

Much Ado About Earmarks

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Foreword

As an Army officer I have held a variety of operational assignments, including deployments to Iraq and Afghanistan, but I never really strayed too far from the military community. That changed when I was accepted into the Army Congressional Fellowship program and was assigned to work on Capitol Hill as a Defense Fellow—essentially a military aide to Congress. I also had the good fortune of being accepted into Congressman C.W. Bill Young's (FL-10) office to work on his staff during the 2010 calendar year. Congressman Young is a devoted public servant and is also the most senior Republican serving in Congress. He served as the Chairman of the Appropriations Committee earlier in the decade and during my tenure he was the Ranking Member on the Defense Appropriations Subcommittee. His seniority puts him in a rather exclusive club of senior decision-makers within our government. By working in his office and by earning the trust of his staff, I was exposed to a great deal of insight and decision-making normally not witnessed by officers of my rank. For this experience, I am truly grateful.

My duties ranged from writing speeches to answering constituent inquiries. Early in the year, I was also involved with the processing of earmark requests, took meetings from companies and organizations seeking them, and helped vet the final list that Congressman Young would propose to the committee. As faith would have it, and ironically, right after I finished packaging the final earmark packets, both the Democrats and Republicans banned earmarks in some capacity, with the Republicans instituting a complete moratorium for at least one year. Not only was I perturbed that all my work was for naught, but I also knew that Congressman Young has historically been a steady

proponent of earmarks. This turn of events by the Republicans was a bit of a shock to us on the staff. Congressman Young, in good faith with the Republican caucus, followed suit with his party's position on earmarks. However, he did express some reservations about the wisdom of the Republican decision and throughout hearings during the year mentioned at times how past congressionally-directed spending has been beneficial. His experience with earmarks and listening to more senior staff was enough to pique my curiosity about the topic. Admittedly, prior to serving on the Hill, I also believed as much of the public has, that earmarks were a symbol of fraud and waste. By being exposed to the process, I at least learned that there was much more to the story of earmarks and that they were probably not as nefarious as I initially imagined.

Additionally, an incident early after the Republican moratorium also drove home the point that this subject was far more complicated than I thought. General Petraeus made a personal request of Congressman Young to accelerate the construction of a parking garage at Central Command Headquarters on MacDill Air Force Base in order to alleviate a critical parking shortage. Construction of the garage was already programmed to begin in the following fiscal year, so on the surface this appeared to be a relatively simple request. Congressman Young also clarified with the Republican leadership that making this request would not violate the caucus's earmark moratorium and we as a staff received permission to proceed (See Appendix A). However, soon after our submission was publicized, reports started circulating with words to the effect that Congressman Young was requesting an

earmark in contrast to the party's stated moratorium.¹ The left-leaning blogs also had a field day with this, along with Congressman Young's election opponent. Ultimately, as a result of this reaction, we were forced to withdraw our request (See Appendix B) and the Republicans issued new guidance stating that, "Military construction requests will be treated as earmarks and Members are advised not to request such projects, even if they represent valid military requirements that have been formally programmed by the military into the military service's full range plan."² The true justification for the change in guidance was concern that the public would not be able to discern between different types of earmarks. With this being an election year, the party did not want to run the risk of damaging its message of fiscal responsibility and cutting spending. That was my initial indication that semantics and politics play a great role in the perception of earmarks. It was enough to spur me into researching this topic.

¹ Alex Leary, "No Earmarks for Bill Young -- Except One." St. Petersburg Times. Available at <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/no-earmarks-bill-young-except-one> (accessed October 9, 2010).

² Howard McKeon, "HASC GOP Earmark Moratorium Guidance." Memorandum, Republican Conference from HASC Republican Committee Staff, Washington D.C., March 22, 2010.

Thesis Statement

This thesis explores the controversy over earmarks and seeks to examine their place within the larger legislative and appropriations process. Additionally, it examines the role earmarks play in relations between the executive and legislative branches of government. It further argues that focusing on earmark spending, while good political theater, in practicality amounts to little more than a political red herring.

Earmarks are often portrayed as a corrupting force in politics and are often contextually labeled as "pork" and wasteful spending. Though there certainly have been instances of corruption, opponents regularly decry them and suggest that the nation's funds would be better served under the stewardship of the executive branch with limited congressional interference. This thesis contends that those types of assertions are fundamentally flawed by misrepresenting the budgetary impact earmarks have, along with negating the constitutionally-directed role of Congress.

Finally, this thesis asserts that there is certainly room to improve the earmarking process and that transparency measures generally serve the public good. By continuing the political assault on earmarks, politicians may win public sentiment, but at the cost of limiting congressional power and diverting attention from more pressing concerns.

Chapter 1: Introduction

“Whoever battles with monsters had better see that it does not turn him into a monster. And if you gaze long into an abyss, the abyss will gaze back into you.” –Friedrich Nietzsche

Are earmarks a monster created out of political necessity? Are crusaders against earmarks themselves guilty of deflecting attention from more pressing concerns? Regardless, and generally speaking, it is probably a fair statement to say that the public's perception of earmarks is decidedly negative. Even to those who are only casual observers of politics, earmarks are equated with wasteful spending or a corrupt practice that is inextricably entangled with special interests or vote buying. The media environment helps perpetuate—or maybe even created—this association by using such buzzwords as "pork" and "bridges to nowhere" and capitalizing on actual known cases of corruption. Comments on blogs and news sites by random individuals are an echo chamber for that so called public knowledge. Furthermore, politicians of all stripes feed this stereotype and have attempted to seize the moral high ground by decrying earmarks in all forms. Ads from both political parties make promises to fix Washington and to reign in out of control spending in part by targeting earmarks. Anecdotally at least, this confluence of forces has succeeded in demonstrably creating a boogeyman out of earmarks—the term has become politically toxic.

In the recent 2010 elections, Tea Party candidates like Marco Rubio were victorious by arguing against government spending, including earmarks. Many other candidates, especially Republicans, echoed a similar theme about spending. Arguably, that and the current economic state were the principal reasons Republicans were able to seize control of

the House. Ironically—based purely on anecdotal observations—Republicans have more often than Democrats been labeled as earmark champions and in some circles are being called hypocritical for now attacking Democrat spending. Regardless, Republicans will assume control of the House next year and they cannot ignore the message delivered to the electorate on the campaign trail which very much included the subject of earmarks.

However, there are indications that within the Republican Party, there is some division on what to do about them. In one camp, Senator Mitch McConnell argued that earmarks have no effect on the deficit and should not be a primary focus. In contrast, fellow Republican Senator Jim DeMint represents a growing chorus that says earmarks should be banned permanently.³ That seems to be the dominant trend, and by committing to that path, it begs the question of what banning earmarks will truly accomplish. Doing so, advocates say, will help to control spending and on the surface it seems like a well-intentioned act to answer constituent concerns about budget deficits and the like. However, a cynic might also say that such bold proclamations do little but fan the flame of voter anger and divert attention from truly difficult decisions that must be made. Does the attack on earmarks equate to little more than a political red herring? Perhaps, or perhaps it is justified to acknowledge that often times perception is reality.

