The Purse's Pardon: How an Amendment to H.R. 3093 Challenges Executive Power

Erin R. Kawa*

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* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2009; B.A. Political Science, Lock Haven University of Pennsylvania, 2006. The author wishes to thank her parents, Bill and Sheilah Kawa, for their endless support, patience, and love.

I. INTRODUCTION

The system of governance in the United States is a dynamic one. Power is divided between the federal and state governments, and then further divided between the three branches of the Federal Government itself.[1] At the most basic level within the Federal Government, the Legislature creates the law,[2] the Executive enforces the law,[3] and the Judiciary interprets the law.[4] Each has its own roles and responsibilities within that framework, but each is nonetheless interdependent.[5] Nearly any action of one branch implicates the roles and responsibilities of all branches. This Comment will analyze a specific instance of one branch's action that implicates the roles of all: a suspect provision of an appropriations bill passed by the legislature that may affect the roles and duties of not only the legislature itself, but also the judiciary, and, most importantly, the executive as well.

The focus of this Comment arises out of the controversial conviction and incarceration of two Border Patrol Agents and subsequent action taken by the United States House of Representatives to right the perceived wrong concerning that conviction. In short, the two agents, Ignacio Ramos and Jose Alonso Compean, were convicted of various criminal charges after the shooting of a Mexican national who was illegally attempting to enter into the United States.[6] The House of Representatives responded to this incident by passing an appropriations bill amendment that essentially decreed no funds will be made available

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1. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 1-4 (Vickie Been et al. eds., Aspen Publishers 3d ed. 2006).

2. *See* U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *see also* BLACK'S LAW DICTIONARY 910 (7th ed. 1999) (defining *legislative* as "[o]f or relating to lawmaking or to the power to enact laws").

3. *See* U.S. CONST. art. II, § 1, cl. 1 ("The Executive Power shall be vested in a President of the United States."); *see also* BLACK'S LAW DICTIONARY 590 (7th ed. 1999) (defining *executive* as "[t]he branch of government responsible for effecting and enforcing laws").

4. *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) (This is a landmark case that established the role of the judiciary in constitutional interpretation. "It is empathically the province and duty of the judiciary to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

5. *See* LOUIS FISHER, THE POLITICS OF SHARED POWER, CONGRESS AND THE EXECUTIVE 3 (Texas A&M University Press, 4th ed. 1998).

6. *Information Issued by U.S. Attorney's Office for the Western District of Texas on Sept. 8: Response of Government to Reporting Inaccuracies Regarding Compean, Ramos Prosecution,* U.S. FED NEWS, Sept 8, 2006 [hereinafter *Response of Government*].

to incarcerate the two patrolmen.[7] This legislation could, depending upon how it is construed, directly affect a power reserved solely to the executive branch: the power to grant pardons.

II. BACKGROUND

A. The Incident

In February of 2005, Ignacio Ramos and Jose Alonso Compean were working as United States Border Patrol Agents at the United States/Mexico border.[8] In performing their duties, the two officers observed a van near the border.[9] The driver of the van, Osvaldo Aldrete-Davila, a Mexican national, jumped out of the van and attempted to abscond by foot back to Mexico instead of yielding to the agents' commands for him to stop.[10] As Aldrete-Davila attempted to escape, Ramos and Compean both drew their service weapons and confronted him.[11] According to the trial testimony of both Ramos and Compean, Aldrete-Davila was not holding a gun; in fact, he was not visibly armed at all.[12] Despite that fact, the agents fired their weapons at Aldrete-Davila as he ran back toward the Mexican border.[13] Compean fired his gun at least 14 times and Ramos fired once.[14] Aldrete-Davila, however, was struck only once and returned to Mexico by foot.[15]

After Aldrete-Davila escaped, the agents discovered the van Aldrete-Davila abandoned contained 743 pounds of marijuana.[16] However, according to uncontested evidence, neither agent was aware the van contained drugs or even that the driver was in fact entering the United States illegally.[17] Compean and another border patrol agent collected and disposed of the shell-casings from the shots fired.[18] No oral or written report was filed concerning the shooting, contrary to Border Patrol Policies.[19] Rather, Compean filed a brief report that only

7. *See* H.R. 3093, 110th Cong. (as passed by House of Representatives, July 26, 2007); *see also* Bruce Fein, *The Pardon Pander,* SLATE, July 26, 2006, *available at* http://www.slate.com/id/2171209/.
8. *Response of Government*, *supra* note 6.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. United States v. Ramos, 537 F.3d 439, 442 (5th Cir. 2008).
16. *Response of Government*, *supra* note 6.
17. *Id.*
18. *Id.*
19. *Ramos*, 537 F.3d at 442.

mentioned the driver of a van contaning marijuana escaped to Mexico, without reference to the confrontation.[20]

After Aldrete-Davila returned to Mexico, he received medical attention for the gunshot wound inflicted in the confrontation.[21] The bullet, however, remained lodged in his body.[22] Because Ramos and Compean were eventually prosecuted for the crime, as discussed below, and Aldrete-Davila was the victim of a crime in the United States, the United States Government brought him back to the United States.[23] Aldrete-Davila received further treatment for his wound, and the bullet that was lodged in his body was used as an important piece of evidence.[24] In order to secure Aldrete-Davila's cooperation in the prosecution of the two agents for events surrounding the shooting of Aldrete-Davila and eventual cover-up, the United States Attorney's office agreed to offer him immunity relating to the drug offenses.[25]

B. Prosecution and Conviction

On March 8, 2006, a unanimous jury in the United States District Court for the Western District of Texas convicted former border patrol agents Ramos and Compean of six and eight felony counts, respectively, for the incidents surrounding and involving the shooting of Aldrete-Davila.[26] The charges for which the two officers were convicted included assault with a deadly weapon, discharge of a firearm in relation to a crime of violence, violating the victim's civil rights,[27] and tampering with an official proceeding.[28]

