



Raymond N. Hulser, Chief
John Dixon Keller
Public Integrity Section, Criminal Division
U.S. Department of Justice
1400 New York Ave, NW, 12th floor
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August 29, 2017

RE: Presidential pardon issued to Joseph M. Arpaio

Dear Mr. Hulser and Mr. Keller,

We write to urge you to oppose defendant Joseph M. Arpaio's motion, filed Monday, to vacate and dismiss his conviction in *United States v. Joseph M. Arpaio*, No. 2:16-CR-01012-SRB-1. The basis for his motion is a presidential pardon issued on Friday, August 25. However, this pardon raises serious constitutional questions.

Your office secured a conviction of Arpaio for criminal contempt of court after he was found to have deliberately violated an injunction in the matter of *Melendres v. Arpaio*, 2:07-CV-02513-GMS, stemming from his then role as Sheriff of Maricopa County. *Melendres* involved, inter alia, Arpaio's longstanding policy of illegally detaining persons of Latino ancestry suspected to be unauthorized immigrants, even if the Sheriff's Office could not charge them with any state crimes. The court enjoined the Sheriff's Office and its officers "from detaining persons for further investigation without reasonable suspicion that a crime has been or is being committed." The judge in the original case, and now Judge Bolton, both found that Arpaio deliberately violated that injunction. As Judge Bolton stated in her findings in the case for criminal contempt of court, Arpaio "willfully violated the order by 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." Two weeks later, President Trump issued a pardon.

While the Constitution's pardon power is broad, it is not unlimited. Like all provisions of the original Constitution of 1787, it is limited by later-enacted amendments, starting with the Bill of Rights. For example, were a president to announce that he planned to pardon all white defendants convicted of a certain crime but not all black defendants, that would conflict with the Fourteenth Amendment's Equal Protection Clause.

Similarly, issuance of a pardon that violates the Fifth Amendment's Due Process Clause is also suspect. Under the Due Process Clause, no one in the United States (citizen or otherwise) may "be deprived of life, liberty, or property, without due process of law." But for due process and judicial review to function, courts must be able to restrain government officials. Due process requires that, when a government official is found by a court to be violating individuals' constitutional rights, the court can issue effective relief (such as an injunction) ordering the official to cease this unconstitutional conduct. And for an injunction to be effective, there must be a penalty for violation of the injunction—principally, contempt of court.

Put another way, one of the most important safeguards for the Due Process Clause is the courts' power to hold wayward law enforcement officials in criminal contempt.

The president's unprecedented pardon of Arpaio undermines the rule of law by immunizing unscrupulous law enforcement officials from judicial review. The foundation of the role of courts as protectors of individual rights will be nullified if they cannot execute and protect their own orders. The pardon itself conveys the unmistakable message that similarly-situated local, state, and federal law enforcement officials need not fear the judiciary, because if they run afoul of a court order, the president will pardon them.

Furthermore, if there were any doubt as to the meaning of the pardon, the president himself erased it through his own communications. Two weeks after the verdict, Trump told a reporter that he was considering a pardon for Arpaio, and that Arpaio "doesn't deserve to be treated this way" because he "has protected people from crimes and saved lives." On August 22, just days after the horrifying white supremacist rally in Charlottesville, Virginia, Trump rhetorically asked a Phoenix campaign audience, "Was Sheriff Joe convicted for doing his job?" On August 25, the president issued the pardon. In a two-paragraph statement, the White House said: "Throughout his time as Sheriff, Arpaio continued his life's work of protecting the public from the scourges of crime and illegal immigration. Sheriff Joe Arpaio is now eighty-five years old, and after more than fifty years of admirable service to our Nation, he is worthy candidate for a Presidential pardon." Trump also added in a tweet, "He kept Arizona safe!" On August 28, he emphasized that Arpaio is "very strong on illegal immigration."

Importantly in this case, President Trump has not issued a pardon after an acknowledgement by Arpaio (or Trump) of his guilt in the matter, as is the case with most pardons. Rather, President Trump has made clear that he believes Arpaio should never have followed the court's order to begin with, and was right to ignore it. That factual context raises grave questions about this pardon's potential to lead to other due process violations.

This issue is not just about Arpaio. Other local, state, and federal government officials will take cues from what happens next, and, if left unchallenged, the pardon will embolden unlawful official action. That is why the pardon power, properly construed with the Due Process Clause, does not allow a president to pardon a government official for contempt of court based on the official's violation of an injunction ordering him to stop violating individuals' constitutional rights.

This position is not in conflict with *Ex parte Grossman*, 267 U.S. 87 (1925). That Prohibition-era case involved a pardon of an individual for criminal contempt after he violated a temporary restraining order against selling liquor at his business in Chicago. *Grossman* simply did not contemplate the present circumstance, involving a pardon issued to a government official for criminal contempt after violating an injunction to stop a systemic practice of violating individuals' constitutional rights. Furthermore, there are serious questions about whether *Grossman* would be reaffirmed today in the current context, given the evolution since 1925 of Due Process Clause analysis with respect to the ability of the other branches of government to limit availability of judicial remedies for constitutional rights violations, and the current erosion of the presumption of regularity and legitimacy for executive action that underlies that decision.

This is an extraordinary request. But that is because of the president's unprecedented action. Your duty to support and defend the Constitution, to protect the ability of the United States to enforce federal civil rights law, and to pursue justice on behalf of individuals whose constitutional rights have been violated trumps this pardon.

We urge you to oppose Arpaio's motion to vacate and dismiss the conviction, because of serious questions about the constitutionality of the presidential pardon. We would be happy to discuss this with your office at your earliest convenience.

Sincerely,

Ronald A. Fein, Legal Director
Shanna M. Cleveland, Senior Counsel
John C. Bonifaz, President
Ben T. Clements, Chair, Board of Directors
Free Speech For People

Ian Bassin, Executive Director
Protect Democracy