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## United States v. Arpaio: The Judicial Limit on the President's Pardon Power

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## CASE SUMMARY

### *UNITED STATES V. ARPAIO: THE JUDICIAL LIMIT ON THE PRESIDENT’S PARDON POWER*

ALICIA VILLANUEVA\*

#### INTRODUCTION

Article II of the United States Constitution grants the President unlimited authority to pardon.<sup>1</sup> Specifically, the President “shall have power to grant reprieves and pardons for offences against the United States (“U.S.”), except in cases of impeachment.”<sup>2</sup> Once a pardon is issued, it must be accepted by the pardoned individual for the pardon to take effect.<sup>3</sup> On August 25, 2017, President Donald J. Trump pardoned Sheriff Arpaio of a conviction for contempt of court.<sup>4</sup> The prior month, the District Court for the District of Arizona (“district court”) had convicted Sheriff Arpaio of criminal contempt of court for intentionally failing to adhere to the district court’s preliminary injunction.<sup>5</sup>

The preliminary injunction ordered Sheriff Arpaio to stop detaining individuals based on their Hispanic appearance in order to investigate civil violations of federal immigration law.<sup>6</sup> However, as Sheriff of Arizona’s Maricopa County Sheriff Office (“MCSO”), he continuously and

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<sup>1</sup> U.S. CONST. art. II, § 2; see *Ex parte Garland*, 71 U.S. 333, 380 (1866) (stating that the President’s power to pardon is limited only in two circumstances: by cases of impeachment and applies only to federal offenses).

<sup>2</sup> *Ex parte Garland*, 71 U.S. at 380.

<sup>3</sup> *Burdick v. United States*, 236 U.S. 79, 90 (1915).

<sup>4</sup> *United States v. Arpaio*, 887 F.3d 979, 980 (2018); Executive Grant of Clemency of Joseph M. Arpaio, (Aug. 25, 2017), <https://www.justice.gov/pardon/file/993586/download>.

<sup>5</sup> *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at \*7 (D. Ariz. July 31, 2017).

<sup>6</sup> *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 994 (2011).

intentionally failed to do so.<sup>7</sup> Sheriff Arpaio characterized himself as “America’s Toughest Sheriff”<sup>8</sup> and was known for his unequivocal stance against illegal immigration.<sup>9</sup>

Subsequently, Sheriff Arpaio accepted President Trump’s pardon and then moved to vacate his conviction.<sup>10</sup> Judge Bolton of Arizona’s District Court denied Sheriff Arpaio’s Motion to Vacate the Judgment for criminal contempt of court.<sup>11</sup> Arpaio then appealed the denial to vacate his conviction before the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”).<sup>12</sup> At which point, the U.S. Department of Justice declined to defend Judge Bolton’s order denying Arpaio’s request for vacatur.<sup>13</sup>

Absent representation from the U.S., plaintiff’s amici requested that the Ninth Circuit appoint a special prosecutor to defend the district court’s decision.<sup>14</sup> In a case of first impression, the Ninth Circuit determined that it had the authority to appoint a special prosecutor to defend the Arizona District Court’s order under Federal Rule of Criminal Procedure 42 and its own inherent judicial power.<sup>15</sup>

## I. FACTUAL AND PROCEDURAL BACKGROUND

From 1993 to 2016, Arpaio served as Sheriff of Maricopa County.<sup>16</sup> In *Ortega-Melendres v. Arpaio*, a group of Latinos filed a class action lawsuit against Sheriff Arpaio and MCSO for violating their Fourth and Fourteenth Amendment rights.<sup>17</sup> The plaintiffs’ alleged that MCSO, at Sheriff Arpaio’s direction, engaged in a policy and practice of stopping Latino motorists who they assumed had illegally entered the U.S. solely based upon their Hispanic appearance.<sup>18</sup> Thereby, violating their Equal

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<sup>7</sup> *Joe Arpaio: Life as ‘America’s Toughest Sheriff’*, BBC NEWS (Aug. 26, 2017), <https://www.bbc.com/news/world-us-canada-41015549>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at \*1 (D. Ariz. Oct. 19, 2017).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *United States v. Arpaio*, 887 F.3d 979, 980 (9th Cir. 2018).