In October, 2006, Ignacio Ramos was sentenced to eleven years of incarceration; Jose Alsonso Compean was sentenced to twelve.[29] The two were ordered to report to prison the following January.[30] Ramos and Compean moved for a new trial, arguing that improper influences were brought to bear upon the jurors in their case.[31] Apparently, some of the jurors misled other jurors into believing that the Court would not accept a

20. *Response of Government*, *supra* note 6.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id*.
26. United States v. Ramos, 481 F. Supp. 2d 717, 718 (W.D. Tex. 2006).
27. The Fourth Amendment to the United States Constitution prohibits officers from shooting a fleeing suspect unless that suspect poses a threat to others. United States v. Ramos, 537 F.3d 439, 442 (5th Cir. 2008).
28. *Id*. at 5.
29. Miguel Bustillo, *2 Border Agents Get Prison*, CHI. TRIB., Oct. 21, 2006, at C4.
30. *Id*.
31. *See Ramos*, 481 F. Supp. 2d at 719.

hung jury.[32] The misled jurors, thus, changed their votes to achieve unanimity.[33] Such allegations of intrinsic influences cannot be used to impeach a jury's verdict.[34] The District Court consequently denied the motion for a new trial.[35] The District Court also denied both Ramos' and Compean's motions for bond pending appeal because each were convicted of a crime of violence, and the Court found no "exceptional reason"[36] to grant the requests.[37] The United States Court of Appeals for the Fifth Circuit also denied the defendants' applications for release pending their appeal.[38]

In July of 2008, the United States Court of Appeals for the Fifth Circuit affirmed the convictions of Ramos and Compean for all counts but tampering with an official proceeding.[39] For that count, the Court of Appeals vacated the conviction and remanded for resentencing.[40] Upon remand and resentencing, the sentences of neither Ramos nor Compean will be significantly reduced.[41] As the United States Court of Appeals for the Fifth Circuit noted, their conviction under 18 U.S.C. § 924(c), using a firearm in the commission of a crime of violence, carries a ten-year mandatory sentence.[42] Because the court of appeals upheld that conviction, each defendant will retain at least a sentence of ten years.

C. Legislative Response

The convictions of Ramos and Compean have sparked national debate concerning both the propriety of the convictions and including the United States' aggressive prosecution of the two. The case has become a celebrated cause for those who take a hard line against illegal immigration and advocates of tighter border security, with tens of

32. *Id.* at 719-20.

33. *Id*.

34. FED R. EVID. 606(b); *see also Ramos*, 481 F. Supp. 2d at 720 (noting that improper statements or coercion of a juror upon fellow jurors are not external influences allowed by Rule 606(b); rather, these influences are inadmissible evidence that cannot be used to impeach a verdict).

35. *Ramos*, 481 F. Supp. 2d at 720.

36. 18 U.S.C. § 3145(c) (2000) ("A person subject to detention . . . may be ordered released . . . if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.").

37. United States v. Ramos, No. EP-05-CR-856-KC (W.D. Tex. 2007), *available at* http://www.txwd.uscourts.gov/opinions/cases/ramoscompean/default.asp; United States v. Compean, No. EP-05-CR-856-KC (W.D. Tex. 2007), *available at* http://www.txwd.uscourts.gov/opinions/cases/ramoscompean/default.asp.

38. United States v. Ramos, Compean, No. 06-51489 (5th Cir. 2007), *available at* http://www.txwd.uscourts.gov/opinions/cases/ramoscompean/default.asp.

39. United States v. Ramos, 537 F.3d 439, 466 (5th Cir. 2008).

40. *Id*.

41. *See id*. at 4.

42. *Id.*

thousands of people signing a petition to support Ramos and Compean.[43] Supporters of the two agents have also held events such as candlelight vigils, and have publicly criticized the convictions.[44] The United States Attorney in the Western District of Texas, Johnny Sutton, has become something of a pariah for those who oppose the convictions.[45] In response to the criticism, Sutton made a statement that Ramos and Compean were not "railroaded by some over-zealous prosecutor," and highlighted that the two patrolmen were found guilty by a unanimous jury of their peers, after having full opportunity to explain and offer evidence in the trial that lasted over two weeks.[46]

Many of those outraged by the convictions of Ramos and Compean have also been calling for presidential action, imploring President George W. Bush to pardon the two officers under his executive power.[47] Some supporters of Ramos and Compean have even threatened to call for impeachment proceedings against President Bush if either Ramos or Compean suffer harm in prison.[48] Some have interpreted President Bush's public responses as to imply that he would consider a pardon; however, President Bush has never explicitly claimed he would pardon the individuals.[49] In early 2007, Justice Department officials stated that Ramos and Compean were ineligible for a pardon at that time.[50] Their ineligibility was determined according to Justice Department guidelines, whereby petitioners are not considered for pardon until at least five years after their conviction.[51] Furthermore, a commutation of each man's sentence is unlikely; such action is usually unavailable for those who are appealing their convictions.[52]

Many of the Nation's lawmakers are among those outraged by the convictions of Ramos and Compean. Absent action by the executive

43. *The Nation; Lawmaker Seeks Pardon for Agents; Rep. Hunter Rolls Out a Bill for Two Ex-Border Officers Convicted of Shooting an Unarmed Drug Smuggler*, L.A. TIMES, Jan. 19, 2007, at A13.

44. Darryl Fears, *Support Swells for Agents Who Shot Drug Smuggler*, WASH. POST, Feb. 17, 2007, at A02.

45. Richard A. Serrano, *U.S. Attorney Put on Defensive; Johnny Sutton's Prosecution of Two Border Agents in Texas Has Conservatives Up in Arms*, L.A. TIMES, May 14, 2007, at A8.

46. *Information Issued by U.S. Attorney's Office for the Western District of Texas on Oct. 23: Response of U.S. Attorney Johnny Sutton to Sentencing of Border Patrol Agents Compean, Ramos*, U.S. FED NEWS, Oct. 23, 2006.

