

# Will Judge Overturn Arpaio Pardon?

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*Featured image: Former Arizona Sheriff Joe Arpaio (Source: [ktul.com](#))*

*When Donald Trump plunged a dagger through the hearts of former Arizona sheriff Joe Arpaio's victims and all justice-loving people by pardoning the racist serial lawbreaker, many threw up their hands in resignation. The president's constitutional pardon power is absolute, they thought.*

Not so, argue lawyers and legal scholars in two proposed amicus briefs filed in US District Court in Arizona. They contend the Arpaio pardon is unconstitutional.

Judge Susan Bolton convicted Arpaio of criminal contempt on July 31, 2017, for demonstrating "flagrant disregard" of a 2011 court order that he cease racial profiling. For 18 months following the 2011 order, Arpaio had continued his racist practice of detaining Latinos without reasonable suspicion in violation of the Fourth Amendment.

While Arpaio awaited sentencing for his criminal contempt conviction, Trump granted him a pardon on August 25, 2017.

After Trump announced the pardon, Arpaio moved to have his criminal conviction dismissed. Judge Bolton vacated the date that had been set for sentencing and scheduled an October 4 hearing to rule on Arpaio's dismissal motion.

If the judge determines Trump's pardon was invalid, she could sentence Arpaio for his contempt conviction, thereby provoking an appeal.

## The Arpaio Pardon Violates Due Process

The Protect Democracy Project (PDP), a group of former Obama administration lawyers, contend in their proposed amicus brief that Trump's pardon of Arpaio violates due process and separation of powers. Thus, Judge Bolton should declare the pardon null and void.

Arpaio was not simply convicted of committing a criminal offense. He was convicted of criminal contempt for refusing during an 18-month period to obey a court order to stop violating the Fourth Amendment. His contempt conviction stems from a civil class action lawsuit filed by Arpaio's victims.

"No person shall ... be deprived of life, liberty, or property without due process of law," the Fifth Amendment's Due Process Clause says. It "protects the rights of private litigants to bring their claims before an impartial and empowered court and prohibits extreme and arbitrary actions of government officials, including the Executive Branch," the PDP amicus reads.

“Due process is violated if the President can eviscerate a court’s ability to ensure compliance with the law by those who wrong the rights of private parties,” the PDP lawyers write in their brief. They quote the Supreme Court opinion in the 1998 case *County of Sacramento v. Lewis*, which says, “the Due Process Clause was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression.”

The Arpaio pardon, the PDP lawyers argue, violates the Due Process Clause “by limiting the protection of private rights, rendering the due process guaranteed by law an empty promise.”

#### The Arpaio Pardon Violates Separation of Powers

PDP maintains the pardon also “unconstitutionally interferes with the inherent powers of the Judicial Branch,” and thus violates the principle of separation of powers.

The PDP lawyers argue in their amicus brief that the Constitution does not grant the president power to pardon a criminal contempt conviction when (1) it stems from a matter involving the rights of private litigants, and (2) the contempt finding is “a valid and binding exercise of judicial power designed to ensure proper redress for those private litigants’ rights,” particularly when they are constitutional rights.

PDP cites the Supreme Court opinion in the 1987 case *Young v. U.S. ex rel. Vuitton et Fils S.A.*, which said the criminal contempt power is so central to the judicial branch, it may not be left to the mercy of the executive branch. The power to punish those who disobey judicial orders is essential to vindicate the authority of the courts, and should not be dependent on the legislative or executive branches.

“The President may no more use the pardon power to trample the rest of the Constitution and the Bill of Rights, than he may use the Commander-in-Chief power to call down airstrikes on political opponents,” the PDP brief states. “The pardon power does not trump the rest of the Constitution.”

#### Contempt Is Not a Pardonable Offense

Another proposed amicus brief was filed by Erwin Chemerinsky, constitutional law scholar and dean of the UC Berkeley Law School; Michael Tigar, prominent attorney and retired law professor; and human rights lawyer Jane Tigar. They argue that the Arpaio pardon is not authorized by the Constitution because the pardon power only extends to “offenses against the United States,” and Arpaio’s contempt conviction is not an “offense.”

The argument distinguishes between crimes, felonies and offenses as defined by the legislature, on the one hand, and contempts, which are inherent in the judicial power.

“The pardon power logically and textually refers only to the former category,” they write.

Chemerinsky, Tigar and Tigar also contend the pardon runs afoul of the principle that courts created by Article III of the Constitution have a duty to provide effective redress when a public official violates the Constitution. Arpaio’s victims are entitled to a remedy for violation

of their constitutional rights.

The three lawyers maintain that Article III courts have the inherent authority to enforce their orders and that power “exists outside and beyond legislative empowerment and executive whim.”

If Arpaio’s conduct is tolerated, they write, it would undermine the court’s “constitutional right and duty to protect its own processes and the lives and liberty of those who come to seek justice.”

In their amicus brief, the three note,

“The judiciary’s counter-majoritarian functions are most often used in ways that foster and support the fundamental values of democratic government.”

They identify these values as “the rights of all persons regardless of race, ethnicity, gender, and sexual orientation to participate in and benefit from equal rights.” In the Arpaio case, “one fundamental value at stake is the right to even-handed treatment at the hands of law enforcement — surely a democratic value.”

Before he pardoned Arpaio, Trump told a crowd of supporters in Phoenix that rather than violating the law, Arpaio was “doing his job.” But “no President till now has proclaimed that a public official who violated the Constitution and flouted orders was ‘doing his job,’” the three lawyers write.

One of the most critical duties of a president is to “take care that the laws be faithfully executed,” under the Take Care Clause of the Constitution. But, PDP argues,

“The Arpaio Pardon does not faithfully execute the law; its sends a signal that public officials, so long as they are allies of the President, need not execute the law at all.” Trump granted Arpaio a pardon “to reward [him] for violating the Constitution.”

Arpaio Might Feel “Outnumbered”

Judge Bolton has not yet ruled on whether she will allow these amicus briefs to be officially filed in the case. In his opposition to the filing of the proposed amicus briefs, Arpaio’s lawyers wrote that the amicus briefs pose “a burden on the [defendant],” who might “feel that he is outnumbered.”

Just like his victims felt “outnumbered” when they were detained by sheriff’s deputies because they were brown or herded into what Arpaio called his “concentration camp”?

Arpaio’s brief calls his conviction for criminal contempt “wrongful” but cites no facts to prove he was wrongfully convicted. His brief flippantly characterizes amici’s arguments as “a bitter soup that is too hard to swallow, being mixed with one part irrelevant English history, one part political bile, and a broth of ‘Chicken Little syndrome,’ to taste.”

The Department of Justice (DOJ) supports Arpaio’s request for dismissal of his contempt conviction. But the DOJ quotes the federal circuit court opinion in *United States v. Surratt*,

which says, “absent some constitutional infirmity,” an exercise of presidential pardon power “simply closes the judicial door.” As the authors of the amicus briefs argue, there are constitutional infirmities with Arpaio’s pardon — specifically violations of due process and separation of powers, and contempt is not a constitutionally pardonable offense.

On September 14, Judge Bolton issued an order, citing *Nixon v. United States*, in which the Supreme Court suggested that a presidential pardon leaves intact the recipient’s underlying record of conviction. She ordered the DOJ to submit a brief addressing whether Arpaio’s conviction should be dismissed.

We shall learn on October 4 whether Judge Bolton will uphold Trump’s pardon of Arpaio, or whether she will find it unconstitutional and impose a sentence on Arpaio, thereby paving the way for an appeal — all the way to the Supreme Court.

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