Invariably, it is safe to assume that the issue of earmarks is far more complicated than what can be captured in sound bites or what can be articulated in heated political debates. Removing emotion from the equation is a prerequisite step in truly understanding the role earmarks play in the legislative process. Further analysis necessitates an

³ *Special Report with Brett Baier*. Rohrbeck, Doug. Fox News Channel. Nov 8, 2010. Television.

understanding of the appropriations process and the interaction between the legislative and executive branches in order to put earmarks in a proper context. Additionally, in order to discern the way ahead for earmarks, it is useful to exam pro and con arguments in favor of earmarks in addition to historical measures taken to limit their use.

Chapter 2: Literature Review

“If I have seen further it is only by standing on the shoulders of giants.” –Isaac Newton

A lot of the popular rhetoric surrounding earmarks is based on opinion pieces and sound-bites echoed in the blogosphere or popular media. At least when it comes to the topic of earmarks, those types of forums are not conducive towards an informed debate. Still, they are useful in highlighting how poorly understood earmarks are and for framing a line of study. Very simplistically, the question over earmarks boils down to whether or not they are beneficial and a corruptive influence. Earmarks are not a new phenomenon and have existed in one form or another since the very early days of this nation, but the fervor over them has reached a much greater intensity in recent years, which begs the question: Why?

If earmarks and resource allocation were a black and white issue, the Constitution lays out the solution. Constitutionally, the “power of the purse” lies with legislative branch so it holds that Congress should control spending. That fact is of paramount importance to this paper and was also thoroughly analyzed by Richard Fenno in his 1966 book, not coincidentally titled, *The Power of the Purse*.⁴ In that book, Fenno also acknowledged the importance of both the House and Senate Appropriations Committees in the budgetary process and how despite any political tensions that surface from time to time, both chambers of Congress guard the institution’s ability to influence spending which is the

⁴ Richard Fenno. *The Power of the Purse: Appropriations Politics in Congress*. New York: Little Brown & Company, 1966.

source of Congress's power, especially in the House. Attempts in the past to limit the Appropriations Committee were always heavily weighed against what doing so might do to the power of Congress as a whole. That dynamic is also evident today in the discussion over earmarks. Many contend that any limitations on earmarks, and hence Congress's ability to direct spending, diminishes Congress's power in favor of the executive. That concept is further explored in this paper.

Much of this thesis focuses on the assertion that earmarks are not that significant in the overall appropriations process as measured by dollar amount, but that for some reason there is a greatly outsized outpouring of emotion, scrutiny, and media attention paid to earmarks relative to their size of the budget. The amount of money involved is miniscule by comparison to other congressional appropriations. The variable that accounts for this interest has a great deal to do with politics. On that note, many scholars have analyzed Congressional politics and there is no shortage of material in that regard. More pertinent for this thesis, however, is work that focuses on budgetary politics. On that subject precisely, in 1984, Aaron Wildavsky wrote *Politics of the Budgetary Process* in which one of the principal themes explored is how budgets are really answers to political questions of how to allocate scarce resources.⁵ As such, analyzing the political actors and their respective motivations are critically important to understanding the budget process. That topic is also explored in this thesis, from the perspective of earmarks as an expression of resource decision-making and issue is taken with popular opinion that seems to want to put more resource decision-making authority in the executive branch. In that sense, the tone of

⁵ Aaron Wildavsky. *Politics of the Budgetary Process*. Glenview, IL.: Pearson Education, 1984.

this paper runs counter to popular opinion. Similar to Wildavsky, Allen Schick and Felix LoStracco also explore the politics of budgeting and they pay special attention to the friction between the president and Congress in *The Federal Budget: Politics, Policy, Process*.⁶ Their book also thoroughly explains the mechanics of the federal budgeting process and along with the Congressional Research Service, this book proved to be an excellent source in understanding the procedures involved. In fact, understanding the budget process is important in properly contextualizing the role of earmarks and putting them in perspective.

Though not nearly in as much detail, this thesis also explains those budget fundamentals to the reader, early in the paper, as part of a foundation for questioning the legitimacy of arguments that claim cutting earmarks will lead to less spending and a reduced budget. Budget mechanics aside, Schick's executive-legislative conflict theme, is really central in understanding the politics behind earmarks when one peels back the rhetoric in today's popular media. Earmarks can be viewed as a weapon in that power struggle as each branch maneuvers for advantage. Interestingly, many in Congress from both parties, perhaps unwittingly, are perfectly disposed to cede at least a portion of the resource decision-making battle to the executive branch. One has to question the rationale for that. Having surveyed many opinion pieces and talk shows it seems that many lawmakers have focused narrowly on the political expediency of denouncing earmarks on the basis that they are publicly unpopular. Granted, that is supposition, and perhaps that

⁶ Allen Schick, and Felix LoStracco. *The Federal Budget: Politics, Policy, Process*. Rev. ed. Washington, D.C.: Brookings Institution Press, 2000.

course of action is an overall smart strategy. After all, since lawmakers are representatives, it does make sense that they echo constituent concerns. A more cynical view holds that focusing on earmarks is a useful distraction from concentrating on larger and more difficult issues like closing the budget deficit. Granted, there are issues with earmarks, and cases of legitimate abuse, but when taken in the aggregate and in context, this paper takes the position that the earmark debate consumes entirely too much time and effort. The fact that they do is an interesting development in itself and justifies further study into the topic.

Opponents of earmarks, however, dismiss their significance as a check on executive power and often highlight their perceived corruptive influence. They also tend to make the contention that legislators spend an inordinate amount of time chasing after earmark dollars at the expense of other legislative duties. While that is a subjective statement, opinions on the propriety of such action also seems to be in the eye of the beholder and depend heavily on one's opinion of what the proper role of Congress should be—another concept further explored in this paper. Above all though, the literature on the budgetary process and corresponding politics does little to answer the simple question posed earlier, on whether or not earmarks are beneficial and a corruptive influence. That is a subjective question, and though a simple one, it evades a simple answer—it depends, and the very nature of the question can beget at most an informed opinion as an answer. Even the definition of an earmark depends on who is asking and who is giving the response as there is no agreed upon standard. Furthermore, most of the negative material over earmarks is distributed in opinion pieces, testimony, websites, nonprofits, media outlets, and other such sources. Judging purely from the chorus of loud voices, one can feel comfortable in joining what

appears to be a significant majority that publicly decries earmarks. In that sense, this paper is contrarian in its assertion that the debate over earmarks is largely over a fictitious construct. Though one opinion cannot necessarily be outweighed against another, the corresponding rationale can be examined. With that perspective in mind, a primary goal of this thesis aims to examine the efficacy of arguments both for and against earmarks by analyzing a sampling of opinion pieces and highlighting the tremendous amount of misinformation that is presented as fact.