47. Fears, *supra* note 44.

48. *Id.*

49. Rachel L. Swarns, *Bush Comments on Agents Who Shot Suspected Drug Dealer*, N.Y. TIMES, Jan. 20, 2007, at A12.

50. *Id.*

51. *Id.*

52. *Id.*

branch, members of Congress decided to take action on their own.[53] On July 25, 2007, the House of Representatives used the "power of the purse" to challenge the convictions of the two agents deemed wrongly incarcerated.[54] The House attempted this challenge through an amendment to the Commerce, Justice, Science, and Related Agencies Appropriations Act of 2008, ("the Amendment").[55] The Amendment, sponsored by GOP Representatives Ted Poe, Tom Tancredo, and Duncan Hunter, essentially decreed that no funds made available to the Bureau of Prisons shall be used to incarcerate Ignacio Ramos or Jose Alonso Compean.[56] If the appropriations bill with this amendment is passed by the Senate and signed by the President, it would free Ramos and Compean from their judicially imposed incarceration for the fiscal year of 2008.[57] Presumably, the Amendment as drafted would need to be passed each year thereafter to keep the two out of federal prison.[58]

Supporters of the Amendment cited many justifications for its passing.[59] Those justifications center on a need to protect the United States border and to show support for the agents whose job it is to protect that border. In the debate concerning the Amendment, members of the House questioned the United States Attorney's exercise of discretion in prosecuting Ramos and Compean, as well as the decision to grant immunity to Aldrete-Davila for the apparent drug violations.[60] Apparently, the hope of the representatives that support the Amendment is to rectify what they perceive as a miscarriage of justice, a failure so patent that it requires action from another branch of government.[61] Some lawmakers made strong political cries: implying that releasing the two would enhance the morale of those agents that secure our borders, and even making the correlation that if this is not done, the United States

53. *See generally* 153 CONG. REC. H8467 (2007) (statements of Reps. Culberson, Hunter, Poe, Tancredo).

54. Al Kamen, *Congress Begs Pardon*, WASH. POST, July 27, 2007, at A19.

55. H.R. 3093, 110th Cong. (as passed by House of Representatives, July 26, 2007).

56. *Id*.

57. Kamen, *supra* note 54.

58. *Id*.

59. *See* 153 CONG. REC. H8467 (2007) (statement of Rep. Poe) ("This case . . . happens to deal with two border agents doing their job. . . . Almost everyone agrees that this punishment is way out of line."); *see also id.* (statement of Rep. Culberson) ("[The agents' incarceration] is patently unfair. . . . I urge the Members of the House to support [the amendment] so we can stop the funding . . . and send as strong as possible a message to the White House and . . . to every law enforcement agent in the field that we're proud of you.") (alteration in original).

60. *Id.* (statement of Rep. Royce).

61. *See id.* (statement of Rep. Rohrabacher) ("[Ramos and Compean] were willing to risk their lives. . . . We should not . . . let them languish in prison as their families go down into abject poverty. . . . If we are patriotic Americans it doesn't go to . . . let these two men languish in prison.") (alteration in original).

could never win the "war on terror."[62] One Representative, expressing his support for the Amendment, called for his colleagues to "[V]ote for our country. Vote for our sovereignty, vote for our borders and vote 'yes' for the Poe-Hunter-Tancredo amendment."[63]

In debate, opponents of the Amendment challenged its legality, claiming it was an inappropriate use of Congress's powers.[64] These lawmakers highlighted that the Amendment essentially challenges the convictions of the two officers, and the House of Representatives is not the appropriate forum to challenge a conviction.[65] According to the opponents, if a remedy is proper, the appropriate resolution to this case lies either in the judiciary through the appeals process or in the executive through its Constitutional power of pardon.[66] According to one Representative, members of the legislature "ought not to override the jurisprudence system we've established in this country . . . the remedies in law lie in a court of law, and therefore, this amendment is not appropriate."[67]

III. OVERVIEW

A. *Constitutional Separation and Delegation of Power*

The federal government of the United States is a government of delegated powers.[68] Thus, in determining the proper authority of each branch, "[t]he question is not what power the Federal Government *ought* to have but what powers *in fact have been given* by the people" via the United States Constitution.[69] In this system of delegated power, the three branches of the Federal Government are interdependent and share some concurrent authority.[70] However, each branch has specific, exclusive powers granted solely to that branch.[71] The separation of powers is one of the fundamental doctrines of the United States Constitution. Using this system, the Framers of the Constitution sought to distribute the central power of government among the legislative, executive, and judicial branches.[72] Checks on each branch are maintained through this

62. *See id.* (statements of Reps. Goode, Culberson).
63. *Id*. (statement of Rep. Goode) (alteration in original).
64. *See id*. (statement of Rep. Mollohan).
65. *Id*.
66. *Id*.
67. *Id*. (statement of Rep. Farr) (alteration in original).
68. United States v. Butler, 297 U.S. 1, 63 (1936).
69. *Id*. (alteration in original) (emphasis added).
70. *See* FISHER, *supra* note 5, at 3.
71. *Id*.
72. CHEMERINSKY, *supra* note 1, at 1.

dual system of shared and independent authority to ensure that no one branch assumes too much power or authority, and subsequently infringes on the rights and duties of another.[73] The separation of powers between the branches has a significant, even peculiar, effect on the governmental institutions.[74] Lines are drawn between the branches to foster efficient distribution among institutions with differing capacities; yet, those lines are blurred in the fields of shared powers so as to ensure that no one branch could abuse its power.[75]

B. *Article III—The Judicial Branch*

The powers reserved to the legislative, executive, and judicial branches of the Federal Government are enumerated in the first three Articles of the Constitution.[76] The Constitution vests the judicial power in the Supreme Court of the United States, while Congress has the power to establish the lower federal courts.[77] The federal courts of the United States are granted the power to adjudicate all proper cases arising under the United States Constitution and federal law.[78]