<sup>13</sup> *Id.* at 981.

<sup>14</sup> *Id.* at 982.

<sup>15</sup> *Id.* at 981-82.

<sup>16</sup> *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at \*1 (D. Ariz. July 31, 2017).

<sup>17</sup> *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 969 (2011).

<sup>18</sup> *Id.* at 992 (Class includes “[a]ll Latino persons who, since January 2007, have been or will be in the future stopped, detained, questioned or searched by MCSO agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County Arizona.”).

Protection rights under the Fourth and Fourteenth Amendments.<sup>19</sup> The plaintiffs sought a declaratory judgment, an injunction against Sheriff Arpaio and his officers, attorneys' fees, and any other relief that the court deemed proper and just.<sup>20</sup>

#### A. INJUNCTIVE RELIEF OF 2011

In *Ortega-Melendres v. Arpaio*, Judge Snow of the district court issued a preliminary injunction preventing Sheriff Arpaio and MCSO from enforcing civil state and federal immigration laws by detaining any person based solely on their Hispanic appearance.<sup>21</sup> The court concluded that it could be easily proven that Sheriff Arpaio and his officers at MCSO had established a policy and practice of racial profiling.<sup>22</sup> The court noted that Sheriff Arpaio had made statements that could be understood as approving and encouraging racial profiling, such as making comments that his officers "can detain people based upon 'their speech, . . . [or] if they look like they came from another country.'"<sup>23</sup> His officers distributed e-mails that "compared Mexicans to dogs, ridiculed stereotypical Mexican accents, and portrayed Mexicans as drunks."<sup>24</sup> Sheriff Arpaio and his officers conducted special operations in response to citizens' complaints based solely on references to places where Latinos congregated but where there was no evidence of a crime.<sup>25</sup> Essentially, the court determined that Sheriff Arpaio and his officers engaged in intentional discrimination based on whether a person appeared to be Latino.<sup>26</sup> The district court ordered a preliminary injunction since it concluded that Sheriff Arpaio and MCSO practiced a policy of racial profiling that would result in ongoing harm.<sup>27</sup>

#### B. INVESTIGATION AND FINDING FOR CRIMINAL CONTEMPT

Following the 2011 preliminary injunction, Arpaio continued to publicly engage in a policy and practice of racial profiling.<sup>28</sup> Grounded on extensive testimony that Sheriff Arpaio intentionally defied the 2011 pre-

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<sup>19</sup> *Id.* at 968.

<sup>20</sup> *Id.* at 970.

<sup>21</sup> *Id.* at 993.

<sup>22</sup> *Id.* at 986.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 987.

<sup>25</sup> *Id.* at 986.

<sup>26</sup> *Id.* at 987.

<sup>27</sup> *Id.* at 986-87.

<sup>28</sup> *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at \*2-3 (D. Ariz. July 31, 2017).

liminary injunction, on August 19, 2016, the district court referred the matter for prosecution to determine whether Sheriff Arpaio should be held in criminal contempt of court.<sup>29</sup> After several trial continuances, on July 31, 2017, district court Judge Bolton found that Arpaio willfully and blatantly disregarded Judge Snow's December 23, 2011 court order.<sup>30</sup> The district court found that Sheriff Arpaio was aware of the injunction but willfully failed to comply with it.<sup>31</sup> Sheriff Arpaio conducted several interviews with various news channels, such as Fox News, KNVX and Univision, where he announced that he would "continue to enforce both state and federal illegal immigration laws as long as the laws [were] on the books."<sup>32</sup> In application, Sheriff Arpaio continued detaining individuals based solely on their Latino appearance and not on suspicion or charges of a criminal offense.<sup>33</sup> From December 23, 2011, to May 22, 2013, he turned individuals over to Immigration and Customs Enforcement without having grounds to charge them for a criminal offense.<sup>34</sup> Judge Bolton held that Sheriff Arpaio was guilty of criminal contempt of court due to his flagrant disregard of the preliminary injunction.<sup>35</sup>

