ to the person addressed, and a mere knowledge of the king's will by such person compelled him, on his allegiance, to obey without formal service. Disobedience to the order of the court which did not constitute active contempt of court could not be punished, since the order of the court, as such, had no legal force; but disobedience to the king's seal was, as has been seen, a contempt of the king. Thus through the use of the great seal the chancellor got power over defendants in his court.[43]

The delegation of the King's power through the court is not directly analogous to the checks and balances system in American government. Furthermore, the ratification of the Constitution provides useful context. "[A]gainst the United States" in Article II, Section 2, clause 1, was added without debate in the Committee of Style.[44] The Constitutional Convention subsequently voted against several proposals to limit the pardon power, resulting in

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[42] *See* Joseph H. Beale Jr., *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 161–66 (1908) (distinguishing between any insult to the king or government in the time of Edward III, acts that interfere with the operation of the court itself, acts that insult the course of justice while outside the court, and acts that interfere with property or persons in the hands of the court such as marrying a ward of the court without license of the court). The author further distinguishes between "[t]he so-called contempt of court which consists in mere disobedience to an order of the court is entirely different, both in its nature and in its origin, from that active contempt, whether in or out of court, which has been considered." *Id*. at 164.

[43] *Id.* at 166.

[44] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 575, 599 (Max Farrand ed., Yale Univ. Press 1911) (1787).

terms practically identical to that of the King of England.[45] With the drafters borrowing directly from a sovereign with a fundamentally different relationship to the court system, it is not clear pardons retain the same scope and breadth in the hands of a president rather than a king.

B. Limits of Contempt of Court Power

Despite the value of the contempt of court power to ensure a functioning judiciary, there is the potential for misuse. Justice White, writing in the case of *Bloom v. Illinois*, highlighted the abuse potential of criminal contempt in the hands of judges: it is for this reason that "despite the important values which the contempt power protects, courts and legislatures have gradually eroded the power of judges to try contempts of their own authority."[46] Federal courts have also consistently articulated the need to limit the scope of judicial contempt, using the due process clause as a buffer against potential abuse.[47] In *In re Michael*, the Supreme Court held "courts, as Congress is limited in contempt cases, '[are limited] to the least possible power adequate to the end proposed.'"[48] *In re Gitken* stated that:

> The power of the courts to punish for contempt has always been looked on in this country with much jealousy, and a very strong disposition shown in all jurisdictions to restrain it. It has been declared to be arbitrary in its nature.[49]

The Civil Rights era provides ample evidence of contempt of court abuse, with one of the most vivid examples being the "Chicago Seven" trial. In that case, the only black defendant, activist Bobby Seale, was denied right of counsel. When Seale requested a postponement of the hearing, the presiding judge

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[45] *See id.* at 419, 426, 626–27. *See also Contempt—Criminal Contempt of Court—Power of President to Pardon*, 38 HARV. L. REV. 685, 685–86 (1925).

[46] Bloom v. Illinois, 391 U.S. 194, 202–07 (1968).

[47] *See, e.g.*, United States *ex rel.* Robson v. Malone, 412 F.2d 848, 850 (7th Cir. 1969).

[48] *In re* Michael, 326 U.S. 224, 227 (1945).

[49] *In re* Gitkin, 164 F. 71, 74 (E.D. Pa. 1908).

refused. Seale strongly protested the actions as unconstitutional. The judge accused Seale of disrupting the court and ordered him to be bound and gagged, as well as tied to a chair, for the remaining trial "in an effort to maintain courtroom decorum."[50] Throughout the days that followed, Seale made muffled sounds and attempted to free himself from his restraints. The defense attorney for the other defendants exclaimed "[t]his is no longer a court of order, Your Honor, this is a medieval torture chamber."[51] The defendant Seale was severed from the case and held in contempt of court. The trial judge found that Seale had committed sixteen specific acts of contempt that "constituted a deliberate and willful attack upon the administration of justice in an attempt to sabotage the functioning of the Federal judicial system; that this misconduct was of so grave a character as to continually disrupt the orderly administration of justice."[52] He was sentenced for four years in prison, one of the most severe punishments for contempt of court offenses issued at the time.[53]

The Seventh Circuit overturned the contempt conviction and outlined important parameters for judicial contempt of court proceedings. First, as established in *Mayberry v. Pennsylvania*, contempt trials must be before another judge than the one reviled. This is a matter of due process, to ensure the trial judge is not biased against the defendant.[54] Second, if the penalty for the criminal contempt exceeds six months' imprisonment, a jury trial must be afforded.[55] This does not remove the court's power to hold someone in contempt, instead it shifts the determination of guilt to the neutral third-party, the jury.

Executive pardons of court contempt decisions can be an important means of curbing abuse of contempt of court, as "[e]xecutive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."[56] While appellate review can augment many of these

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50 United States v. Seale, 461 F.2d 345, 350 (7th Cir. 1972).

51 *The Case of the Defendant who was Bound and Gagged*, CONST. RTS. FOUND., http://www.crf-usa.org/bill-of-rights-in-action/bria-6-4-the-case-of-the-defendant-who-was-bound-and-gagged (last visited Feb. 5, 2018).

52 *Seale*, 461 F.2d at 374 (citing an attached certificate of contempt).

53 *Id.* at 350–51. Jason Epstein, *A Special Supplement: The Trial of Bobby Seale*, N.Y. REV. BOOKS (Dec. 4, 1969), http://www.nybooks.com/articles/1969/12/04/a-special-supplement-the-trial-of-bobby-seale/.

54 *See* Mayberry v. Pennsylvania, 400 U.S. 455, 455 (1971).

55 *Seale*, 461 F.2d at 352.

56 *Ex parte* Grossman, 267 U.S. 87, 120 (1925).

mistakes, a presidential pardon is a useful ace-in-the hole. The ability of the President to unilaterally act can ensure due process and fairness when the judicial system fails to police itself. Abuse, especially in divided political environments like in the "Chicago Seven" case, may run rampant without the executive pardon power in contempt cases. When the judicial and executive branches are at political loggerheads, as with the current Trump administration that pardons may become a political, rather than a remedial, tool. How this pardon should be treated—what is the constitutionality of checking a constitutional check, how to ensure the balancing system is itself balanced—is at the heart of the *Arpaio* case.