C. *Article II—The Executive Branch*

The executive power of governance is vested in a President via Article II of the Constitution.[79] The powers reserved to the President include the office's position as Commander in Chief of the armed forces,[80] the power to appoint officials and make treaties with the advice and consent of the Senate,[81] as well as the power to grant pardons and reprieves to those who have committed offenses against the United States.[82]

73. *Id*.
74. *See* Robert A. Strong, *Separation of Powers and Current Relations Between Congress and the Presidency*, *in* CONTEMPORARY PERSPECTIVES ON THE CONSTITUTION AND SEPARATION OF POWERS 24 (Special Committee on Youth Education for Citizenship, American Bar Association 1990).
75. *Id*.
76. *See* CHEMERINSKY, *supra* note 1, at 1-2.
77. U.S. CONST. art. III, § 1.
78. U.S. CONST. art. III, § 2, cl. 1.
79. U.S. CONST. art. II, § 1, cl. 1.
80. U.S. CONST. art. II, § 2, cl. 1.
81. U.S. CONST. art. II, § 2, cl. 2.
82. U.S. CONST. art. II, § 2, cl. 1.

D. Article I—The Legislative Branch

All powers of legislation are granted to the United States Congress.[83] Specifically, the Constitution grants Congress the power to: lay and collect taxes in order to provide for the functioning of the government,[84] establish rules of naturalization,[85] declare war,[86] and coin money,[87] among many other powers. Also, Article I, Section Nine of the Constitution prohibits Congress from taking certain actions.[88] For example, Congress may neither pass a bill of attainder or ex post facto law,[89] nor may it suspend the writ of habeas corpus except in cases of rebellion or invasion.[90]

E. Congress's Spending and Appropriations Powers

Congress has the "power of the purse" pursuant to Article I, Section Nine of the Constitution. The relevant clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[91] Appropriations are types of legislation that confer spending authority to the executive branch.[92] The Constitution grants broad spending power to Congress.[93] Article I, Section Eight provides that, "[t]he Congress shall have the Power to lay and collect Taxes, Duties, Imports and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States."[94] In other words, Congress is expressly authorized to tax in order to provide for the general welfare.[95] The power to appropriate, found in Section Nine, does not specifically say that the funds are to be appropriated for the general welfare.[96] However, such an interpretation is necessary because funds collected through taxation may only be spent through appropriations.[97] Certainly, the requirement that the spending be related to the common defense or general welfare gives Congress broad authority to appropriate

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83. U.S. CONST. art. I, § 1.
84. U.S. CONST. art. I, § 8, cl. 1.
85. U.S. CONST. art. I, § 8, cl. 4.
86. U.S. CONST. art. I, § 8, cl. 11.
87. U.S. CONST. art. I, § 8, cl. 5.
88. *See* U.S. CONST. art. I, § 9.
89. U.S. CONST. art. I, § 9, cl. 3.
90. U.S. CONST. art. I, § 9, cl. 2.
91. U.S. CONST. art. I, § 9, cl. 7 (alteration in original).
92. Kate Stith, *Separation of Powers and the Power of the Purse*, *in* CONTEMPORARY PERSPECTIVES ON THE CONSTITUTION AND SEPARATION OF POWERS, *supra* note 74, at 19.
93. *Id.*
94. U.S. CONST. art. I, § 8, cl. 1 (alteration in original).
95. United States v. Butler, 297 U.S. 1, 65 (1936).
96. *Id.*
97. *Id.*

funds for nearly anything.[98] Under this power, therefore, Congress's use of the "power of the purse" to authorize expenditures is not limited to the direct, specific areas over which the Legislature is granted power elsewhere in the Constitution.[99] By using the spending power, Congress has the ability to indirectly exercise influence over areas in which it does not have direct or enumerated power.[100]

F. Limitations on the "Power of the Purse"

However, there are limitations on the spending power that arise from the Constitution itself.[101] Pursuant to the "independent bar" doctrine, Congress would abuse the spending power if it "exercised [it] for ends inconsistent with the limited grants of power in the Constitution."[102] Thus, although Congress has discretion in respect to the spending power, it may not use that power to usurp another branch's enumerated domain.[103]

G. The President's Pardon Power

Article II, Section Two of the Constitution specifically grants the President the power to issue a pardon for any crime committed against the United States.[104] The power to pardon is one of the few powers granted exclusively to the executive branch by Article II of the United States Constitution.[105] This power entails the ability to reduce a person's sentence after commission or conviction of a federal crime.[106]

The President can choose the form the pardon will take: whether the pardon will exonerate the individual or simply commute the individual's sentence.[107] Traditionally, a pardon has the effect of excusing the individual for the criminal act, "so that in the eye of the law the offender is as innocent as if he had never committed the offen[se]."[108]

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98. Stith, *supra* note 92, at 19.

99. *See Butler,* 297 U.S. 1, 66 (1936) (holding that Congress is not limited to spending only to achieve specific objectives listed in Article I, Section 8 of the Constitution).

100. *See* South Dakota v. Dole, 483 U.S. 203, 210 (1987) ("These cases establish that the 'independent Constitutional bar' limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.").

101. *See generally* Veazie Bank v. Fenno, 75 U.S. 533 (1869).

102. *Id*. at 541 (alteration in original).

103. *See id*.

104. U.S. CONST. art. II, § 2, cl. 1.

105. FISHER, *supra* note 5, at 11.

106. CHEMERINSKY, *supra* note 1, at 364.

107. *Id*.

108. *Ex parte* Garland, 71 U.S. 333, 380 (1867) (alteration in original).