Chapter 3: Defining Earmarks

"I am very much afraid of definitions, and yet one is almost forced to make them. One must take care, too, not to be inhibited by them." --Robert Delaunay

Any decent analysis requires a proper definition of terms and any discussion of earmarks is very much influenced by what definition is used. In fact, there is no standardized definition across the whole of government or the private sector.⁷ That in and of itself is a strong indicator of the difficulty involved in doing a succinct and standardized analysis of earmarks. Words matter and definitions can be skewed to the preference of whatever entity is using it. In the earmarking arena, there are also numerous synonyms or related terms like congressional earmark, congressional directive, presidential earmark, administration earmark, executive branch earmark, and directed spending. All of those terms are related but the differences among them are large enough to cause significant debate. The one thing they have in common is that they all deal with discretionary funding that is allocated either by law, non-statutory direction, or administrative direction to benefit a specific purpose, entity, or geographic area. Furthermore, according to the *Congressional Quarterly's American Congressional Dictionary*, under the broadest definition of earmarks, one can say that virtually every appropriation is an earmark.⁸

In one form or another, bureaucrats, politicians, and our nation's leaders have always made difficult decisions about how to allocate scarce resources. The public, in turn,

⁷ Clinton Brass, Garrett Hatch, and Eric Petersen, "Bush Administration Policy Regarding Congressionally Originated Earmarks: An Overview." CRS Report for Congress (Nov 17, 2008): 2. Available at www.crs.gov (accessed September 7, 2010).

⁸ Walter Kravitz, *Congressional Quarterly's American Congressional Dictionary*. 3rd ed. (Washington, D.C.: CQ Press, 2001), 87-88.

judges them on their decision-making and arguably the most publicly accountable is the politician—certainly more so than a nameless political appointee. Having this battle over resources in mind, our founding fathers created an adversarial system that prevents any one branch of government from having a monopoly on decision-making authority. With that as a backdrop, it is understandable how over the years our different branches of government have sought to assert their prerogatives and authorities, which many times boils down to a resource debate. To that end, whether you call it an earmark or something else, the President, agencies, and Congress have all been involved in the process. Yet the majority of rhetoric focuses on Congress and Presidential or agency earmarking is discussed much less, despite being almost functionally equivalent in the end result.

Still, that has not prevented the executive branch from trying to assert its moral prerogative on earmarking. The Bush Administration codified its definition of earmarks in Executive Order 13457, Sec. 3 (b):

[T]he term ‘earmark’ means funds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.⁹

That definition appears to have evolved from a series of memoranda in the Office of Management and Budget and a key characteristic is the use of the word "circumvents", to imply, rightly or wrongly, that the executive branch is the authoritative decision maker

⁹ George W. Bush, "Protecting American Taxpayers From Government Spending on Wasteful Earmarks." Executive Order 13457. Available at <http://www.archives.gov/federal-register/executive-orders/2008.html> (accessed September 6, 2010).

on allocating resources. The Obama Administration defines earmarks in much the same way as the previous administration which is an extremely broad position that infers Congress is an obstacle to efficient spending:

Earmarks are funds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.¹⁰

Not surprisingly, Congress has a slightly different definition. In the House, Rule XXI, clause 9(e) states:

[T]he 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 discretionary 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.¹¹

The Senate has a very similar definition, described in Rule XLIV, clause 5(a):

[T]he term “congressionally directed spending item” means a provision or report language included primarily at the request of a Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan

¹⁰ Office of Management and Budget, "Earmarks." The White House. Available at <http://earmarks.omb.gov/earmarks-public/> (accessed October 7, 2010).

¹¹ United States House of Representatives, "Rules of the House of Representatives - Rule XXI." Government Printing Office. Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_house_rules_manual&docid=110hruletx-78.pdf (accessed October 7, 2010).

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[.]¹²

Citizens Against Government Waste, a congressional watchdog group, uses a decidedly more negative definition towards Congress that favors the executive branch and Presidential decision making:

A “pork” project is a line-item in an appropriations or authorization bill that designates funds for a specific purpose in circumvention of established budgetary procedures. To qualify as pork, a project must meet one of seven criteria [requested by only one chamber of Congress; not specifically authorized; not competitively awarded; not requested by the President; greatly exceeds the President's budget request or the previous year's funding; not the subject of congressional hearings; or, serves only a local or special interest] that were developed in 1991 by CAGW and the Congressional Porkbusters Coalition.¹³

Definitions clearly matter and set the stage for debate. Due to the similarity of the House and Senate versions and the significant disparity with the executive, one can surmise that a good portion of the earmark debate boils down to questions over power and the proper role of each branch of government. Public sentiment highlights how a much darker light currently illuminates Congress over this issue. Many definitions of earmarks on blogs and anti-earmark sites use negative buzzwords such as pork and pet projects. With that in mind, Republicans in the House attempted to seize the moral high ground in early 2010 by voting to ban all earmarks for at least a year. Republican Members received guidance on

¹² United States Senate, "Congressionally Directed Spending and Related Items - Rules of the Senate." United States Senate Committee on Rules and Administration. Available at <http://rules.senate.gov/public/index.cfm?p=RuleXLIV> (accessed October 7, 2010).

¹³ Citizens Against Government Waste, "Pork Barrel Report," Available at <http://www.cagw.org/reports/pig-book/> (accessed November 3, 2010).

implementation and on what was technically considered an earmark and what was not (See Appendix C) in order to avoid public scrutiny. All of this sets the stage for a larger question over what the proper role of government is. Part of the answer over where earmarks should fall into the legislative process, if at all, depends on a fundamental perspective about the role of Congress.

Chapter 4: Expectation of Government and the Role of Congress

“Congress is so strange. A man gets up to speak and says nothing. Nobody listens - and then everybody disagrees.” --Boris Marshalov

In the dialogue about earmarks, often times public discourse focuses on wasteful spending and inefficiency. The counterpoint to that, of course, is a desire for a responsive government that functions in an orderly manner, free of gridlock and partisan bickering. That sounds fantastic but is woefully divorced from reality, particularly with the way Congress operates. Numerous books have studied Congress and John Kingdon wrote a particularly notable one, analyzing agenda setting and policy formulation, which is backed up by empirical research. One might think that his scientific method implies that there is a structured and elegant approach to that process. Rather, his data suggests that there are multiple actors with varying degrees of influence that contribute generally in three areas: problems, policies, and politics. Those components are worked on concurrently, and come together in a "garbage can model" process, resulting in an amorphous body of work that has a chance of becoming actual legislation when an appropriate "policy window" opens up to give the opportunity to do so.¹⁴

Yet despite the apparent chaos, there is an underlying order to the process of policymaking with definite causes and effects—they are just many and varied. Similar to how chaos theory describes dynamic systems that are seemingly random, Kingdon also eloquently explains the tumultuous Washingtonian process. Just plain and simple, there are

¹⁴ John W. Kingdon, *Agendas, Alternatives, and Public Policies* (New York: Longman, 2002), 71-88.