### C. EFFECT OF SHERIFF ARPAIO'S PARDON

Sheriff Arpaio was scheduled for sentencing on October 5, 2017.<sup>36</sup> However, on August 25, 2017, President Trump granted Arpaio a full and unconditional pardon of his conviction for criminal contempt of court and for any other offenses in connection with *Melendres v. Arpaio*.<sup>37</sup> Arpaio accepted the pardon, and he then filed a motion to dismiss the case with prejudice and "to vacate the verdict and all other orders," including the sentencing on October 5, 2017.<sup>38</sup> In response, several third parties filed briefs as amici curiae in opposition to Arpaio's motion.<sup>39</sup> In a separate order, decided on October 19, 2017, Judge Bolton found that the pardon was valid, dismissed the criminal contempt action against Arpaio with prejudice, but declined to vacate all rulings against

<sup>29</sup> *Ortega-Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2016 WL 4414755 at \*2 (D. Ariz. Aug. 19, 2016).

<sup>30</sup> *Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at \*7.

<sup>31</sup> *Id.* at \*2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*4.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*7.

<sup>36</sup> *Id.*

<sup>37</sup> Executive Grant of Clemency of Joseph M. Arpaio, (Aug. 25, 2017), <https://www.justice.gov/pardon/file/993586/download>.

<sup>38</sup> *United States v. Arpaio*, 887 F.3d 979, 980 (9th Cir. 2018).

<sup>39</sup> *Id.* at 982.

him.<sup>40</sup> She reasoned that while a pardon is an act of grace from the President that exempts an individual from the punishment of the law, it does not “erase a judgment of conviction, or its underlying legal and factual findings.”<sup>41</sup>

Arpaio then appealed the district court’s refusal to vacate all rulings against him.<sup>42</sup> The court sought appointment of counsel from the U.S. to defend the district court’s order denying Arpaio’s request to vacate all prior rulings.<sup>43</sup> The U.S. replied that they did “not intend to defend the district court’s order” and that they would instead argue that Arpaio’s motion to vacate should have been granted.<sup>44</sup> In response, non-profit organizations acting as amici curiae for the plaintiffs asked the Ninth Circuit to appoint a special prosecutor to defend the district court’s decision.<sup>45</sup> On April 17, 2018, the Ninth Circuit held that a special prosecutor should be appointed to provide briefing and argument for Arpaio’s appeal.<sup>46</sup>

## II. THE NINTH CIRCUIT’S ANALYSIS

Since the U.S. abandoned representation of the district court, the Ninth Circuit reasoned that it could not competently adjudicate the matter unless they appointed a special prosecutor.<sup>47</sup> The Ninth Circuit articulated that it had authority to appoint counsel to defend Judge Bolton’s decision based on two independent bases: Federal Rule of Criminal Procedure 42(a)(2) (“Rule 42(a)(2)”) and its inherent judicial power to appoint special counsel when the U.S. abandons representation.<sup>48</sup>

First, Rule 42(a)(2) allows the court to appoint a special prosecutor but “[t]he court must request that the contempt [is] prosecuted by an attorney for the government [and] . . . [i]f the government declines the request, the court must appoint another attorney to prosecute the contempt.”<sup>49</sup> The Ninth Circuit reasoned that this rule is not limited to trials and investigations at the district court level, but could also be applied to matters in front of the court of appeals.<sup>50</sup> The Ninth Circuit recognized

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<sup>40</sup> *Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at \*3.

<sup>41</sup> *Id.* at \*1.

<sup>42</sup> *Arpaio*, 887 F.3d at 980.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 981.

<sup>45</sup> Motion for Leave to Participate as Amici Curiae at 1, *United States v. Arpaio*, 887 F.3d 979 (2018) (No. 2:16-CR-01012) 2017 WL 5514450.