On the other hand, a pardon can merely reduce a sentence through a commutation.[109] In this instance, the offender's sentence is reduced or terminated, yet that person is not entirely excused of the crime.[110] The President also has the ability to issue a pardon that is effective only upon satisfaction of a condition by the individual or to issue a pardon that grants clemency for a class of people.[111] The President's pardon power is exceedingly broad, and "[i]t extends to every offence known to the law, and may be exercised at any time after its commission."[112]

H. Limitations on the Pardon Power

This power is subject to only one proscription concerning the crime in the Constitution: the President may not grant pardons in cases of impeachment.[113] The President's pardon power, subject to the express limitation concerning cases of impeachment, therefore "extends to every [criminal] offen[se] known to the law."[114] A pardon may neither absolve an offender of civil liability,[115] nor may the pardon involve withdrawing money from the treasury without an act of Congress authorizing such withdrawal.[116] Otherwise, pardons are not subject to control by the Legislature.[117] Congress may neither limit the effect of a pardon[118] nor identify a class of offenders that are ineligible for pardons.[119] The power to pardon an individual or group of individuals, in whatever form, lies only in the purview of the powers of the President.

What happens when one branch infringes upon the power or duties of another? Often, improper exercise of power is attempted under the guise of an application of proper, expressly granted authority.[120] For

109. FISHER, *supra* note 5, at 11.

110. CHEMERINSKY, *supra* note 1, at 365; *see also* Biddle v. Perovich, 274 U.S. 480 (1927) (holding that the president has the authority to commute a death sentence to life imprisonment).

111. WILLARD H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 22 (American Council on Pub. Affairs 1941).

112. *Garland*, 71 U.S. at 380 (alteration in original).

113. U.S. CONST. art. II, § 2, cl. 1.

114. *Garland*, 71 U.S. at 380 (alteration in original).

115. CHEMERINSKY, *supra* note 1, at 365; s*ee also Ex parte* Grossman, 267 U.S. 87, 111 (1925) (asserting the President may grant a pardon for criminal contempt, but not for civil contempt as the former is punitive and in the public interest, while the latter is remedial and in the interest of the opponent in civil litigation).

116. Knote v. United States, 95 U.S. 149, 154 (1877).

117. *Garland*, 71 U.S. at 380.

118. *Id.*; *see also* United States v. Klein, 80 U.S. 128 (1872) (holding that Congress may not infringe on the President's Constitutional power to grant pardons).

119. *Garland*, 71 U.S. at 380.

120. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The President at the time had seized steel mills, justifying such action as a duty of the

example, the President has invoked his duty to act as Commander in Chief to justify unconstitutional measures taken, particularly when the nation is facing divisive times.[121] Granted, sometimes exercising power in an area over which a branch does not have direct constitutional control is appropriate.[122] As mentioned before, the Supreme Court has held that Congress can constitutionally use appropriations to achieve goals that are not directly within its constitutionally mandated duties.[123] However, this type of indirect exercise of authority is entirely inappropriate when another provision of the Constitution provides an independent bar to such action.[124] In this situation, even separate branches working concurrently to expand the power of one single branch would nonetheless be an exercise barred by the Constitution.[125]

IV. ANALYSIS

Pursuant to the power to appropriate funds for the general welfare of the nation, the House of Representatives passed an amendment that would presumably free Ignacio Ramos and Jose Alonso Compean.[126] This action, taken by the Legislature, implicates the roles and powers of the other branches. Whether this action interferes with the role of the judiciary, (as the two were duly convicted in a District Court), is beyond the scope of this Comment. This analysis will focus on how congressional action through appropriations legislation in this instance interacts with the role of the executive branch and whether the action infringes on a power allocated solely to the Executive: the power to grant pardons.

Commander in Chief of the Armed Forces. However, such action was strictly within the power of the Legislature. *Id.*

121. *See id.* (holding that a presidential order directing the government to seize steel mills was not within the president's Constitutional authority as commander of the military or other powers of that office).

122. *See* South Dakota v. Dole, 483 U.S. 203 (1987) (holding that Congress may attach certain requirements relating to a minimum drinking age to receipt of federal funds, while not addressing whether Congress can mandate a minimum drinking age upon the states).

123. *See id.* (noting that Congress may indirectly achieve certain objectives through the use of appropriations).

124. *See* Buckley v. Valeo, 424 U.S. 1, 91 (1976) ("Any limitations upon that exercise of granted power must be found elsewhere in the Constitution.").

125. *See* Clinton v. City of New York, 524 U.S. 417 (1998) (holding that the Line Item Veto Act, by which Congress granted the President the authority to cancel provisions in budgetary acts, was not authorized by the Constitution).

126. The Amendment directs that no funds shall be used to enforce either the judgments or the sentences of the two. *See* H.R. 3093, 110th Cong. (as passed by House of Representatives, July 26, 2007).

Congress has wide latitude in appropriations; providing for the general welfare and common defense is a broad formulation,[127] and Congress is often given wide discretion in legislation.[128] Clearly, there is no direct authority in the Constitution that allows Congress to question the incarceration of an individual.[129] However, indirect exercises of power not expressly granted by means of appropriations can be legitimate.[130] More importantly, though, these means must not be prohibited by other provisions of the Constitution.[131] The characterization of the Amendment would likely determine its validity: whether it is merely a spending provision aimed at providing for the general welfare, an action authorized by the constitution, or whether it is a form of congressional pardon, an action independently barred by the Constitution.

A. *The Spending Power*

No money may be drawn from the Treasury unless pursuant to an act of Congress that allocates the spending authority for that money.[132] The Constitution allows Congress to raise money, and then appropriate that money to provide for the general welfare of the United States.[133]

B. *Using the "Power of the Purse" to Indirectly Achieve Objectives*

Using funds to provide for the general welfare of the nation grants Congress broad spending authority.[134] Congress may, theoretically, appropriate funds for nearly anything, including areas in which it does not have direct authority, as long as the ultimate goal is for the general welfare.[135] However, this power is not unlimited.[136] Congress may indirectly achieve objectives by appropriations in areas over which it

127. Stith, *supra* note 92, at 19.

128. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

129. Although, the converse may be implied. There is authority in the Constitution that *prohibits* Congress from directing legislation against an individual as punishment; the prohibition on Bills of Attainder. *See* U.S. CONST. art. I, § 9, cl. 3.