II. LEGAL PRECEDENT FOR PRESIDENT TRUMP'S PARDON

A. Historical Background

The pardoning power of the executive for criminal contempt of court charges was initially established in American jurisprudence through Attorneys General opinions. In 1841, Attorney General Gilpin wrote in Dixon's case, the first of these decisions.[57] Titled "Respecting the Pardon Power," Gilpin declares that "there can be no doubt" that "the principles established by the common law respecting the operation of a pardon" embrace a presidential pardon of Dixon's contempt of court charge.[58] Attorney General Nelson agreed with this reasoning in Conger's case in 1844,[59] as did Attorney General Mason in Rowan's case in 1845,[60] Attorney General Miller in Mackenzie's case in 1901,[61] and Attorney

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[57] *See id.* at 118 (citing Respecting the Pardon Power, 3 Op. Att'y Gen. 622, 622 (1841)).

[58] Respecting the Pardoning Power, 3 Op. Att'y Gen. 622, 622 (1841). Dixon was charged "for a contempt committed by an affray between himself and another person, in the presence of the judges of the circuit court of the United States at Jackson." *Id.*

[59] Power of the President to Remit Fines for Contempt, 4 Op. Att'y Gen. 317, 317 (1844) ("The power vested in the President to grant reprieves and pardons for offences against the United States is sufficient to authorize him to remit a fine imposed upon a citizen for contempt in neglecting to serve as a juror.").

[60] Power of the President to Remit Fines Against Defaulting Jurors, 4 Op. Att'y Gen 458, 458 (1845) (dealing with remitting fines imposed by the judiciary upon defaulting jurors). "The pardoning power, except in the single case in which it was withheld by the constitution, is co-extensive with the punishing power, and applies as well to punishments imposed for contempt of the process of the United States, as for the violation of any other law." *Id.*

[61] Pardon, 19 Op. Att'y Gen. 476, 477 (1890) ("I have examined the question made by you as to your power to grant a pardon to a prisoner undergoing a

General Daugherty in a case involving the Comptroller of New York City in 1923.[62] Rebutting the value of these statements, the Eighth Circuit made obiter remarks in the 1902 case of *In re Nevitt* attacking their precedential value:

> [T]hese opinions are neither controlling nor persuasive, because they contain no discussion and give no consideration to the controlling fact which must in the end condition and determine the decision of these questions, the fact that the judicial power of the United States is not derived from the king, as it was in England, or from the president, but is granted by the people by means of the constitution, in its entirety, including the inherent and indispensable attribute of that power, the authority to punish for disobedience of their orders, to the federal courts, free from the control or supervision of the executive department of the government, to the same extent that the entire executive power of the nation is vested in the president, free from the supervision or control of the courts.[63]

Issued by the executive branch, it is not surprising that the Attorneys General opinions solidify presidential authority.

There is little case law regarding contempt of court pardons. What does exist is largely confined to the late nineteenth and early twentieth century. In 1890, a district court in Minnesota found that "[t]o arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record, or superior courts. Where jurisdiction exists, there can be no review.

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sentence for contempt of court.").

[62] *Ex parte* Grossman, 267 U.S. at 118 (referencing the unpublished Attorney General opinion by Attorney General Daugherty).

[63] *In re* Nevitt, 117 F. 448, 457 (8th Cir. 1902). *See also Contempt—Criminal Contempt of Court—Power of President to Pardon*, *supra* note 45, at 685.

> The court passes over these cases and rests its decision on the ground that a criminal contempt of court is primarily an offense against the court and only indirectly an offense against the United States and that, considering the fundamental doctrine of separation of powers, the people could not have contemplated giving the president a power which would make it possible for him to thwart such an inherent power of the courts.

Id.

A pardon by the executive is in most cases the mode of release."[64] In 1869, a district court in New York found that "should the president consider the facts such as to justify the exercise of his constitutional 'power to grant reprieves and pardons for offences against the United States,' there is nothing in the character of this offence which withdraws it from the general authority."[65]

In a related line of jurisprudence, the power of a state governor to pardon criminal contempt of court has weak precedential support from nineteenth century courts of appeal decisions in Louisiana,[66] Mississippi,[67] New Mexico,[68] Tennessee,[69] and in the *dicta* statement of a Colorado court.[70] These rulings upheld executive pardoning power on the grounds that contempt of court is not an offense against a judge personally. Instead, it is considered an offense against the state in general. Because the state is the offended party, the state has the discretion to use another department of its government to pardon the offender.[71]

Courts, however, were by no means consistent in treatment of contempt of court pardons. In the 1871 case, *United States v. Klein*, the Supreme Court found that "legislation attempting to withdraw court's jurisdiction to consider the effect of a Presidential pardon infringes upon judicial power and violates principle of separation of powers."[72] In 1897, the Texas Civil Court of Appeals found in

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64 *In re* Mason, 43 F. 510, 515 (D. Minn. 1890).

65 *In re* Mullee, 17 F. Cas. 968, 970 (C.C.S.D.N.Y. 1869).

66 State *ex rel.* Van Orden v. Sauvinet, 24 La. Ann. 119, 121–22 (1872) (accepting *Ex parte Hickey* as controlling law without scrutinizing the decision).

67 *Ex parte* Hickey, 12 Miss. (4 S. & M.) 751, 784 (1842). This was the first state case upholding the executive pardoning power in a contempt of court case; the precedential value of this case is limited by the fact that the court relies on the constitution of the state of Mississippi to reach its conclusion. *Id.* at 783–84.

68 State v. Magee Publ'g Co., 224 P. 1028, 1028–29 (N.M. 1923). In 1923, the governor of New Mexico granted a contempt of court pardon to Carl Magee. As editor of the New Mexico State Tribune, Magee was indicted for criminal libel. *Id.* While the case was pending, Magee published numerous articles attacking the presiding judge and discussing the case. In response to these articles, the judge fined the paper $4,000 and sentenced Magee to a year in prison. *Id.*

69 Sharp v. State, 49 S.W. 752, 752 (Tenn. 1899) (accepting *Ex parte Hickey* and *Sauvinet* as good law without interrogating the assumptions each court relied upon).