<sup>46</sup> *Arpaio*, 887 F.3d at 980.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 981-82.

<sup>49</sup> FED. R. CRIM. P. 42(a)(2).

<sup>50</sup> *Arpaio*, 887 F.3d at 981.

that no case existed where the court of appeals had appointed a special prosecutor after the government's refusal to oppose the contemnor's appeal.<sup>51</sup> However, they could not find any reason why "such an appointment should not take place under Rule 42(a)(2)."<sup>52</sup>

Second, the Ninth Circuit found that apart from Rule 42(a)(2), it had the inherent power to appoint a special counsel when the government declined to represent a position they previously defended.<sup>53</sup> The Ninth Circuit determined it had long been established that the judiciary holds an "inherent authority to initiate contempt proceedings for disobedience to their orders, [the] authority which . . . encompasses the ability to appoint a private attorney to prosecute the contempt."<sup>54</sup> Citing several cases, the Ninth Circuit reasoned that the U.S. Supreme Court has an established practice of using its inherent power to appoint disinterested counsel when the government fails to defend its prior position.<sup>55</sup>

In its October 10, 2018 order denying an en banc hearing, the Ninth Circuit explained that while the government had successfully prosecuted and convicted Sheriff Arpaio for criminal contempt of court, a special prosecutor was necessary to defend that conviction on appeal.<sup>56</sup> The court outlined the importance of the judiciary's power to prosecute contempt of court cases. While criminal prosecutions are part of the executive power, prosecution of contempt of court fall within the inherent power of the judiciary if the government fails to prosecute the contemnor.<sup>57</sup> Therefore, the appointment of a special prosecutor was an exercise of inherent judicial power rather than an intrusion on the executive power because "[p]rosecutions for criminal contempt of the court are different [because] [s]uch prosecutions are vindications of the judicial power, and the use of private attorneys as special prosecutors is part of the judicial function."<sup>58</sup>

### III. IMPLICATIONS OF THE DECISION

The Ninth Circuit's order, laid out in its April 17, 2018 decision, would lead to an expansion of the judiciary's power on two bases. First, the court expanded Rule 42(a)(2)'s appointment of a special prosecutor

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 980.

<sup>54</sup> *Id.* at 982.

<sup>55</sup> *Id.* (citing *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 793 (1987); *United States v. Brainer*, 691 F.2d 691, 693 (4th Cir. 1982); *Lucia v. S.E.C.*, 138 S. Ct. 923 (2018); *United States v. Providence Journal Co.*, 485 U.S. 693 (1988)).

<sup>56</sup> *United States v. Arpaio*, 906 F.3d 800, 801 (9th Cir. 2018).

<sup>57</sup> *Id.* at 803.

<sup>58</sup> *Id.*

to defend an already prosecuted conviction for contempt of court when the government abandons its original position in opposing the contemnor.<sup>59</sup> Rule 42(a)(2) no longer solely applies to prosecutions and investigations of criminal contempt of court, but also applies to defending successful convictions for contempt of court in front of the court of appeals.<sup>60</sup> Second, the court also expanded the judiciary's inherent power to include the appointment of a special prosecutor to defend a conviction of criminal contempt in front of the court of appeals.

However, the dissenting opinions issued in the April 17, 2018 order, and in the denial for an en banc hearing, strongly suggest that there are bases for an appeal to the U.S. Supreme Court. This could result in a reversal of the Ninth Circuit's expansion of judicial power. Judge Tallman's dissent from the April 17, 2018 order concluded that the majority's decision was inappropriate.<sup>61</sup> First, he opined that the amici's underlying purpose for requesting a special prosecutor was to challenge the President's pardon of Sheriff Arpaio since they failed to timely appeal the pardon.<sup>62</sup> Use of Rule 42(a)(2) to appoint a special prosecutor is a pretext to circumvent an untimely challenge of a pardon.<sup>63</sup> This results in the judicial branch infringing on the powers designated to the executive branch.<sup>64</sup> Second, Judge Tallman narrowly defined Rule 42(a)(2) to only apply to the appointment of a special prosecutor when *investigating* or *prosecuting* cases for criminal contempt.<sup>65</sup> Since the case for criminal contempt was already investigated and litigated by the government, the government did not abandon the prosecution for contempt of court. Instead, the government already successfully investigated and prosecuted the criminal contempt of court, eliminating the need for special counsel.<sup>66</sup>