130. *See* discussion *infra* notes 139-50 and accompanying text.

131. *See* discussion *infra* notes 163-83 and accompanying text.

132. Stith, *supra* note 92, at 19.

133. *See* U.S. CONST. art. I, § 8, cl. 1.

134. Stith, *supra* note 92, at 19.

135. *See* South Dakota v. Dole, 483 U.S. 203 (1987) (holding that, although Congress may not have direct authority to mandate a national minimum drinking age, Congress may attach related conditions to the receipt of federal funds).

136. *Id.* at 207 (noting that the spending power is limited by restrictions articulated by the courts and by the Constitution itself).

does not have control, but may not act in areas that are elsewhere prohibited by the Constitution.[137]

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate . . . are constitutional."[138]

The Supreme Court addressed this indirect exercise of control by Congress in *South Dakota v. Dole*.[139] South Dakota permitted persons 19 years of age or older to purchase alcohol.[140] However, an act of Congress reduced federal highway funding to states with a minimum drinking age below 21.[141] South Dakota sued the United States and challenged the law, claiming that it violated both the Twenty-First Amendment and Congress's spending power in Article I, Section Eight.[142]

South Dakota contended that Congress was attempting to directly legislate a national drinking age via the law, an action that should be barred by the Twenty-First Amendment.[143] The Supreme Court did not address whether such an action would be prohibited by the Constitution.[144] Rather, the Court noted that Congress had acted indirectly, (as opposed to directly), under the spending power to encourage uniformity in drinking ages; the law did not mandate a minimum age.[145]

In addressing the constitutionality of the indirect exercise of authority, the Court noted that Congress's power to authorize expenditure of public monies is not unlimited.[146] However, the spending need not be limited solely to objectives found within the "enumerated legislative fields" of Article I.[147] Such expenditures must be "in pursuit of the general welfare," and conditions attached to the spending must be related to this particular interest.[148] Moreover, these expenditures will be appropriate unless another provision of the Constitution provides an

137. *Id*.
138. McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (alteration in original).
139. 483 U.S. 203 (1987).
140. *Id*. at 205.
141. *Id*.; *see* 23 U.S.C. § 158 (2007).
142. *Dole*, 483 U.S. at 205.
143. *Id.* at 206.
144. *Id.* ("[W]e need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age.").
145. *Id.*
146. *Id.* at 207.
147. *Id.* at 206 (quoting United States v. Butler, 297 U.S. 1, 65 (1936)).
148. *Id.* at 207.

independent bar.[149] The Court held that this conditional grant of federal funds did fall within the ambit of providing for the general welfare.[150] Further, as the law merely encouraged state action and did not mandate a national minimum drinking age, it was not prohibited elsewhere in the Constitution, specifically the Twenty-First Amendment.[151]

In *United States v. American Library Association*, the Supreme Court addressed the constitutionality of provisions of an Act of Congress which prohibited federal assistance for internet access unless the library agreed to install filtering software.[152] A group of libraries, library associations, and others sued in the United States District Court for the Eastern District of Pennsylvania challenging these provisions of the Children's Internet Protection Act.[153] The group argued, and the District Court agreed, that Congress exceeded its authority under Article I, Section Eight of the Constitution because compelling a library or a patron to filter information would necessarily violate the First Amendment.[154] Using the "power of the purse" to effect a content-based restriction on speech, according to the District Court, was an unconstitutional use of Congress's Spending Power.[155]

In overturning the decision of the District Court, the Supreme Court noted that, while Congress may not compel an entity to engage in unconstitutional activity, Congress does have "wide latitude to attach conditions" to federal funds in order to further the objectives of providing for the general welfare of the nation.[156] Because the provisions in question did not regulate private conduct, but rather receipt of federal funds, the Supreme Court applied the same framework as used in *South Dakota v. Dole*.[157] The Court mentioned that the government does have broad discretion in deciding what private speech to make public based upon its content.[158] The Court ruled that, in this instance, the government was not compelling unconstitutional activity by prohibiting funding in the absence of a filtering provision.[159] Rather, Congress was insisting that the federal funds be spent within the limits of the program under which they were appropriated.[160] The Court therefore reversed the

149. *Id.* at 208.
150. *Id.*
151. *Id.* at 212.
152. 539 U.S. 194 (2003).
153. United States v. Am. Library Ass'n, 539 U.S. 194, 201-02 (2003).
154. *Id.* at 202.
155. *Id.* at 202-03.
156. *Id.* at 203.
157. *Id.*
158. *Id.*
159. *Id.* at 211.
160. *Id.* at 212.

decision of the District Court, holding that because the Act neither violated First Amendment rights nor induced libraries to do so, such a condition was within Congress's power to regulate pursuant to the spending power.[161]

C. The Independent Bar

The Supreme Court directly addressed the confines of Congress's Spending Power in *United States v. Butler*.[162] The Court noted that there have historically been different views as to whether Congress's power to tax and appropriate is limited to the constitutionally enumerated fields, or whether that power is in fact broader.[163] The Court ultimately decided that "[w]hile, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress."[164] Therefore, Congress's power to appropriate money for the general welfare of the nation is not limited by the direct grants of legislative power.[165]

While Congress does have broad power to spend according to this interpretation, that power is by no means unlimited.[166] The power to tax and spend must be in pursuit of the general welfare and must not be exercised in a manner inconsistent with the Constitution.[167] In this particular case, provisions of the Agricultural Adjustment Act of 1933 were being challenged.[168] Provisions of the Act authorized levying a tax on processing cotton, the proceeds of which were appropriated to aid in crop control in order to reduce crop production and raise prices.[169] The Court ultimately held that the Act was an unconstitutional assertion of Congressional power and that the tax imposed by this Act was invalid.[170] The power to tax may be broad, and Congress may be given a certain degree of discretion in fashioning appropriate means.[171] Taxation may be used as a means to carry out another power expressly granted.[172] But, using the appropriate means through powers granted to reach a prohibited end may never be within the power of Congress.[173]

