

## HOW CONGRESS CAN MAKE THE EARMARK PROCESS WORK

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*Congress holds the “power of the purse,” but it has limited the exercise of this right by refraining from earmarking, the practice of directing funds to specific projects (like road improvements) at the request of members of Congress. For many years, both members of Congress and the public criticized earmarks, alleging that they were fiscally irresponsible and corrupt. When the Republicans took control of the House of Representatives following the 2010 midterm elections, Congress suspended the formal practice of earmarking. Ever since, some have criticized the policy and have called on Congress to resume earmarking. Indeed, Congress should consider restoring earmarks, since these provisions have a legitimate place in the legislative process. Reintroducing reformed earmarks would allow Congress to reassert its constitutional role over both the country’s finances and policy. Congress has many tools at its disposal to promote a healthy earmark process, and if it implements additional reforms, the practice could be revived responsibly, limiting the opportunity for abuse that was present in the previous system.*

### INTRODUCTION

Both the House and Senate standing rules explicitly define earmarks. House Rule XXI, clause 9(e), states:

For the purpose of this clause, the term ‘congressional earmark’ means a provision or report language included primarily at the request of a member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discre-

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tionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.<sup>1</sup>

The Senate's definition is almost exactly the same, except that an earmark is referred to as a "congressionally directed spending item."<sup>2</sup> Under the administration of George W. Bush, the Office of Management and Budget advised department heads:

Earmarks are funds provided by the Congress for projects or programs where the congressional direction (in bill or report language) circumvents the merit-based or competitive allocation process, or specifies the location or recipient, or otherwise curtails the ability of the administration to control critical aspects of the funds allocation process.<sup>3</sup>

Some essential elements of an earmark emerge from these definitions. First, earmarks are particular: They are intended for a specific entity or a specific location. Second, they are not merit-based: If an earmark is duly enacted, the recipient may receive the funds regardless of whether they satisfy the criteria that apply to others. Third, an earmark is at the request of a member of Congress, not the administration. Earmarks that satisfy these definitions may be found in several locations. They may be found within the text of an authorization bill or an appropriations bill. Additionally, earmarks could be found within a committee report or within a conference committee report.

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<sup>1</sup> HOUSE RULE XXI, RULES OF THE HOUSE OF REPRESENTATIVES, 115th Cong. 36 (2017), <https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf>.

<sup>2</sup> S. Res. 285, 106th Cong. (2013), <http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf>.

<sup>3</sup> OFFICE OF MGMT. & BUDGET, MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES (Jan. 25, 2007), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-09.pdf>.

### I. PAST EARMARK REFORM EFFORTS

Americans have long been ambivalent about spending federal funds for local projects, but the immediate impetus for earmark reform dates to the mid-2000s, when the public learned how some members, staff and lobbyists abused the process, either for personal gain or by sponsoring earmarks of dubious merit. Following these revelations, both chambers introduced various measures to reform, but not eliminate, earmarking. In September 2006, the House adopted a resolution defining an earmark; requiring earmarks and the identity of the member who requested them in a bill be disclosed; and providing a point of order against a bill that did not meet these requirements.<sup>4</sup> When the Democrats took control of the chamber in 2007, similar provisions were added to the standing rules of the House on the first day of the 110th Congress.<sup>5</sup>

When the Congress enacted the Honest Leadership and Open Government Act of 2007, it added Rule XLIV to the Senate's standing rules, which defined an earmark, required disclosures and created a point of order against legislation that did not satisfy the rules requirements.<sup>6</sup> When the Republicans retook control of the House in 2011, the newly installed Speaker John Boehner led the successful effort to institute an earmark moratorium. Although the Democratic Senate Majority Leader and their Appropriations Committee Chairman supported earmarks, they acquiesced to the policy, recognizing that congressionally directed spending provisions would not pass in the House. This moratorium, however, is only informal. The House and Senate standing rules still technically permit earmarks in legislation.

Like the legislative branch, the executive branch has supported earmark reform. For instance, President George W. Bush signed Executive Order 13457 of January 29, 2008, which prohibited the

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<sup>4</sup> DREIER, PROVIDING FOR EARMARKING REFORM IN THE HOUSE OF REPRESENTATIVES, H.R. REP. NO. 109-655, at 4 (2006), <https://www.congress.gov/109/crpt/hrpt655/CRPT-109hrpt655.pdf>.