a number of variables and actors at work that are subject to individual whims, uncontrollable events, and other forces of nature. None of Kingdon's concepts are difficult to understand; the difficulty only lies in trying to articulate and grasp all of the variable processes at work on a given matter. Such is certainly the case with earmarks, and even the brief discussion about definitions should indicate an underlying complexity. Sometimes political theory focuses on a structured and sequential process of how laws are made and most elementary education just scratches the surface. Kingdon sheds a little more light on the process, enough that one can confidently look past the surface issues in order to better understand that there are complex dynamics at work. With that in mind, it might be futile to hope for a truly efficient government and expectations may have to be lowered a bit. Furthermore, eliminating things like earmarks will unlikely change the fundamental nature of our legislative body.¹⁵

To many outsiders—and probably even some insiders—Congress is a strange and seemingly dysfunctional entity that cannot be trusted to safeguard our nation's treasure. Some would say that the dysfunction is by design, that the Founders clearly established a ponderous and cumbersome system for the sole purpose of advancing slow and deliberate change vice rapidly decided legislation that might impair personal freedom. The same logic can be applied to the allocation of resources. Despite any disparaging viewpoints, Congress was and continues to be the voice of the people of the United States. Arguably, the Founders addressed the legislative branch first in the Constitution because they felt it

¹⁵ Kingdon, *Agendas, Alternatives, and Public Policies*, 71-88.

was the most important component to the new system they were creating.¹⁶ Many still try to discern precisely what the Founders intended when they drafted the Constitution, especially as the application of its law has changed over time. What is clear is that the Congress was designed to play different roles and some of those roles have changed over time. Indeed, one of the strengths of the Constitution is its inherent flexibility. In fact much of the Congress's current constitutional derived powers have arisen out of historical experience and from the interaction with the executive and judicial branches. The use of earmarks has also correspondingly changed over time.¹⁷

Concurrently, perceptions of the Congress as an institution have also changed over time. What is interesting to note is that the perception of Congress by the public varies depending on what role or vision is being ascribed to it at the time of scrutiny, even when it comes to earmarks. Most appreciate when a new bridge or road is built in their district, yet the same person could be absolutely livid that another state received money for an airport. Of those visions, it can be said that the Congress has three distinct roles: being an assembly of constituent representatives, a national legislative body, and a watchdog or check on executive power. The discussion over earmarks is greatly influenced by what role is attributed to Congress.¹⁸

ROLE AS CONSTITUENT REPRESENTATIVES

¹⁶ The U.S. Constitution, Article I.

¹⁷ Kingdon, *Agendas, Alternatives, and Public Policies*, 71-88.

¹⁸ *Ibid.*

A unique characteristic of the American political system is the relative weakness of political parties as compared to parliamentary systems, particularly in Europe. To some this is counter intuitive in light of partisan-oriented political maneuvering. Yet despite recent trends, historically, the Democrat and Republican parties exerted relatively weak influence over their members. This manifested itself in Congressional Representatives and Senators that were and are highly responsive to constituent demands. Institutionally and as a matter of legislative procedure, with the near absence of political party direction, legislation lived and died in committees. With a decentralized strong committee system, more often than not legislation was stalled, defeated, or otherwise mitigated.¹⁹

The committees were not beholden to party politics and grew to become more and more responsive to constituent demands. Sometimes this meant bringing home the "bacon," but it often meant protecting constituents from what was perceived to be harmful legislation. Historically, this resulted in a very low amount of legislation actually becoming law. Interestingly, that performance measure or lack thereof, results in varying perceptions of Congress as an institution. Depending on one's perspective, this slow pace can be viewed as right in line with the Founders' intent, but it also engenders complaints of inefficiency and grid-lock.²⁰ In short, if you were a constituent that benefited, your view of Congress or at least your member was favorable. To everyone else, Congress likely engendered negative criticism.²¹

¹⁹ Erik. Damgaard, "How Parties Control Committee Members," in *Parliaments and Majority Rule in Western Europe* (Frankfurt: Campus Verlag, 1995), 308.

²⁰ Ibid.

²¹ Julius Turner, *Party and Constituency* (Baltimore: Johns Hopkins UP, 1970), 62.

Perceptions evolved over time as events forced a reexamination. Prior to the 1994 Republican Revolution, members of Congress were far more focused on developing a personal reputation separate and distinct from their party affiliation. Constituency demands were more prominent and members sought to attract support across party lines in an effort to gain a larger electoral base. Ideology was also not as significant a factor which meant it was much more politically and personally tenable to achieve compromise. Candidates ran their election campaigns with a focus on their own identity as opposed to party politics.²² The political polarization in the nineties changed this and the closing of political party ranks, so to speak, forced renewed consideration of the demands and legislative goals of the party as a whole. This has a strong bearing on what the Republicans will do about earmarks in the future. Compromise also became harder to come by and legislative stalemate became more frequent that resulted in a decreased favorability rating in the eyes of the public.²³

Yet even with the ideological divide, a common concern for all members of Congress continues to be getting re-elected. In that sense, it remains business as usual. Though the Democrats suffered a huge electoral defeat during the Republican Revolution, 84% of incumbents remained in office after 1994.²⁴ The largely homogenous Congressional districts ensured for the most part that members could continue to cater to constituent demands to a large degree, isolating themselves from national political trends.

²² Thomas E. Mann and Bruce E. Cain, *Party Lines Competition, Partisanship, and Congressional Redistricting* (New York: Brookings Institution, 2005), 31.

²³ Ibid.

²⁴ Sarah A. Binder, *Stalemate Causes and Consequences of Legislative Gridlock* (New York: Brookings Institution Press, 2003), 110.

Thus the role of Congress as an assembly of constituent representatives remains intact, as designed.²⁵ Is it wrong then for Members to seek earmarks that benefit their constituency?

ROLE AS A NATIONAL LEGISLATIVE BODY

Yet it is not enough for the Congress to be purely a voice of constituent concerns. It must also address national matters and serve as the federal government. One of the primary reasons the Articles of Confederation failed was precisely because the federal government was far too weak. Members of Congress must therefore balance constituent demands versus national concerns. In times of crisis, the Congress has acted in kind and responded with meaningful and important legislation such as during Reconstruction, the Marshall Plan, and the “New Deal.” In less troubling times, action has been less forthcoming, which is the source of most public dissatisfaction with Congress. Difficult economic times, as the country has experienced over the last few years, also exacerbates negative opinions.

What the Congress can and cannot do is found in the Constitution, specifically with enumerated powers and historical interpretations of the elastic clause. The conduct of Congressional business on a daily basis has been established over time through internal rule-making, statute, and tradition. The scope of work has also changed over the last two hundred years and in order to handle the plethora of legislative, oversight, and administrative tasks, the Congress divides itself into approximately 200 committees and subcommittees to share the burden and maintain some semblance of legislative efficiency.

²⁵ Ibid.