70 *In re* Brown, 2 Colo. 553, 555 (1875).

71 Annotation, *Power of Executive to Pardon One Committed for Contempt*, 23 A.L.R. 524 sec. II (1923).

72 Legislative Proposal to Nullify Criminal Convictions Obtained Under the Ethics in Government Act, 10 U.S. Op. O.L.C. 93, 95 n.7 (1986) (citing United States v. Klein, 80 U.S. 128, 146–47 (1872)).

Taylor v. Goodrich that the governor's pardon of a criminal contempt charge was invalid.[73] This decision was reaffirmed in 1927 with *Ex parte Green*.[74] The Supreme Court of Wisconsin also discussed the power of the Executive to pardon judicial contempt in *State ex rel. Rodd v. Verage*, although its discussion did not bear directly on the issue before the court there.[75]

In 1928, the most significant rejection of executive contempt pardon authority was the Indiana Supreme Court of decision of *State v. Shumaker*.[76] At issue were articles published by Shumaker, editor of a temperance publication, alleging the state supreme court was full of drunkards and improperly allowing bootleggers to avoid conviction. As a result, Mr. Shumaker was charged with contempt for misrepresenting the opinion of the court and scandalizing the state judiciary. The Governor of Indiana attempted to pardon Mr. Shumaker but the court voted three to two against the pardon, holding:

> The Supreme Court is not here arrogating unto itself a supreme position over either of the other two departments of the government. In the exercise of its functions and duties, it understands that the citizens gave to it certain inherent powers, one of which is to maintain itself free from defamatory, degrading, and libelous attack which debases the character of the court. It will not do in answer to say that the sovereign may rest assured that no one of its separate departments of government will intrude upon another department to the extent that it may embarrass such other department in functioning, either to carry out its mandates or to preserve its self-respect.[77]

While this language is striking, the *Shumaker* decision was criticized at the time for overstepping judicial bounds.[78] It also had limited precedential value on a national scale because it dealt with

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[73] Taylor v. Goodrich, 25 Tex. Civ. App. 109, 114–15 (1897).

[74] *Ex parte* Green, 295 S.W. 910, 912 (Tex. 1927).

[75] State *ex rel.* Rodd v. Verage, 187 N.W. 830, 836 (Wis. 1922).

[76] State v. Shumaker, 164 N.E. 408, 411 (Ind. 1928).

[77] *Id.* at 409.

[78] THOMAS, *supra* note 18, at 35–36 (explaining that many argued that the case marked significant judicial overreach and was riddled by personal animus toward Shumaker).

a state constitution and the intervention of a governor.[79] Nonetheless, it is an explicit instance where a court refused to allow executive intervention on the basis that a court alone has the authority to decide how its procedures and norms should be enforced.

Reflecting contemporary divisions in jurisprudence, early twentieth-century criminal law and legal encyclopedias also present conflicting opinions of executive branch authority in this area.[80] The 1923 American Law Report "*Power of Executive to Pardon One Committed for Contempt*" is equally split between support for and against this power.[81] Referencing a Supreme Court case from 1874, strong language is cited:

> It is not, however, necessary to a decision of the application before us, nor is it our purpose, to here decide whether or not criminal contempts—contempts instituted solely for the purpose of vindicating the dignity of the courts, preserving their power, and punishing disobedience of their orders—fall within the pardoning power of the Executive. That question has been presented and pressed upon our consideration by the argument and the authorities of counsel for the petitioners, and it has been adverted to, and some of the considerations which in our opinion must control its ultimate decisions have been suggested, that it might be clear that in what is said in this opinion this court neither intimates nor decides that there is or ought to be any authoritative decision that the executive department of the government has been vested with any such power.[82]

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79 *See* U.S. CONST. art. VI, cl. 2. Though a counterargument may be made that the Indiana state constitution was modeled after and closely resembles the United States Constitution, thereby allowing extension via analogy:

The analogy between the exercise of such a power by the President in all the states, in cases of the sort arising in the courts of the United States, and the exercise of that power in a single state by its governor, in the same class of cases arising in the courts of a state, seems to be strong and well defined.

Power of Executive to Pardon One Committed for Contempt, *supra* note 71.

80 *See* STEWART RAPALJE, A TREATISE ON CONTEMPT INCLUDING CIVIL AND CRIMINAL CONTEMPTS §162 (Fred B. Rothman & Co. 1981) (1890).

81 *See Power of Executive to Pardon One Committed for Contempt*, *supra* note 71, at sec. I.

82 *Id.* (quoting *In re* Nevitt, 117 F. 448, 458 (8th Cir. 1902) (citing City of New Orleans v. N.Y. Mail S.S. Co., 87 U.S. (20 Wall.) 387, 392 (1874))).

Given the conflicting sources of federal and state precedent, it would only be a matter of time before the Supreme Court addressed the issue again.

A. Ex Parte Grossman

The lodestar for legal analysis of presidential criminal contempt of court pardons is the 1924 Supreme Court case of *Ex Parte Grossman*.[83] On November 24, 1920, the government filed a bill in equity in the District Court of Northern Illinois, alleging that Philip Grossman was creating a nuisance by unlawfully selling liquor. On November 26, 1920, the district court granted an injunction, prohibiting Grossman from selling liquor on his business' premises. On January 11, 1921, Grossman was charged with violating this injunction after selling alcohol. Grossman was tried in district court and found guilty of contempt. He was sentenced to a year imprisonment and a fine of $1,000. This decision was affirmed on appeal.[84] In December of 1923, President Coolidge pardoned Grossman, commuting his sentence. In May of 1924, however, the district court recommitted Grossman to prison, notwithstanding the pardon.[85] Determining that the court had the power to refuse the pardon, the district court based its decision on the constitutional separation of powers scheme and the fact that the English king pardon power did not explicitly carry over into the American system of law.[86]