<sup>5</sup> HOUSE RULE XXI, RULES OF THE HOUSE OF REPRESENTATIVES, 115th Cong. 920-22 (2017), <https://www.gpo.gov/fdsys/pkg/HMAN-115/pdf/HMAN-115-pg868.pdf>.

<sup>6</sup> S. Res. 285, 106th Cong. (2013), <http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf>.

administration from providing money for “earmarks included in any non-statutory source, including requests in reports of committees . . . or any other non-statutory source,” unless the law required it or officials determined the projects satisfied any criteria laid out in law or were as competitive as non-earmarked projects.<sup>7</sup> In 2011, President Barack Obama’s administration considered a policy of publishing online requests by members who contacted agencies directly to secure funding for pet projects—an attempt to evade the earmark moratorium. This policy, however, was not adopted.<sup>8</sup>

## II. SHOULD CONGRESS REINTRODUCE EARMARKS?

There are many reasons Congress should consider restoring earmarks. The first reason is that it is a matter of constitutional importance. The authors of the Constitution intended members of Congress to be uber-advocates for their constituents. In *Federalist 52*, the author wrote:

As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House] should have an immediate dependence on, and an intimate sympathy with, the people.<sup>9</sup>

Looking out for their constituents is the most important characteristic of a member of Congress, and they should be the person whose responsibility it is, within the federal system, to advocate for their needs. To that end, Congress possesses the authority to set policy through law and make spending decisions. To say that Congress should not be entrusted with the responsibility of earmarking because of the potential for corruption undercuts the constitutional principle that the legislature decides how to spend funds.

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<sup>7</sup> Exec. Order No. 13457, 3 C.F.R. § 13457 (2009), <https://www.gpo.gov/fdsys/pkg/CFR-2009-title3-vol1/pdf/CFR-2009-title3-vol1-eo13457.pdf>.

<sup>8</sup> Kevin Bogardus, *Obama Administration Draft memo Could Shed Light on ‘Lettermarking,’* THE HILL (Nov. 9, 2011), <http://thehill.com/business-a-lobbying/192497-obama-administration-draft-memo-could-shed-light-on-lettermarking>.

<sup>9</sup> THE FEDERALIST NO. 52 (James Madison).

Additionally, it raises serious questions about the prospect of democratic governance. If members of Congress are not entrusted to determine how to spend for local improvements, then should they have authority over other, weightier aspects of governance either? If the legislature is not entrusted with authority over funding decisions, why should the executive? It is true that the executive branch has a competitive grant-making process, but it is not obvious why this would not be abused, as the congressional appropriations process has been. After all, plenty of executive branch officials throughout American history have been convicted of crimes related to their official duties. The past abuse of the earmark process is no reason to eliminate its proper use.

In fact, the potential for the executive branch to misuse funds entrusted to it is also a reason for restoring earmarks. One way Congress holds the administration accountable is through authorization bills that set national policy and recommend funding levels. The accountability that comes with the possibility of having an agency's program cut or eliminated shifts the control of spending from the executive branch back to the legislative branch. Earmarks support Congress' efforts to hold the executive branch accountable since they both direct administration officials' actions and build coalitions to pass legislation.

The importance of building coalitions should not be overstated. Earmarks give the minority party in each chamber the opportunity to participate in the legislative process and accomplish important priorities for their districts, which gives them incentives to vote for authorization and appropriation bills. Giving lawmakers in the minority party more power to legislate with earmarks has the benefit of allowing the majority to pass important authorization and spending bills with bipartisan majorities. The Framers were keenly aware—and wary—of partisan influence in government. In building bipartisan coalitions, earmarks could lessen this influence.

Aside from questions about accountability and corruption, there is the question of the extent to which earmarking drives up the deficit. Even in their heyday, earmarks were a relatively small percentage of the Federal budget. According to Citizens Against Government Waste, an anti-earmark group, earmarks peaked at \$29 bil-

lion in fiscal year 2006.<sup>10</sup> By comparison, government spending for that fiscal year was \$2.65 trillion.<sup>11</sup> This means earmarks accounted for just under 1.1 percent of Federal spending for fiscal year 2006. Concerns about the effect of earmarks on the Federal debt are somewhat misplaced.