In this manner, the institution structures itself to best be able to handle the nation's business. However, as previously mentioned, committees predominantly killed legislation. The cumulative effect of this in the public's mind is that the Congress is non-responsive and lethargic at best.²⁶

As everyone understands, the Congress is split into two chambers. Senators represent larger, heterogeneous constituencies, have a more difficult time pleasing everyone, and are consequently more ideologically diverse. They are also protected somewhat from re-election concerns by having to run for office only once every six years. This allows for a degree of autonomy and flexibility when addressing matters of national concern.²⁷ As a general rule, Senators can spend the first four years of their term acting magnanimously and then turn more to constituent concerns as reelection time approaches. As intended by the Framers, however, the House is much more intimately tied to the electorate by having to run for office every two years. Constituent concerns reign supreme and it is far more difficult for members of the House to completely abandon local concerns for important national matters. No matter what, members of Congress at one point or another must balance competing national and constituent concerns.²⁸ That debate becomes more difficult when jobs and money are concerned and earmarks are a convenient foil to the concept of national interest. Of course, a compromise position might claim that what is good for the local region is also good for the nation.

²⁶ Lawrence C. Dodd and Bruce I. Oppenheimer, *Congress Reconsidered* (Washington DC: CQ Press, 2008), 141.

²⁷ Wendy J. Schiller, *Partners and Rivals* (New York: Princeton University Press, 2000), 88.

²⁸ David R. Mayhew, *Congress The Electoral Connection*, Second Edition (New York: Yale University Press, 2004), 5.

ROLE AS A CHECK ON EXECUTIVE POWER

Most observers of the U.S. government would say the strength of the system as a whole lies in the fact that power is divided among three branches—so-called checks and balances. The Congress was addressed first in the Constitution and is arguably the most important branch of government because it is most intimately tied to the people. What the Founders feared most was unrestrained power in tyrannical governments and with that in mind, designed the Congress to be a strong check on executive power. For example, the Constitution specifically gives the legislative branch the power to declare war, raise and support armies, and the power of the purse.²⁹ In contrast, for the executive branch, the Constitution grants the President comparatively few enumerated powers.³⁰

Despite this disparity in specifically enumerated powers, there is little question that in today's world the President yields a tremendous amount of influence and power--these powers evolved over time. The public's response to all this seems to have varied over time as well, yet periodically there is a strong outcry for the Congress to get more involved. The 2010 elections for instance can be viewed as a message by voters to curtail an executive branch that overreached its mandate. Regardless, there is little question that the Framers envisioned shared responsibility for governing. Alexander Hamilton articulated this view

²⁹ The U.S. Constitution, Article I.

³⁰ The U.S. Constitution, Article II.

in the Federalist Papers.³¹ Consistent with the theme of checks and balances and distributed powers, this shared responsibility was born out of the reality the Framers witnessed at the time. They were equally wary that the legislative branch had the capacity for tyranny by attempting to govern and regulate everything in a totalitarian fashion, as demonstrated by the French legislature in 1787.³² The key for proper functioning is for the executive and legislative branches to balance each other. In that sense, arguments over earmarks can be viewed as a natural extension of a power play that has been in existence from the founding of this nation.

However, despite the intent of the Founders, much has changed over the last half century, with a decided tilt of power towards the executive branch. As an example of that power loss, one of the most dramatic shifts in power occurred with the way the U.S. conducts war. While Congress was specifically given the authority to declare war, the President's power has grown over time from the strength of the men in office, prior precedent, and also Supreme Court decisions culminating in what some scholars would say is a distortion of the Constitution's original intent. In much the same way, the current debate over earmarks mirrors a combination of factors that are taking even more power away from Congress. In an attempt to reassert itself into the war-making process, Congress passed the War Powers Resolution on November 7, 1973.³³

³¹ Alexander Hamilton. *The Federalist No. 75*.

³² James A. Nathan, "Revising the War Powers Act." *Armed Forces & Society* 17, (4) (Summer 1991): 513-43.

³³ *Ibid.*

The War Powers Resolution was an attempt to reinsert the Congress into the decision making process of when and how to use troops through a series of oversight and reporting requirements. However, as events have demonstrated, reality is far from the intent and the War Powers Resolution has had minimal impact.³⁴ No president has fully complied, acknowledged, or consistently followed the provisions of the act. Public perception of this phenomena has also changed over time and is also a product of other competing domestic and political concerns, and it seems the public's overall concern has turned toward domestic concerns with little worry over Congress's role as a check on executive power. That has potentially dangerous ramifications. Though Congress has the constitutional authority to declare war, that power is virtually meaningless in modern application. Despite that weakness, one of the most effective tools Congress has to check the executive branch is the power of the purse, which is also derived from specifically enumerated powers. Would giving up earmarks cede some of that authority, similar to how war powers have diminished? If Congress cannot earmark, will the executive branch be the sole arbiter of resource decision making?

INTERACTION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES

Leaving the executive branch as the sole arbiter of anything is contrary to the principles that founded this nation. The Founding Fathers created our system of government so that there were three separate branches that share power. By design, this system is contentious in order to prevent usurpation of complete power by any one component of government. Historically, the most contentious and interesting dynamic has

³⁴ . Nathan, "Revising the War Powers Act", 513-43.

been between the executive and legislative branches of government. Today, for instance, we have a system in which the executive branch has regulatory power through agencies—so called administrative law—and a legislative branch which creates statutory guidelines by passing laws. At times these systems are at odds and that tension manifests itself in the debate over congressional earmarks.

Although it may appear that President has the upper hand in the power struggle today, historically that was not always the case and Congress used a variety of means to exert its influence. For instance, in an attempt to exert greater control over executive action, the Congress created the concept of a legislative veto system in the 1930s with President Hoover's consent.³⁵ In effect, the Congress created the ability to halt Executive action it did not approve of. The use of legislative vetoes increased steadily until the early 1980s when it was challenged in court. Ultimately, the U.S. Supreme Court ruled in 1983—in the case of *Immigration and Naturalization Service v. Chadha*³⁶—that the practice of legislative vetoes was unconstitutional and a violation of the separation of powers doctrine. As part to the ruling, the Court stated that Congress has the responsibility of issuing laws, but once that occurs, has no right to interfere in their execution, which is solely the role of the executive branch.³⁷

³⁵ A legislative veto is defined as the repeal by Congress of federal agency or presidential actions. The Executive actions stand unless nullified by disapproval resolutions passed by Congress.

³⁶ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

³⁷ University of Missouri Kansas City, "Separation of Powers Under the United States Constitution," UMKC School of Law. Available at <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.html> (accessed November 1, 2010).

That being said, once an agency is created and laws formulated, Congress is not without recourse in shaping executive action. By design, the legislative branch does have inherent oversight responsibilities and ultimately controls the purse. The annual budgetary process is an extremely effective time in which to examine the performance of particular agencies and to decide whether or not funding should be changed or eliminated. Certain committees also have direct oversight over agencies and can call for hearings if necessary. Agency officials usually testify before the appropriations subcommittee with jurisdiction over the agency's budget request. The testimony is comprised of detailed written budget justifications prepared by an agency and submitted to the applicable subcommittee. It is usually published as part of the subcommittee's hearings. Each year, the hearings of the House appropriations subcommittees combined often exceed 100,000 pages, covering testimony of about 10,000 witnesses.³⁸

In addition to formal-derived means of asserting influence over agency behavior, Members of Congress have other subtle means of doing so commensurate with established rules and procedures that do not violate the separation of powers doctrine. Members may properly communicate with an executive or independent agency on any matter to request information or a status report; urge prompt consideration; arrange for interviews or appointments; express judgment; or call for reconsideration of an administrative response which is not supported by established law, or federal regulation or legislative intent.³⁹

³⁸ Bill Heniff Jr., "Agency Justification of the President's Budget," CRS Report for Congress. (June 12, 2008): 2-4. Available at www.crs.gov (accessed October 2, 2010).