Judge Tashima wrote one of the dissenting opinions when the court denied the request for an en banc hearing.<sup>67</sup> Similar to Judge Tallman, Judge Tashima reasoned that the court has extremely limited power to appoint a special prosecutor under either Rule 42(a)(2) or the court's inherent power.<sup>68</sup> First, Judge Tashima disagreed with the majority's application of Rule 42(a)(2) because the majority's explanation was based

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 802-03.

<sup>61</sup> *Id.* at 803-04.

<sup>62</sup> *United States v. Arpaio*, 887 F.3d 979, 983 (9th Cir. 2018).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 986.

<sup>65</sup> *Id.* at 984 (emphasis added).

<sup>66</sup> *Id.*

<sup>67</sup> *United States v. Arpaio*, 906 F.3d 800, 811 (9th Cir. 2018).

<sup>68</sup> *Id.* at 805-07.



on finding “no reason why such appointment should not take place under Rule 42.”<sup>69</sup> Such a finding resulted in the judiciary overstepping its role because the executive branch’s responsibility is to prosecute while the judiciary’s role is to adjudicate.<sup>70</sup> Essentially, by appointing a special prosecutor, the court acted in the role of the executive branch.<sup>71</sup> Second, he asserts that the majority’s justification for its inherent power based on the court’s “longstanding practice” to appoint a special counsel is misconceived.<sup>72</sup> Judge Tashima indicated that there is a longstanding practice to appoint a special counsel as *amicus curiae* to defend a lower court’s decision on appeal, but there is no longstanding practice of appointing a special prosecutor.<sup>73</sup> Thus, it would have been within the judicial power to appoint *amicus curiae* to defend the opposition to contemnor’s appeal instead of intruding on the executive’s power by appointing a special prosecutor.<sup>74</sup>

Sheriff Arpaio has until January 8, 2019, to request a review on certiorari of the Ninth Circuit’s denial for a hearing en banc.<sup>75</sup> As of the writing of this case summary, such request has not been made. However, it has been reported that Sheriff Arpaio plans on requesting a review by the U.S. Supreme Court on the Ninth Circuit’s appointment for the special prosecutor.<sup>76</sup>

#### IV. CONCLUSION

While a presidential pardon wipes out all punishment, it does not erase the record.<sup>77</sup> Notwithstanding a pardon, the Ninth Circuit determined that the judicial branch has the authority to appoint a special prosecutor to defend a criminal contempt of court conviction when the government fails to do so.<sup>78</sup> Expanding the judiciary’s power, the court concluded that it has inherent power and is authorized under Rule 42(a)(2) to make such appointments.<sup>79</sup> In his effort to vacate his convic-

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<sup>69</sup> *Id.* at 806.

<sup>70</sup> *Id.* at 811.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 808.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 805.

<sup>75</sup> SUP. CT. R. 13 (90 days from the denial for a hearing en banc on October 10, 2018).

<sup>76</sup> Jacques Billeaud, *Court Picks Prosecutor to Defend Ruling on Arpaio’s Pardon*, A. P. NEWS (Oct. 16, 2018), <https://www.apnews.com/2b1cac645f25409db751033326236bd4>.

<sup>77</sup> *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at \*1 (D. Ariz. Oct. 19, 2017).

<sup>78</sup> *United States v. Arpaio*, 887 F.3d 979, 981-82 (9th Cir. 2018).

<sup>79</sup> *Id.*

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tion for criminal contempt of court, Sheriff Arpaio will have to defend his request against a court-appointed special prosecutor unless he requests a writ for certiorari and the Supreme Court grants his request.