Although Congress has banned earmarks in the name of fiscal discipline and good governance, various people, including fiscal watchdogs, congressional scholars and elected officials themselves, have observed that members have found more creative but less transparent ways to fund local projects. One way is by what is known as “phonemarking,” where a member calls an executive branch agency to request money. Another is by “lettermarking,” where they do the same by sending a letter to an official. Or instead of incorporating into authorization or appropriations bills and reports provisions that *require* money to be spent on such projects, members of Congress can make suggestions, known as “softmarks,” in committee reports. In December 2011, Senator Tom Coburn of Oklahoma suggested the extent of alternative earmarking when he denounced the fiscal year 2012 omnibus appropriations bill:

This 1,200-page bill . . . has over \$3.5 billion worth of phonemarks in it. We don’t have earmarks anymore; they are all phonemarks . . . . The pay-to-play game is still going on in Washington. Now we just don’t do it in the bill, we do it by telephone, and we threaten agencies: If you don’t give this money to this person, your money will be cut the next year.<sup>12</sup>

Prior to the moratorium, disclosure requirements and President George W. Bush’s executive order on earmarks served the interests of public accountability; now members direct spending without either safeguard. Restoring an honest and transparent earmark pro-

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<sup>10</sup> CITIZENS AGAINST GOVERNMENT WASTE, 2010 CONGRESSIONAL PIG BOOK SUMMARY 1 (20th Anniversary ed. 2010), <https://www.cagw.org/sites/default/files/pdf/2010-pig-book-summary.pdf>.

<sup>11</sup> FIN. MGMT. SERV. DEP’T OF TREAS., MONTHLY TREASURY STATEMENT OF RECEIPTS AND OUTLAYS OF THE UNITED STATES GOVERNMENT FOR FISCAL YEAR 2006 THROUGH SEPTEMBER 30, 2006, AND OTHER PERIODS 2 (2006).

<sup>12</sup> 157 CONG. REC. S8720 (daily ed. Dec. 16, 2011) (statement of Sen. Coburn).

cess would prevent members of the President’s party from doing an end run around the current earmark process by requiring them to be written into law.

### III. HOW TO REINTRODUCE EARMARKS

Since the earmark “ban” has created a situation where spending decisions are even less transparent than before and because Congress has the responsibility to make spending decisions, legislators should consider restoring and reforming earmarks. Earmarks could be reintroduced if Congress strengthened the authorization process and made wide-scale changes to its budget process.<sup>13</sup> Broadly speaking, congressional rules require that programs first be authorized. In the authorization process, Congress debates policies that are enacted via laws that the executive branch must administer. Such authorization bills, however, should not appropriate funds but may *recommend* funding levels. The separate appropriations process actually provides funding.

Each year, Congress should adopt a concurrent budget resolution and enact 12 appropriations bills for discretionary spending before fiscal year ends on September 30. Both the authorization and appropriations processes experience extensive failures. For example, in recent years, it is estimated that only about 30 percent of discretionary spending has current authorizations. Although adopting a budget resolution should precede considering spending bills, Congress rarely does so before the deadline on April 15—if it does at all. For fiscal years 2005 through 2014, Congress failed to pass a budget resolution at all on six occasions and was late in adopting a resolution in the remaining four.<sup>14</sup> Appropriations bills are similarly late. However, as the Constitution requires the enactment of an appropriation bill be-

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<sup>13</sup> Material on authorization process drawn generally from Mark Strand & Timothy Lang, *Fixing the Authorization Process: Restoring Checks and Balances*, CONG. INST. (Oct. 19, 2017), <https://www.conginst.org/2017/10/19/fixing-the-authorization-process-restoring-checks-and-balances/>. Material on the budget process and biennial budgeting drawn generally from Mark Strand & Anca Butcaru, *Everyone Seems to Want It So What’s the Hold-Up on the Biennial Budget?*, CONG. INST. (Oct. 11, 2016), <https://www.conginst.org/2016/10/11/everyone-seems-to-want-it-so-what-is-the-hold-up-on-the-biennial-budget/>.