³⁹ University of Missouri Kansas City, "Separation of Powers Under the United States Constitution." Online.

Though this process is informal, it is important that Members and staff are careful balancing facts, opinions, constituency concerns, and a respect for the separation of the branches of government. During this process, Members should consider expressly assuring agency administrators that no effort is being made to exert improper influence and that all correspondence is in accordance with full and fair consideration, consistent with applicable law, rules, and regulations. Informal action can yield far quicker responses as the mere act of conducting inquiries and highlighting potential problems often will result in changed behavior. As a final recourse, if executive agency and bureaucratic behavior is particularly egregious, the legislative branch can enact laws to change the situation. Once the fundamental statutory guidelines are changed, the agency must follow the law. The key distinction with this course of action, as opposed to a legislative veto, is that it does not attempt to interfere with day to day execution of the law—it changes the law.⁴⁰

Just as Congress attempted to assert its authority with a legislative veto, the President has often sought a line item veto to strike out particular portions of bills that he might find offensive, while not sacrificing the whole bill. The first proposal to provide the President with an item veto was introduced in 1876. Then, President Grant endorsed the measure as a response to the growing practice in Congress of attaching provisions altering permanent law to appropriations bills. Ultimately, that effort went nowhere. However, over a century later, The Line Item Veto Act⁴¹ was signed into law on April 9, 1996 and it became effective January 1, 1997. Key provisions allowed the President to cancel any dollar amount of discretionary budget authority, any item of new direct spending, or certain

⁴⁰ University of Missouri Kansas City, "Separation of Powers Under the United States Constitution." Online.

⁴¹ Public Law 104-130, 110 Stat. 1200.

limited tax benefits contained in any law, unless disapproved by Congress. That ability to "cancel" was an attempt to circumvent the absence of constitutional authority to veto individual portions of a bill. Supporters argued that this authority was a legitimate delegation of Congressional authority to the President and amounted to a form of modified rescissions.⁴²

Normal rescissions cancel previously enacted budget authority and reflect a change in priorities. For instance, money set aside for one procurement can be cancelled in favor of another or can be used to offset unanticipated budget increases in other programs. While the President may recommend rescissions, it is up to Congress to approve them. Congress may also initiate rescission matters on its own, and all rescission actions must be enacted into law. According to the Congressional Budget Act,⁴³ if Congress does not approve rescission requests within 45 days, the budget authority must be made available for obligation. In effect, Congress does not even need to respond to rescission requests because after an elapsed time, previously enacted budget authorities automatically go into effect.⁴⁴

The line item veto changed that dynamic by forcing Congress to respond to all Presidential "cancellations" it did not agree with, requiring a 2/3 majority to override each item vetoed. Obviously, this would require a lot of time pressure on Congress which might not be willing to spend the time needed to save every provision. From the President's

⁴² Virginia McMurty, "Item Veto and Expanded Impoundment Proposals: History and Current Status," CRS Report for Congress (June 18, 2010): 2-6. Available at www.crs.gov (accessed October 1, 2010).

⁴³ Public Law 93-344, 88 Stat. 297.

⁴⁴ Virginia McMurty, "Item Veto and Expanded Impoundment Proposals: History and Current Status," 2-6.

standpoint, this is a very effective method in dealing with congressionally-directed spending.⁴⁵

However, the Supreme Court took issue with that exact point. On June 25, 1998, in the case of *Clinton v. City of New York*,⁴⁶ the Court held the Line Item Veto Act unconstitutional on the grounds the U.S. Constitution sets forth a very clear process for enacting a law. The Act violated the presentment clause because the Constitution clearly does not allow the President to sign or return a portion of a bill. In order to grant the President true item veto authority, the Constitution would have to be amended.⁴⁷

To opponents of Congressional earmarks, the Supreme Court's decision was disheartening, but the Court realized that a line item veto drastically changes the balance of power between Congress and the President. Though on the surface the President might have welcomed this new authority, it may also have turned out to be more of a hindrance than a benefit. Instead of looking at spending bills in their entirety, the President would be obligated to examine thousands of lines of spending, which would be a huge bureaucratic and political challenge in and of itself. Yes, he could single out a few million dollars here and there on seemingly low priority spending but it would come at the cost of creating enemies out of proponents for that spending.⁴⁸

⁴⁵ Ibid.

⁴⁶ *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁴⁷ Virginia McMurty, "Item Veto and Expanded Impoundment Proposals: History and Current Status," 2-6.

⁴⁸ Charles S. Konigsberg, *America's Priorities: How the U.S. Government Raises and Spends \$3,000,000,000,000 (trillion) Per Year*. (Bloomington, IN: Authorhouse, 2007), 70.

Additionally, if the President fails to veto an item, that means he tacitly supports it, which then could put any blame for wasteful spending on him. Furthermore, it would create a great deal of political posturing, as politicians of all stripes would seek approval from the President prior to even inserting spending language. Major legislation like appropriation bills are often the result of extensive compromises among competing interests. Giving the President an item veto authority to force separate votes after legislation is passed would greatly complicate the ability to assemble important legislation without advance presidential assurances. That fundamentally changes the process in which legislation is passed. Additionally, all of this would greatly complicate the budget process which is complex to begin with and the President might be sacrificing the bigger picture. Instead of focusing on national priorities, he runs the risk of getting bogged down in minutia. It is extremely interesting how a seemingly simple debate over earmarks can have radical consequences for the structure of our government.⁴⁹

⁴⁹ *Konigsberg, America's Priorities: How the U.S. Government Raises and Spends \$3,000,000,000,000 (trillion) Per Year*, 70.

Chapter 5: Committee Development, the Budget Process, and Earmarking

“Congress in session is Congress on public exhibition, whilst Congress in its committee rooms is Congress at work’.” --Woodrow Wilson

THE NEED FOR COMMITTEES

There is no doubt that Congress today faces a myriad of issues, ranging from healthcare reform to Afghanistan and a host of seemingly less important concerns that, nevertheless, compete for the most precious commodity members of Congress have—time. Even if the body worked at peak efficiency, it is doubtful that it could adequately address all the issues in front of it in a timely manner. As it stands, the public in general complains frequently about the inefficiency of government. Supporters say that is exactly as the Founders intended though even in the nascent days of our government, it was quickly realized that the legislative workload would have to be distributed in some manner, hence the creation of the committee system. This system evolved over time and has created a situation where legislative action is fragmented to include decisions about resource allocation. While perhaps not ideal, under the circumstances it is the best alternative we have and it fits in with the previous discussion about the role of Congress and the identity crisis created between its role as a representative body and national assembly.