Grossman then petitioned for a writ of habeas corpus to the Supreme Court.[87] The Supreme Court overturned the district court's verdict and ordered Grossman's immediate release.[88] The decision was written by former President and Chief Justice William Howard Taft. Beyond the potential bias stemming from his time in the oval office, his neutrality is also tempered by the fact that he had given lectures at Columbia University describing the pardoning power of the executive years prior.[89] Decades earlier, as Solicitor General in 1892, Taft also submitted a petition

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[83] *Ex parte* Grossman, 267 U.S. 87 (1924).
[84] Grossman v. United States, 280 F. 683 (7th Cir. 1922).
[85] United States v. Grossman, 1 F.2d 941, 953 (N.D. Ill. 1924).
[86] *Id.*
[87] Grossman, 267 U.S. at 87 (granting the writ of habeas corpus).
[88] *Id.* at 122.
[89] WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 118–124 (Carolina Acad. Press 2002) (1916).

to the Attorney General stating that the pardon power is unlimited, with the exception of impeachment, and extends to every offense known to law:

> This power of the President is not subject to legislative control; Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions.[90]

This language is echoed almost verbatim in *Grossman*.

After acknowledging the concern that executive pardoning could "destroy the independence of the judiciary and violate the primary constitutional principle of a separation of the legislative, executive and judicial powers,"[91] Judge Taft states that "[t]he federal Constitution nowhere expressly declares that the three branches of the government shall be kept separate and independent."[92] In response to the claim that contempt of federal court was not within Article 2, Section 2, Clause 1's definition of the word "offenses" in the Constitution, which empowers the President to grant pardons, Taft rebuts by quoting previous Attorneys General opinions. He writes that "the power thus conferred is unlimited, with the exception stated, i.e., cases of impeachment. It extends to every offense known to the law." He goes on to declare:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. . . . To afford a remedy. . . . is a check entrusted to the executive for special cases. . . . Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.[93]

It is important to highlight that Judge Taft focuses on the remedial aspect of the executive pardon power rather than the power itself. Taft view the presidential pardon of contempt of court as conducive, rather than perilous, to the separation of powers. He

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90 Amnesty.-Power of the President, 20 U.S. Op. Att'y Gen. 330, 336 (1892).
91 *Grossman,* 267 U.S. at 119.
92 *Id.*
93 *Id.* at 120–21. *See also* 20 U.S. Op. Att'y Gen. 330, 336 (1892).

asks:

> Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?[94]

The Supreme Court put a lot of stock in historical context, looking at British institutions and the common law that existed at the time the Constitution was adopted.[95] The decision states that:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the convention of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.[96]

The decision also reflects a normative approach to separation of powers concerns. As a contemporary comment in the Michigan Law Review notes:

> The Supreme Court seemed to be of the opinion that the fear of the usurpation by the executive of the judicial power was unwarranted since it was

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[94] *Grossman,* 267 U.S. at 122.

[95] *Id. See also Constitutional Law—Separation of Powers—Power of President to Grant Pardon in Cases of Criminal Contempt*, 24 MICH. L. R. 189, 190 (1925).

[96] *Grossman,* 267 U.S. at 108–09.

> unlikely that coordinate departments would seriously cripple one another by the undue use of overlapping functions, citing several instances of distribution of power by the Constitution in a manner not strictly in accord with the observation of a rigid separation of powers. In view of the legislative tendency to increase the exercise of the restraining power of the court as a means of control of criminal conduct it would seem wise not to leave an absolute power to punish in any one officer or department.[97]

The case is not a complete victory for the executive, however, as the merits of judicial review are extolled. In the case's conclusion, Taft writes:

> It goes without saying that nowhere is there a more earnest will to maintain the independence of federal courts and the preservation of every legitimate safeguard of their effectiveness afforded by the Constitution than in this court. But the qualified independence which they fortunately enjoy is not likely to be permanently strengthened by ignoring precedent and practice and minimizing the importance of the coordinating checks and balances of the Constitution.[98]

Taft wants an independent and effective judiciary, which he believes will only remain strong through measured judicial review. Despite overruling the district court's rejection of executive contempt pardon, *Grossman* leaves open the door for the opposite result in later decisions through as long as the decision is a "legitimate safeguard." *Grossman* is the strongest authority for executive pardoning power in contempt of court cases and remarkable for being one of the few unanimous court decisions regarding this controversial issue.[99]

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[97] *Constitutional Law—Separation of Powers—Power of President to Grant Pardon in Cases of Criminal Contempt*, *supra* note 95, at 190.

[98] *Grossman*, 267 U.S. at 122.

[99] THOMAS, *supra* note 18, at 78.

B. Post-Grossman Jurisprudence

While criminal contempt of court pardons are not common, there have been some modifications of *Grossman* on the circuit level. In the Seventh Circuit, *Bowens v. Quinn* states that "[e]xecutive clemency is a classic example of unreviewable executive discretion because it is one of the traditional royal prerogatives."[100] However, in *Hirschberg v. Commodity Futures Trading Commission*, the court found that a presidential pardon does not prevent the use of the initial conviction as part of the consideration in federal regulatory licenses.[101] The Third Circuit held, in *United States v. Noonan*, that *Grossman* does not require the expungement of criminal records. The Fifth Circuit held, in *United States v. Barnett*, that courts can set their own punishments for criminal contempt "by "conform[ing] its practices by analogy with that [of a] policy so as to insure these defendants the same protections and immunities which would surround them if they were prosecuted for crime in a conventional proceeding."[102] The Eighth Circuit held in *Clark v. United States* that "[t]here is no fixed formula for contempt proceedings, and technical accuracy is not required."[103] None of these cases address the validity of executive contempt of court pardons head-on.

State courts have relied on *Grossman* as well. The District of Columbia cites the case in *In re Abrams* to support the claim that presidential pardons are "virtually identical to that exercised by the King of England, except that the President's authority to grant pardons would not extend to 'cases of impeachment.'"[104] *Hoffa v. Saxbe* uses *Grossman* to establish that "the President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate and it is not for the courts to inquire into the rationale of his decision."[105] The Supreme Court of Kentucky cites *Grossman* in *Fletcher v. Graham*, holding that "[t]he primary role and purpose of the executive pardon/amnesty is to bring necessary balance to the severity and force of criminal

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100 Bowens at 78.v. Quinn, 561 F.3d 671, 676 (7th Cir. 2009).