<sup>14</sup> See Katharine Conlon, *Federal Budget Process 101*, CARE ACTION! (Jan. 9, 2017).

fore the executive branch may spend money, Congress typically resorts to temporary continuing resolutions until proper appropriations are passed. On three occasions in the last five years, funding has expired before new appropriations were adopted, resulting in government shutdowns. With an ad hoc budget process such as the government has today, it is little wonder that the earmark process required reform too. In light of the current budget process' ailments, a few key reforms must be put in place for earmarks to be restored.

First, the authorization process must be revived. Earmarks can only work if the projects they support have been properly vetted by the committees that have jurisdiction over their subject matter. In addition to debating good policy, these committees must also draft authorization bills and shepherd them through the House and Senate to ensure that the monies are directed towards the correct projects. Aside from ensuring that worthwhile projects are funded, properly drafted authorization bills could limit attempts at inserting earmarks in the appropriations process. According to House precedent, if an authorization bill grants an administration official discretion in allotting a lump sum, "a specific appropriation for a particular item included in such general purpose"—an earmark, in other words—is impermissible in an appropriation bill.<sup>15</sup> This precedent reinforces a wider principle that is enshrined in House Rule XXI prohibiting legislating on an appropriation bill. Appropriations in violation of this rule—which could include certain earmarks—are, in theory, subject to a point of order; if sustained, the offensive provisions would be removed from the bill.<sup>16</sup> Also, as mentioned before, restoring earmarks would have the beneficial side effect of restoring bipartisan incentives to pass authorization bills.

Second, along with strengthening the authorization process, Congress must reform how it adopts its budget resolution and appro-

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<sup>15</sup> GOV'T PUBLISHING OFFICE, UNAUTHORIZED APPROPRIATIONS; LEGISLATION ON APPROPRIATION BILLS 5490 <https://www.gpo.gov/fdsys/pkg/GPO-HPREC-DESCHLERS-V8/pdf/GPO-HPREC-DESCHLERS-V8.pdf> (last visited Mar. 15, 2018).

<sup>16</sup> The House of Representatives often waives the rule prohibiting unauthorized appropriations, nullifying its potential effects. Leaving this rule operative would provide members another way to eliminate inappropriate earmarks and reinforce the importance of the authorization process.

priations bills. Frequent budget battles consume an inordinate amount of members' and their aides' time and energy. Congress must establish a regular appropriations schedule that it can actually adhere to, so it can then prioritize authorizations. A critical piece of this new process would be to enact biennial budgeting, where Congress budgets on a two-year cycle. There are two main variants of biennial budgeting. In one, both the budget resolution and the appropriations bills cover two years. In the other, the budget resolution sets spending priorities for two years, but the appropriations bills themselves still cover only one year. If Congress adopted a biennial budget process where appropriations bills were done on a two-year cycle, it could dedicate every other year to authorization bills, where it could focus on properly vetting earmark projects. Even if it did not go so far as to adopt a two-year cycle for appropriations, adopting two-year budget resolutions would still alleviate some time constraints and would allow members, committees, and agencies to plan farther ahead than they do now.

Third, a final protection of a restored earmark process would be for the administration to strictly enforce the George W. Bush-era executive order ignoring funding requests that do not have the force of law (i.e., lettermarks, phonemarks, and simple suggestions in committee reports).<sup>17</sup> Strict enforcement of these executive orders means members of Congress would need to ensure that their funding requests are properly enshrined in law. The prospect of the executive branch ignoring requests that are not legally binding might seem like it would weaken the legislative branch, but Congress would need to enact earmarks with the force of law—not mere recommendations—to direct the administration, which would result in a more balanced legislative-executive relationship.

## CONCLUSION

The changes to the legislative process described here—and a number of others along with them—demonstrate that earmarks can be restored in a transparent manner that enhances the overall legislative

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<sup>17</sup> We have not studied how strictly this executive order was observed, so we cannot judge its effects; however, its principles remain sound.

and budgeting process. They would promote responsible congressional leadership in making spending decisions through earmarking, and they would help reform the legislative process as a whole. In a Congress where members are thoroughly engaged in the process and the public critically evaluates their representatives' performance, there should be little to fear from congressional earmarks—and Congress would be the stronger for them.