161. *Id.* at 214.
162. 297 U.S. 1 (1936).
163. *Id.* 66-67.
164. *Id.* at 67 (alteration in original).
165. *Id.*
166. *Id.*
167. *Id.* at 68.
168. *Id.* at 53.
169. *Id.* at 58-60.
170. *See Butler*, 297 U.S. 1, 78 (1936).
171. *Id.* at 67.
172. *Id.* at 69.
173. *Id.*

"To the Executive Alone is Entrusted the Power of Pardon."[174]

Congress does have broad powers with appropriations as long as the ends are within the constitutional bounds of legislative control.[175] The power to pardon is one area in which Congress may not interfere pursuant to legislation.[176] The Supreme Court noted that only the President has the power to issue pardons.[177] As this power is granted solely to the President, any attempt by Congress to interfere with the President's discretion in this field would infringe on that constitutionally granted power.[178] The Court has held that Congress cannot constitutionally detract from the legal effect of a pardon.[179] In *United States v. Klein*, the Court addressed an Act of Congress that essentially did just that; provisions of the Abandoned and Captured Property Act declared that any person who "aided the rebellion" or was guilty of disloyalty could not avail themselves of their subsequent pardon to negate the prior disloyalty.[180] Basically, a pardon was supposed to be used to prove the person provided "aid and comfort to the rebellion," thus justifying United States' capture of their private property.[181] But, that person's pardon, while absolving them of the crime, did not restore their rights in that property.[182] The Court found that this rule required courts to "receive special pardons as evidence of guilt [of the accused] and to treat them as null and void. [The court] is required to disregard pardons . . . and to deny them their legal effect."[183] Such a result was constitutionally unacceptable as it "impair[ed] the executive authority and direct[ed] the court to be instrumental to that end."[184]

174. United States v. Klein, 80 U.S. 128, 147 (1872) (alteration in original).
175. South Dakota v. Dole, 483 U.S. 203, 205 (1987).
176. *Klein*, 80 U.S. at 147 ("[T]he President's power of pardon *is not subject to legislation*." (emphasis added)).
177. *Id.* at 147 ("To the executive alone is [sic] entrusted the power of pardon; and it is granted without limit.").
178. *Id.* ("Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.").
179. *Id*.
180. *Id.* at 143-44. This controversy took place after the Civil War. The President subsequently issued many pardons for those who were "disloyal;" most of which were conditional pardons that required a pledge of loyalty. *See id.*
181. *Id.*
182. *Id.* ("The substance of this enactment is that an acceptance of a pardon . . . shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it.").
183. *Id.* at 147 (alteration in original).
184. *Id.* (alteration in original).

D. Application

The constitutionality of the Amendment, denying funds to incarcerate two duly-convicted individuals, may depend upon how the Amendment is characterized. "To the President alone is [e]ntrusted the power of pardon . . .;[185] but, through appropriations, Congress has the power to legislate nearly anything.[186] The ultimate constitutionality of Congress's action depends upon whether the Amendment is simply a general spending provision designed to provide for the general welfare of the nation, or if it is, in fact, a Congressional pardon of Ramos and Compean.[187]

Promoting the General Welfare of the Nation

If this provision is merely legislation aimed at promoting the general welfare of the nation, then it likely would pass a constitutional analysis as an exercise of Congress's power to indirectly achieve goals not otherwise explicitly authorized by the Constitution.[188] Congress's decision to spend public funds is not limited to the "enumerated legislative fields" found in the Constitution.[189] If Congress is permitted to tax for the general welfare and common defense, then Congress should also be allowed to spend for that welfare and defense.[190] And, the Representatives of the people are best suited to determine what provisions in fact would provide for the general welfare of the Nation.[191]

The supporters of the Amendment validate its propriety as providing for the general welfare of the nation. Their justifications primarily center on the strong message that will be sent by denying the funds to incarcerate Ramos and Compean, two people they believe to be victims of the failures of the justice system: that those who represent the Nation's lawmakers will not stand for this perceived miscarriage of justice.[192] The supporters intend the bill to send this message to both the people of the nation and to the agents who protect the nation's borders.[193]

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185. *Id.*
186. Stith, *supra* note 92, at 19.
187. Or, the effect of the Amendment could amount to a commutation of sentence, which would also be constitutionally suspect.
188. *See* discussion *supra* notes 140-51 and accompanying text.
189. South Dakota v. Dole, 483 U.S. 203, 206 (1987) (quoting United States v. Butler, 297 U.S. 1, 65 (1936)).
190. United States v. Butler, 297 U.S. 1, 65 (1936).
191. *See* German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 413 (1914) ("What makes for the general welfare is necessarily in the first instance a matter of legislative judgment. . . .").
192. *See, e.g.*, 153 CONG. REC. H8467 (2007) (statement of Rep. Culberson).
193. *See id.*

One Representative noted the outrage among the American populace regarding the convictions of the two agents:[194]

> [E]very American is born with an innate sense of fairness. . . . I have never seen a level of outrage among my constituents and really across the country. . . . Every American understands this case. . . . We cannot as Members of Congress send a stronger signal . . . to the American people how committed we are to protecting this border and standing behind our law enforcement agents. . . . We understand clearly that we will never win the war on terror until we have truly protected our borders.[195]

Apparently, the Amendment will not only send a message to the American people, but also to those agents who are trusted to perform the significant duty of protecting the United States' borders.[196] "By voting for this amendment to free these men, Congress will not only be correcting a terrible mistake, it will begin repairing the morale and effectiveness of our Border Patrol that have been damaged by [the prosecution of these agents]."[197] With such marketable slogans being used in debate, it is not hard to see why those who have to answer to their constituency would pass such an amendment.