101 Hirschberg v. Commodity Futures Trading Comm'n, 414 F.3d 679, 682–83 (7th Cir. 2005).

102 United States v. Barnett, 330 F.2d 369, 404 (5th Cir. 1963).

103 Clark v. United States., 61 F.2d 695, 699 (8th Cir. 1932).

104 *In re* Abrams, 689 A.2d 6, 29 (D.C. 1997) (Terry, J., dissenting) (quoting *Ex parte* Grossman, 267 U.S. 87, 112 (1925)).

105 Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974).

law enforcement."[106]

However, *Grossman* should not be looked upon as gospel. An opinion by the United States Attorney General, released in 1955, declared that "[t]he books are replete with statements that Congress can neither control nor regulate the action of the President in this regard."[107] A Central Intelligence Agency ("CIA") internal memo from 1954 explored how *Grossman* applies when a member of the executive department commits contempt of Congress, and states "this matter has not been determined."[108] It is worth noting that the Ninth Circuit questioned the validity of *Grossman*'s conclusion that continuous and long practice is entitled to the presumption of constitutionality in *United States v. Woodley*. *Woodley* held that "unchallenged historical practice" is no longer sufficient evidence of constitutionality, and noted that "[r]ecent Supreme Court discussions of the issue indicate that any practice, no matter how fully accepted or efficient, is 'subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised.'"[109]

The strongest support for the presidential pardon power comes from a case that is no longer good law within the Ninth Circuit. Much of Taft's decision relies on the consistent application of executive pardons tracing back to colonial America and England. If, after the formative administrative law case *INS v. Chadha*, consistent practice is no longer relevant when determining constitutionality, many of the conclusions of *Grossman* deserve to be reevaluated.

III. CONTEMPT OF CONGRESS

Given the scarcity of pardons of contempt of court in the case law, a detour to discuss contempt of Congress demonstrates how another branch of government deals with intervention in its legal

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106 Fletcher v. Graham, 192 S.W.3d 350, 368 (Ky. 2006) (footnote omitted).

107 Pardoning Power of the President, 41 Op. Att'y Gen. 251, 254 (1955) (citing *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867) (finding that the power of the President to grant reprieves and pardons is not subject to legislative control)).

108 Memorandum to Gen. Counsel of the Cent. Intelligence Agency on the Relationship of *Ex Parte Grossman* to the Issue of Whether the President May Pardon a Contempt Committed before the Bar of the Cong. by a Member of the Exec. Dep't (July 13, 1954) (made available at https://www.cia.gov/library/readingroom/docs/CIA-RDP59-00882R000100340006-5.pdf).

109 United States v. Woodley, 726 F.2d 1328, 1337 (9th Cir. 1983) (omission in original) (quoting INS v. Chadha, 462 U.S. 919, 945 (1983)).

process.

There are three methods for ensuring Congressional compliance. First, there is the dormant inherent contempt power, which permits Congress to rely on its constitutionally granted authority to imprison an individual until they comply with congressional demands. Congressional power to punish contempt was firmly established in the 1935 Supreme Court case *Jurney v. MacCracken*. The petitioner was arrested by the Senate sergeant-at-arms for refusing to comply with a Senate subpoena and destroying certain relevant documents. Not only was the Senate "engaged in an enquiry which it had the constitutional power to make; that the Committee had the authority to require the production of papers as a necessary incident of the power of legislation," but also, the Senate clearly had "the power to coerce their production by means of arrest." [110] Second, a criminal contempt statute permits Congress to defer to the Department of Justice for the criminal prosecution of the contemnor. The purpose of the statute, passed in 1857, was "

> [T]o avoid the procedural difficulties which had been experienced . . . when [a] person cited for contempt . . . [was] brought before its bar to show cause why they should not be committed, and, more important, to permit the imprisonment of a contemnor beyond the expiration of the current session of Congress.[111]

This had the effect of speeding up and streamlining the contempt proceedings. Finally, Congress can seek, in federal court, a civil judgement declaring that the contemnor is legally obligated to comply with the terms of the congressional subpoena.[112]

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[110] Jurney v. MacCracken, 294 U.S. 125, 144 (1935).

[111] *See* United States v. Bryan, 339 U.S. 323, 327 (1950) (speaking on the Act of January 24, 1857, ch. 19 §§ 1, 3, 11 Stat. 155 (1857) (versions at 2 U.S.C. §§ 192, 194 (1938) (empowering Congress to make an individual guilty of a misdemeanor any witness who willfully defaults or refuses to answer any question pertinent to the question under inquiry, and imposing a fine of not more than $1,000 or less than $100 and imprisonment of not more than twelve months or less than one month))). The constitutionality of the statute was upheld by the Supreme Court in *In re* Chapman, 166 U.S. 661, 672 (1897).

[112] TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34114 CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH 9 (2014), https://fas.org/sgp/crs/misc/RL34114.pdf.

The scope of the contempt of Congress power is narrow. If there is no legislative duty to be performed[113] or the act is deemed not to be of a character to obstruct the legislative process,[114] then Congress does not have the ability to hold the actor in contempt. "But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance."[115] There is strong historical precedence: this power was exerted by Congress in 1795,[116] the Continental Congress and state legislative bodies engaged in contempt proceedings before the Revolution, and it is a practice that can be traced back to the British House of Commons.[117]

In modern contempt of Congress proceedings, cases are referred to the U.S. Attorney for the District of Columbia for prosecution. In the late nineteenth-century case of *Chapman v. United States*, the D.C. Court of Appeals held that Congress may delegate contempt of Congress cases for judicial enforcement, but this is not required.[118] This delegation opens the door for the President to exercise his plenary power to issue pardons. If a contempt proceeding is initiated under the contempt statute, rather than through Congress' inherent contempt power, the President may also legally intervene. Only when Congress uses its dormant inherent contempt power is the conviction fully immune from presidential pardon.