From a purely philosophical standpoint, most complex problems are more easily solved when they are broken down into component pieces. Even from a computer science standpoint, the issue of distributed problem solving is well known, understood, and embraced. In that community, “distributed problem solving involves the collective effort

of multiple problems solvers to combine their knowledge, information, and capabilities so as to develop solutions to problems that each could not have solved as well alone.”⁵⁰ Interestingly, the challenge with microchips is the same as with people in that one has to address the best manner how each agent acts so that the collective whole works efficiently.⁵¹ The same concept extends to governments and historically we have seen the inefficiency involved with command economies like the former Soviet Union which further enforces our belief in federalism as the best way to address the needs of our citizenry. This same logic can be applied to the concept of resource allocation and earmarking. Critics contend that the executive branch should make all of the decisions on resource allocation, but perhaps that is unwise and a better course of action is to maintain a form of decentralized decision-making.

Cynics can easily jump in here and chastize Congress for acting in anything but a logical manner, so what applies to microchips cannot be applied to politicians. In this vein, Christopher Deering and Stephen Smith write:

Fragmentation describes the degree to which a committee attracts the attention of outsiders who perceive their interests as unrelated to each other. Fragmentation in a committee’s political environment is rooted in the committee’s jurisdiction: the larger the number of topics falling under its jurisdiction, the more fragmented its political environment is likely to be.⁵²

The critical concept mentioned in those lines is the idea of the political environment. Politics changes the equation considerably and adds a great deal more

⁵⁰ Edmund Durfee, "Distributed Problem Solving and Planning," Artificial Intelligence Laboratory. Available at <http://www.isi.edu/~blythe/cs541/Readings/ACAI01.pdf> (accessed August 9, 2010).

⁵¹ Ibid.

⁵² C.J. Deering, *Committees in Congress* (Washington D.C.: CQ Press, 1997), 33.

variables to consider. That strikes at the concept of resource allocation in the form of earmarks. Given the human component, one might conclude that giving too many political agents a decision is indeed problematic as it leaves the issues at hand under the purvey of flawed agents. Under that fragmented scenario, the sum of many flawed decisions inevitably leads to a flawed outcome and the conclusion that Congressional earmarks are a bad idea.

Other criticisms abound. Some would say that merely through the process of fragmentation, the focus on individual parts blinds people to the totality of the whole. In essence, the forest is ignored for the trees. Likewise, a congressman can be too greatly interested in securing an earmark for his constituency, but be blinded to perhaps a greater need for resources elsewhere. In general, though, knowledge in the modern era has primarily advanced because of specialization and understanding component parts. Human organization, and other fields have led to understanding complex systems as more than the sum of their parts.⁵³ However, the great danger lies with an inability to turn that specialized knowledge into greater understanding of the aggregate issues. To paraphrase T.S. Elliott, as a result, our ability to turn information into knowledge and knowledge into wisdom has diminished.⁵⁴ The implication for earmarks is that a greater knowledge of local issues has the potential to more greatly advance the greater good, assuming it is somehow synchronized with the big picture.

⁵³ G.P. Williams, *Chaos Theory Tamed* (Washington D.C.: John Henry Press, 1997), 45-56.

⁵⁴ T.S. Elliott, *The Rock* (New York, NY: Faber & Faber, 1934), 2-12.

Another potential problem is the issue of unintended consequences. While individual components may be addressed to seeming satisfaction, failure to understand their interaction with the larger whole may also lead to unforeseen problems down the road.⁵⁵ Sometimes situations may in fact become worse, which then begs the question of whether “efficiency” in Congress is good or not. Do we fundamentally trust our legislators to do a complete and accurate analysis of all issues and potential problems? Probably not. Despite these potential shortcomings, the committee system with its jurisdictional processes is still the best solution we have. Relatively recent developments within Congress also mitigate to an extent some of the above mentioned concerns. In particular, the growth in staff professionalism and activity of the congressional support agencies, tend to promote great efficiency and, more importantly, knowledge and wisdom of the background details of policy concerns. Even though the political component is never removed—nor should one necessarily desire an absence of politics—proper staff analysis serves as an important guide to legislative action. Overtime, staffs learn to value information more when they know and trust its source and understand its political motivations, which in the end serves to better educate the members themselves.⁵⁶

Despite the grumblings of the day to day public, the reality is that Congress works hard to address the myriad of issues at hand. Though too much efficiency is not desirable, lest hasty mistakes be made, Congress, nevertheless, developed the committee system as a means of more effectively addressing its legislative agenda. Despite the

⁵⁵ Williams, *Chaos Theory Tamed*, 45-56.

⁵⁶ F. Maltzman, *Competing Principals Committees, Parties, and the Organization of Congress* (New York: University of Michigan Press, 1999), 45-60.

inherent difficulties with coordinating multiple actors, in the end, fragmentation best serves the American people, including the concept of resource allocation.

THE APPROPRIATION COMMITTEES

As far as resource allocation is concerned, the most important bodies in Congress that deal with that subject matter are the appropriation committees. The majority of congressional earmarks are decided upon by the appropriation committees of both the House and Senate. As mentioned, the committee system in general evolved as a means of distributing the legislative workload and also as a reaction to near autocratic “czar-like” political control in the early 1900s.⁵⁷ Power and status in committees were based on time served within the committees while rules were adapted to secure a member’s position on the committee from arbitrary dismissal or reassignment. The seniority system, along with a concerted effort in the 50s to maintain committee autonomy, served to further diminish the importance of remaining loyal to political party leadership. This legislative environment had a profound impact on how members responded to constituent concerns, and had the net effect of increasing individuality and divergent political views. Though the majority party earned the right to seat committee chairs, those chairmen did not often feel the need to demonstrate party loyalty. On the contrary, their status and independence grew even more over time.⁵⁸

⁵⁷ Richard F. Fenno and Richard F. Jr Fenno, *Congressmen in Committees* (Berkeley: Univ of California Inst of, 1995), 93.

⁵⁸ *Ibid.*

That same environment shaped the appropriation committees and their various subcommittees. By virtue of writing the nation's appropriations bills and controlling the expenditure of money, these committees hold a great deal of power and influence. The House and Senate Appropriations Committees' evolved over time with significant changes occurring early in the twentieth century. In 1920, the House started to consolidate jurisdiction over all appropriations matters into the Appropriations Committee and after the Budget and Accounting Act of 1921⁵⁹, started to organize that committee into subcommittees based on the structure of the executive agencies they were appropriating for. Later, in 1922, the Senate Appropriations Committee followed a similar organizational plan, which marked the beginning of the modern appropriations construct.⁶⁰

From that point until the end of World War II, the appropriations structure changed little and was primarily marked by consolidating various spending bills. The subcommittees changed radically after the war and through 1970, largely to keep pace with significant changes in the executive branch, such as the creation of the Department of Defense, and efforts to create separate appropriations bills. Little changed again until 2003 when both the House and Senate created a subcommittee to handle the newly established Department of Homeland Security and made changes in structure to nearly every other subcommittee. In 2005, the House eliminated three subcommittees and the Senate eliminated one, which resulted in differing committee jurisdictions and

⁵⁹ Public Law 67-13, 42 Stat. 20, enacted June 10, 1921).