Granted, nowhere in the Constitution does it say that Congress may legislate to improve the morale of the nation and those who protect it.[198] However, Congress's spending is authorized to provide for the general welfare.[199] If promoting the morale, (which, according to certain Representatives would result in more secure borders and a "win" on the war on terror), can amount to the general welfare, then appropriating money to do so would likely be constitutionally sound. But, one must nonetheless ensure that the broad power of the purse is not elsewhere circumscribed by the Constitution.[200]

Potential Pardon, Independent Bar

If, on the contrary, the Amendment amounts to a Congressional pardon, then the legislation should be barred by the "independent bar" doctrine.[201] Congress may never use even explicitly authorized means, (the power to appropriate), to reach an end prohibited by the

194. *Id.*
195. *Id.*
196. *See id.* (statement of Rep. Royce).
197. *Id.* (alteration in original).
198. *See generally* U.S. CONST. art. I.
199. United States v. Butler, 297 U.S. 1, 65 (1936).
200. *See* South Dakota v. Dole, 483 U.S. 203, 208 (1987).
201. *See* Buckley v. Valeo, 424 U.S. 1, 91 (1976) ("Any limitations upon that exercise of granted power must be found elsewhere in the Constitution.").

Constitution.[202] For example, Congress may not appropriate funds if the result would amount to a bill of attainder.[203] Nor may Congress legislate in a manner that would interfere with the power granted directly, and only to the President: the power to grant pardons.[204] This power is "not subject to legislation" by Congress.[205]

Some opponents of the Amendment expressed their concern that it was not a provision that merely promoted the general welfare; rather, the Amendment would serve to second-guess the convictions of the two agents and subsequently pardon the two.[206] Effecting a pardon, by no means, is an acceptable role of the Legislature.[207] Even proponents of the Amendment recognize that the power to pardon lies within the President.[208] But, because the President has not done so, the proponents suggest that it is now their role to "intervene in cases where we [determine] that the outcome was something we [do] not agree with."[209]

While not minimizing the affective position of the other representatives, opponents of the Amendment expressed that such intervention was beyond the power of the Legislature.[210] According to one Representative,

> This issue ought to be resolved in the courts surely, or if the President of the United States wanted to take it up he has the power that we don't have. . . . [The President] has a pardoning power. [Congress does not] have that here, but in effect, we are attempting to act as if we did here with these two amendments.[211]

At least one Representative suggested that taking action to challenge a proper conviction would "override the jurisprudence system that we've established in this country," a result that is unacceptable.[212]

If the provision would amount to a pardon given by the Legislature, it would certainly be an unconstitutional exercise of Congress's appropriations power. The Constitution grants solely to the President the

202. *See Butler*, 297 U.S. at 69.
203. *See* United States v. Lovett, 328 U.S. 303 (1946). The Supreme Court held an act of Congress that excluded certain individuals from government employment served as a bill of attainder. "Legislative acts, no matter what their form, that apply either to name individuals . . . as to inflict punishment . . . are bills of attainder prohibited by the U.S. Constitution." *Id*. at 315.
204. United States v. Klein, 80 U.S. 128, 147 (1872).
205. *Id.*
206. *See* 153 CONG. REC. H8467 (2007) (statement of Rep. Mollohan).
207. *See id.*
208. *See id.* (statement of Rep. Tancredo) ("We have begged the President to please become involved with this, please pardon, please commute.").
209. *Id.*
210. *See id.* (statement of Rep. Mollohan).
211. *Id.*
212. *Id.* (statement of Rep. Farr).

power to pardon,[213] and established law has consistently held that Congress may not interfere with that power.[214] Whether it be an attempt to limit the President's power to pardon, to mandate the class of persons who may or may not be pardoned, or to take the law in their own hands—Congress may not themselves assume role of the Executive and meddle with the pardoning power.[215]

V. CONCLUSION

Congress' authority in appropriations is a powerful tool. The Legislature may achieve objectives not typically within the realm of legislative power through use of the power of the purse.[216] As long as the spending is reasonable to achieve an end not prohibited by the Constitution, Congress has wide discretion in how they choose to appropriate funds from the Treasury.[217] The appropriate means must not, however, be used to reach a prohibited end: the power of the purse may not be used to usurp the power of another branch.[218]

Whether denying funds to incarcerate two individuals is within the purview of Congressional power depends on how such a provision is characterized. If this action can somehow be construed as only a means to provide for the general welfare or defense of the nation,[219] then the Amendment would likely fall within Congress's broad discretion to spend. However, the Amendment would, presumably, have the effect of releasing from incarceration two individuals who were duly convicted by a jury of their peers—the same effect that would result from an actual pardon or commutation granted by the President of the United States.[220] Because "[t]o the executive alone is [sic] entrusted the power of pardon," such an end would be an impermissible infringement by Congress upon the power and role of the Executive.[221]

213. U.S. CONST. art. II, § 2, cl. 1.

214. *See* United States v. Klein, 80 U.S. 128, 147 (1872); *see also Ex parte* Garland, 71 U.S. 333, 380 (1867).

215. *Id.*

216. *See* discussion *supra* notes 139-50 and accompanying text.

217. *See* discussion *supra* notes 140-50 and accompanying text.

218. *See* discussion *supra* notes 175-83 and accompanying text.

219. For example, supporters could characterize the goals of improving morale in order to better protect the borders as providing for both the general welfare and common defense.

220. This Comment will not address the implications of the Amendment if it does, in fact, amount to a Congressional pardon. An interesting topic to consider is, if the Amendment were to be signed into law as drafted, how such an exercise of power could be challenged. Presumably, the Amendment would be challenged in the courts of the United States. However, it does not seem clear who exactly would have standing to challenge the amendment.

221. United States v. Klein, 80 U.S. 128, 147 (1872) (alteration in original).