There has never been an explicit executive pardon for contempt of Congress. The commutation of Lewis "Scooter" Libby's jail sentence is the closest a President has come to pardoning for a contempt. Libby was convicted, fined, and sentenced to prison for

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113 Kilbourn v. Thompson, 103 U.S. 168, 188, 190 (1881) (explaining that Congress had overstepped its bounds by investigating the private activities of the defendant in a matter in which it had no jurisdiction).

114 Marshall v. Gordon, 243 U.S. 521, 542 (1917).

115 *Jurney*, 294 U.S. at 148.

116 *See, e.g.*, ANNALS OF CONG. 165, 166, 169, 219–20 (1795). On December 28, 1795, Robert Randall was taken into custody in the House of Representatives. *Id.* at 169. On January 6, 1796, he was found guilty of contempt and committed to the custody of the sergeant at arms. *Id.* at 219–20.

117 C. S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV 691, 692, 697, 713 (1926). *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 121–22 (Da Capo Press ed.) (1943). *See also* THOMAS ERSKINE MAY, A TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 86, 88, 93 (T. Lonsdale Webster & William Edward Grey eds., 11th ed. 1906).

118 Chapman v. United States, 5 App. D.C. 122, 133–34 (D.C. Cir. 1895).

obstructing a Special Counsel's investigation into the alleged outing of CIA agent Valerie Plame. President Bush commuted Libby's prison sentence, but stopped short of a full pardon, for which Vice President Dick Cheney advocated. The presidential commutation was lambasted by some Congressmen who feared it may undermine deterrence to comply with Congressional directives. Some, like House Judiciary Committee chairman John Conyers, were concerned that this action removed any incentive for Libby to comply with Congressional orders. Others, like Rules Committee chairwoman Louise Slaughter, felt that it represented a failure of accountability that encouraged future misdeeds. Oversight and Government Reform Committee chairman Henry Waxman went so far as to say that "[t]he Libby commutation makes a mockery of our judicial system and our most fundamental values."[119] The U.S. House Judiciary Committee held a hearing in response, "The Use and Misuse of Presidential Clemency Power for Executive Branch Officials,"[120] but no formal legal challenge was mounted.

IV. SHERIFF JOE ARPAIO AS A TEST CASE

In 2011, after a two-year investigation, the Civil Rights Division of the United States Department of Justice (DOJ) found that the Maricopa County Sheriff's Office (MCSO) had engaged in a pattern of discriminatory policing that violated federal law and the Constitution.[121] In a 2011 letter to the Maricopa Sheriff's office, the DOJ explained their findings:

> [W]e find reasonable cause to believe that MCSO engages in a pattern or practice of unconstitutional policing. Specifically, we find that MCSO . . . engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO's policies or practices. . . .

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119 *Chairman Waxman on President Bush's Decisions to Commute*, NANCY PELOSI DEMOCRATIC LEADER: BLOG (July 2, 2007), https://www.democraticleader.gov/newsroom/chairman-waxman-on-president-bushs-decision-to-commute/.

120 *Use and Misuse of Presidential Clemency Power for Executive Branch Official: Hearing before the Comm. On the Judiciary H. of Reps.*, 110th Cong. (2007), https://fas.org/irp/congress/2007_hr/clemency.pdf.

121 *See* Letter from U.S. Dep't of Justice Civil Rights Div. to Bill Montgomery, Cty. Att'y, Maricopa Cty. Att'y's Office (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

> . . . MCSO operates its jails in a manner that discriminates against its limited English proficient ("LEP") Latino inmates. Specifically, we find that MCSO . . . routinely punishes Latino LEP inmates for failing to understand commands given in English and denies them critical services provided to the other inmates, all in violation of Title VI and its implementing regulations
> . . . [There is a] chronic culture of disregard for basic legal and constitutional obligations.[122]

Beyond discriminatory policing, the DOJ found additional areas of serious concern requiring further investigation:

> [T]roubling incidents involving MCSO deputies using excessive force against Latinos. . . . [and] serious allegations that MCSO failed to investigate a large number of sex crimes. Given the systemic nature of MCSO's constitutional violations, effective resolution of this matter will require the development of a comprehensive written agreement along with federal judicial oversight.[123]

Despite the injunction, Arpaio continued to racially profile drivers. In 2011, after twenty-one days of evidentiary hearings, U.S. District Judge G. Murray Snow found Arpaio guilty of civil contempt of court for failing to comply with the injunction, making material misstatements under oath, and refusing to produce court-ordered evidence:

> In short, the Court finds that the Defendants have engaged in multiple acts of misconduct, dishonesty, and bad faith with respect to the Plaintiff class and the protection of its rights. They have demonstrated a persistent disregard for the orders of this Court, as well as an intention to violate and manipulate the laws and policies regulating their conduct as they pertain to their obligations to be fair, "equitable[,] and impartial" with respect to the interests of the Plaintiff class.[124]

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122 *Id.*
123 *Id.*
124 Finding of Facts And Order Setting a Hearing for May 31, 2016 at 3,

Again, Arpaio was enjoined from racially profiling drivers without reasonable suspicion of a crime.

The next year, Arpaio gave a television interview to Univision where he admitted he was still detaining Latino drivers, and

> He further stated that he would continue to enforce the laws, and "if they don't like what I'm doing, get the laws changed in Washington." According to a March 28, 2012 press release following a load vehicle raid, "Arpaio remains adamant about the fact that his office will continue to enforce both state and federal illegal immigration laws as long as the laws are on the books." In an April 4, 2012 Fox News interview, [Arpaio stated], "[I] will never give in to control by the federal government." . . . [In an April 24, 2012 PBS Newshour interview he stated], "I'm still going to do what I'm doing."
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> . . . In a [June 25, 2012 interview with] Univision, [he admitted], "we have been doing it anyway, nothing has changed." . . . In a June 26, 2012 interview with Fox News, [Arpaio discussed having to] "work around" [the federal policy of only detaining felons].
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> . . . [Throughout this time period], ninety-seven persons not charged with a criminal offense were turned over to ICE [by MCSO in violation of the preliminary injunction].[125]

In June 2017, Arpaio was convicted of criminal contempt by U.S. District Court Judge Susan Bolton. Judge Bolton found that Arpaio had "flagrant disregard"[126] for a previous judicial order and "willfully violated an order of the court" while broadcasting "to the world and to his subordinates that he was going to continue business as usual no matter who said otherwise."[127] Bolton used the *United States v. Baker* standard for criminal contempt: requiring that a contemnor knew of an order and willfully disobeyed it, where willfulness and awareness of the order is

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Melendres v. Arpaio, No. CV-07-2513-PHX-GMS (D. Ariz. May 13, 2016).

[125] Findings of Fact and Conclusions of Law at 3–5, 7, United States v. Arpaio, No. CR-16-01012-001-PHX-SRB (D. Ariz. Jul. 31, 2017) (internal citations omitted).

[126] *Id.* at 13.

[127] *Id.* at 13–14.

shown beyond a reasonable doubt.[128] The criminal contempt ruling carries a monetary fine and possible maximum of six months in jail.[129] On August 25, 2017, President Donald J. Trump issued the first pardon of his administration to Arpaio.[130] President Trump's pardon regarding the criminal contempt charge was issued before Arpaio was formally sentenced or granted appeal.

Beyond disobeying explicit court orders, Arpaio also has a well-documented history of targeting the judiciary. While under oath during the civil contempt hearings, Arpaio admitted his attorneys hired a private detective to investigate Judge Snow's wife in an attempt to reveal judicial conflict of interest.[131] In 2009, U.S. District Court Judge Mary Murguia recused herself from the initial racial profiling case after Arpaio found statements Judge Murguia's twin sister had made to a national Latino rights group.[132]

In 2008, Arpaio launched a government corruption investigation resulting in the spurious indictment of Superior Court Judge Gary Donahoe.[133] In response, the U.S. Department of Justice opened a criminal abuse-of-power investigation into the Sheriff's Office. Maricopa County Attorney Andrew Thomas, who worked with Arpaio in the corruption investigation, was disbarred. No federal charges were filed against him or Mr. Arpaio.[134]

On September 11, 2017, Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar submitted an amicus brief in Arizona district court. They argue that the President's pardon of Arpaio is void because contempt of court is not an "offense" within Article II,

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128 United States v. Baker, 641 F.2d 1311, 1317 (9th Cir. 1981).

129 Colin Dwyer, *Ex-Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR: THE TWO-WAY (July 31, 2017, 4:08 PM), http://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt.

130 Kevin Liptak et al., *Trump pardons former Sheriff Arpaio*, CNN (Aug. 27, 2017), http://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon.

131 *See* Megan Cassidy, *Arpaio: PI hired to investigate judge's wife*, AZCENTRAL (Apr. 23, 2015, 11:10 AM), http://www.azcentral.com/story/news/local/phoenix/2015/04/23/joe-arpaio-apologizes-contempt-hearing-day-three-abrk/26240715/. *See also* Finding of Facts and Conclusions of Law, *supra* note 125, at 68–69 (explaining that there was a conflict of interest because Arpaio investigated Judge Snow's wife).

132 wife).ai*supra* note 131.

133 *not* ("[T]he charges . . . crumbled when it became clear that there was no real basis for the allegations and no federal statutes specifically authoriz[ing] [the indictments].").

134 *Id.*

Section 2 of the Constitution. Furthermore, citing *Marbury v. Madison*, they state that Article III courts have a duty to provide effective redress when a public official commits harm by violating the Constitution and also possesses inherent power to enforce their orders outside "executive whim."[135] The trio spend a significant portion of their brief discussing *Grossman*, distinguishing Trump's pardon on the grounds that the initial transgression in *Grossman* involved a defendant violating a Prohibition-era statute whereas Arpaio violated the court order. Specifically, he writes that "[t]he proceedings against Grossman were conducted by public authority to vindicate a public interest. In the case now before the Court, private persons sought and obtained judicial relief from unlawful governmental action."[136] To support the distinction between public interest verses private action against the government, the trio cite early seventeenth-century English case law and commentary. They also appeal to statutes, writing: "[t]he distinction between offenses prosecuted by the sovereign and punishments imposed by a court to protect private rights is reflected as well in 18 U.S.C. §§ 401, 402."[137]

This distinction is relevant because "[t]he proceedings against Grossman were based on Congressional creations of criminal offenses,"[138] whereas Arpaio's "consistent conduct, if tolerated, undermines this court's constitutional right and duty to protect its *own* processes and the lives and liberty of those who come to seek justice."[139] Finally, they state:

> No President till now has proclaimed that a public official who violated the Constitution and flouted court orders was "doing his job." The purported pardon is an attempt to exercise a power that even the King of England did not possess in 1787. By that time, the English people had rejected what Madison termed the "impious doctrine of the Old World that people were made for Kings and not Kings for people." [140]

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135 [Proposed] Memorandum of *Amici Curiae* Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar at 1–2, United States v. Arpaio, No. CR-16-01012-001-PHX-SRB (D. Ariz. Oct. 19, 2017).

136 *See id.* at 3–4.

137 *Id.* at 5.

138 *Id.* at 11.

139 *Id.* at 11–12.

140 *Id.* at 13 (quoting THE FEDERALIST NO. 45, at 238 (James Madison) (George W. Carey & James McClellan, eds. 2001)).

While this language is rousing, the distinction ignores the underlying nature of criminal contempt of court charges to begin with. They are, as *Bray v. United States* established, independent proceedings from the initial matter of law because a criminal contemnor is illegally interfering with the institution of the court. In all criminal contempt cases, "the public [is] on one side and the defendant on the other."[141] Criminal contempt always involves the public interest, reflected through the judiciary.

The trio's distinction circles around, but does not explicitly state what I believe is the most important difference between *Grossman* and *Arpaio*—the nature of the contemnor's transgressions and the value of judicial contempt in vindicating the rights those transgressions violated. A fundamental difference between the prohibited acts in *Grossman* and *Arpaio* is that the actions in *Grossman* were *malum prohibitum* and the actions in *Arpaio* were *malum in se*. The crime in *Grossman* is a strong example of *malum prohibitum*, an act which is wrong because it is defined as a crime, as opposed to *malum in se,* an act that is a crime because they are wrong. Mr. Grossman offended a controversial public interest, violating a Prohibition-era statute, whereas Sheriff Arpaio violated basic human rights, in addition to the right to equal protection using continued racial targeting. The former touches on public order. The latter touches on fundamental civil liberties. This difference, rather than the distinction between private and public action, is most striking difference between the two cases. This delineation also makes judicial contempt, as means of preventing abjectly wrong acts beyond ensuring procedural compliance, a much more fundamental remedial tool.

Even using the trio's framework, their amicus brief overlooks the valid remedial nature of pardons which Chief Justice Taft highlights in *Grossman*. They ignore the potential due process concerns in abuse of contempt cases like the "Chicago Seven." Instead of wholesale denying the executive pardon power for contempts of court, a more measured approach would ensure both the executive and judicial branches are accountable for their actions.

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141 OFFICE OF THE U.S. ATTORNEYS', U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 756 (2009) (citing Bray v. United States, 423 U.S. 73 (1975)), https://www. justice.gov/usam/criminal-resource-manual-756-tests-distinguishing-between-civil-and-criminal-contempt.

The *Arpaio* pardon is a unique combination of different types of judicial contempt last addressed separately a century ago: *Ex parte Grossman*'s violation of a court injunction and *State v. Shumaker*'s mockery of the court. Arpaio explicitly violated an injunction, as did Grossman. What distinguishes this case is Arpaio's targeting of Judge Snow's wife, the spurious investigation of Judge Gary Donahoe, and public statements that Arpaio would continue his discriminatory practices regardless of what the court had ruled. This is a mirror image of *Shumaker*'s "defamatory, degrading, and libelous attack which debase[d] the character of the court."[142] Not only, as in *Grossman*, is a direct court order being disobeyed, but also the dignity and reputation of the judiciary as a whole is being impinged. President Trump's pardon threatens, as in *Shumaker*, to embolden further disrespect for the rule of law.

Grossman helps provide a path forward. Chief Justice Taft's rationale for executive power regarding pardons of criminal contempt of court relies on the fact that it was used sparingly and justly: "[t]he pardoning by the President of criminal contempts has been practiced more than three-quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the federal courts of its validity."[143] This power, however, is not unlimited. Chief Justice Taft declares:

> If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this if to be imagined at all would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.[144]

Arpaio, as Taft warned, engaged in recurring contempts—one civil, one criminal. Likewise, Trump's pardon deprives the Arizona district court of the ability to enforce its orders. Impeaching the President, nevertheless, is an unlikely option, requiring action in

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142 State v. Shumaker, 164 N.E. 408, 409 (Ind. 1928).
143 *Ex parte* Grossman, 267 U.S. 87, 122 (1925).
144 *Id.* at 121.

tandem with the legislative branch.

I would offer this alternative legal analysis: after a person has been convicted of an offense, the executive pardon power may be exercised and, as such, would serve as a check on judicial overreach. If the President failed to take action and contempt proceedings result in criminal contempt, then unless the President points to persuasive evidence indicating lack of due process in the contempt proceeding, the President should no longer be able to exercise his pardon power. This preserves the President's ability to pardon criminal contempts in situations where there are due process concerns with the contempt conviction or the illegal activity leading to the contempt charge does not threaten fundamental civil liberties and rights—in other words, the pardon does not tacitly approve or encourage unconstitutional action.

There are two reasons for this procedure: first, *malum in se*, as opposed to *malum prohibitum*, concerns the very core of our societal values, largely in consensus. Second, a judicial pardon proceeding with the ability to allege due process violations was held, presumptively with due process, which served as "another look" at the case thereby obviating much of the checks and balances argument upon which executive pardon lies. Once due process is established, an executive pardon under such circumstances would violate both the separation of powers principle, the Article II, Section 3, Clause 5 duty to "take care that the Laws be faithfully executed," and the sworn presidential oath to "preserve, protect, and defend the Constitution."

This solution addresses the concern in *Grossman* of a wayward judge abusing the contempt power. If lack of due process, such as with the Chicago Seven case, can be established, then the executive still has the ability to pardon contempts of court. If not, then arbitrariness and political showboating from the executive is avoided without requiring the recourse of presidential impeachment. Furthermore, it helps curb recurring violations by ensuring judicial contempt powers are robust and, in most cases, binding authority.

CONCLUSION

The legality of President Trump's pardon of Arpaio turns on whether the pardon is a form of remedial justice responding to a biased legal system, as put forth in the rationale of *Ex parte Grossman*. If not, and the courts were operating fairly without

animus, then the pardon is likely what Chief Justice Taft warned of—a dangerous and illegal deprivation of judicial power. "Constantly recurring contempts," which Taft held to be outside the scope of proper execution of the presidential pardon power, are noticeably present here. Arpaio's continuous racial profiling flagrantly ignored both a federal injunction and Department of Justice investigation. He also assaulted the reputation and dignity of the court, like the defendant in *State v. Shumaker*, through the use of a private investigator and spurious corruption investigation of the judge hearing his cases. This is an attack on the judiciary as a whole, beyond a particular judge and his orders. This is a unique pardon and raises questions that have not been wrestled with for nearly a century.

Pardon power and contempt power are both essential means of ensuring the government remains balanced between the executive and judicial branches. It is not common for these powers to come into direct conflict, but when they do one branch ultimately must acquiesce to the other. While pardons may be a necessary remedial step required to ensure justice on a case-by-case basis, the ability of the courts to maintain their own procedures and codes of conduct, as well as the validity of their decisions, is equally, if not more, necessary to ensure justice across the entire judicial system. A bifurcated review system, limiting the ability of the President to intervene unless due process violations can be established, helps maintain the separation of powers scheme set forth in the Constitution. Ultimately, this hybrid solution, neither denying the judiciary autonomy or the executive remedial recourse, ensures both branches are held accountable for their actions.