⁶⁰ James Saturnao, "Appropriations Subcommittee Structure: History of Changes from 1920-2007." CRS Report for Congress (Jan 31, 2007). Available at www.crs.gov (accessed October 7, 2010): 2-8.

complicated the passage of appropriations bills. In 2007 the House and Senate appropriations committees reorganized again to reestablish twelve parallel subcommittees to handle passage of the twelve annual appropriations bills . The majority of Congressional earmarks will appear in one of these bills or a corresponding report.⁶¹

THE BUDGET PROCESS

Earlier in this paper it was mentioned that the broadest definition of earmarks could include all appropriations matters. Appropriation is a power specifically granted to Congress in the Constitution, which states, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁶² This power is arguably the most significant given to Congress, which historically has guarded it through the passage of various laws. For instance, the Antideficiency Act⁶³, made it a criminal offense for federal government employees and officers to make contracts or other obligations in advance of or in excess of an appropriation. Other laws state that public funds can only be used as directed by Congress during the budget cycle. That is the fundamental justification for Congressional earmarks.⁶⁴

The way in which appropriations and the budget have been handled has evolved considerably over time. The current framework was primarily established by the Budget

⁶¹ James Saturnao, "Appropriations Subcommittee Structure: History of Changes from 1920-2007." 2-8.

⁶² U.S. Constitution, Article I, Section 9.

⁶³ 31 U.S.C. § 1341.

⁶⁴ Sandy Streeter, "The Congressional Appropriations Process: An Introduction." CRS Report for Congress (Dec 2, 2008): 1-26. Available at www.crs.gov (accessed August 2, 2010).

and Accounting Act of 1921⁶⁵ and the Congressional Budget and Impoundment Control Act of 1974.⁶⁶ Before 1974 there was no formal process. Today, the House and Senate Appropriations Committees handle the annual appropriations bills which fund the government--everything from national defense to education. These appropriations bills represent the discretionary portion of the budget and is also where earmarks will be found. Interestingly, these bills equate to only 40% of total federal spending for a given year. The other 60% is controlled by the House and Senate authorization committees and is largely made up of entitlement spending such as Social Security, Medicare, Medicaid, and interest payments on the debt--an important point to remember when earmarks are included in budget deficit discussions.⁶⁷

The President initiates the annual budget cycle when he submits his annual budget for the upcoming fiscal year to Congress, which he must do before the first Monday in February. The President recommends spending levels for programs and agencies of the federal government. This results in the budget authorities that are then ultimately funded--or not--by the appropriations bills which authorize outlays from the treasury. After the budget submission, individual agencies submit supporting material to Congress and may testify at hearings held by the subcommittees of jurisdiction. The President's budget, according to some, may also include earmarks, but historically the appropriations

⁶⁵ Public Law 67-13, 42 Stat. 20, enacted June 10, 1921.

⁶⁶ Public Law 93-344, 88 Stat. 297, 2 U.S.C. § 601-688.

⁶⁷ Streeter, "The Congressional Appropriations Process: An Introduction," 1-26.

subcommittees of jurisdiction only focus on top level budget numbers and agencies do not necessarily have to disclose line item expenditure figures.⁶⁸

Congress responds to the President's budget by adopting a Budget Resolution, as stipulated under the Congressional Budget and Impoundment Control Act of 1974.⁶⁹ The budget resolution must cover at least five fiscal years and sets total new budget authority and outlay levels. It essentially is a spending guideline that reflects Congress's priorities by setting the funding levels for generally twenty functional areas of government. These twenty top level dollar amounts are referred to as 302(a) allocations (referring to section 302(a) of the 1974 Budget Act) and hold committees accountable for staying within spending limits. The full Appropriations Committees of the House and Senate then divide the 302(a) allocations into 302(b) allocations for their twelve subcommittees. These allocations establish the maximum dollar amount that can be spent on the twelve appropriations bills, hence the entire discretionary budget for the year. That is a salient point to highlight in the discussion over earmarking. Before Congressional earmarks even enter the equation, the maximum budget is already set. Therefore any argument that earmarks add to the budget is entirely moot.⁷⁰

In a perfect schedule, the House Appropriations Committee begins to report the twelve appropriations bills to the full House beginning May or June. Ideally, the bills are passed before the August recess. However, Congress often fails to meet those timelines

⁶⁸ Megan Lynch, "The Budget Resolution and Spending Legislation." CRS Report for Congress (June 9, 2009): 2. Available at www.crs.gov (accessed September 7, 2010).

⁶⁹ Public Law 93-344, 88 Stat. 297, 2 U.S.C. § 601-688.

⁷⁰ Lynch, "The Budget Resolution and Spending Legislation", 2.

and generally passes two or more of the twelve separate appropriations bills as a giant omnibus bill later in the year. The Senate follows a similar schedule, but generally starts a little later and finishes in September, though it also often fails to meet those timelines. The fall and winter period is usually the time the two full appropriations committees use to resolve differences between their bills, generally in conference committee. Usually there is very little time left before the end of the fiscal year and Congress is generally forced to pass a Continuing Resolution to continue funding the government at last year's levels.⁷¹

If all goes well, the House and Senate conferees reach agreement on all differences between their respective versions of the bill and issue a conference report to both chambers to be voted on. The conference report typically includes a joint explanatory statement or manager's statement. Though they may appear in the actual bill or corresponding amendments, most earmarks will be found in these accompanying statements. In the defense bill, they primarily appear as tables:

⁷¹ Streeter, "The Congressional Appropriations Process: An Introduction," 2.

Table 1

257

DEFENSE PRODUCTION ACT PURCHASES

For Defense Production Act Purchases, \$150,746,000 is available for
fiscal year 2010, as follows:

EXPLANATION OF PROJECT LEVEL ADJUSTMENTS
(in thousands of dollars)

	Budget Request	House	Senate	Recommendation
BERYLLIUM SUPPLY INDUSTRIAL BASE	19,500	19,500	19,500	19,500
GALLIUM NITRIDE X-BAND MONOLITHIC MICROWAVE INTEGRATED CIRCUITS	2,500	2,500	2,500	2,500
GALLIUM NITRIDE ELECTRONIC WARFARE	120	120	120	120
POWER AND ENERGY SYSTEMS PRODUCTION INITIATIVE	9,086	9,086	9,086	9,086
RADIATION HARDENED MICROELECTRONICS MODERNIZATION	3,000	3,000	3,000	3,000
LITHIUM ION (LI ION) BATTERY PRODUCTION	4,040	6,040	54,040	31,040
Program Increase - Lithium Ion Battery Production		2,000	50,000	27,000
ALUMINUM OXY-NITRIDE AND SPINEL OPTICAL CERAMICS		3,000		2,400
ARMOR AND STRUCTURES TRANSFORMATION INITIATIVE - STEEL TO TITANIUM		8,100		8,100
FLEXIBLE AEROGEL MATERIALS SUPPLIER INITIATIVE		2,600	3,000	2,400
HIGH PERFORMANCE THERMAL BATTERY INFRASTRUCTURE PROJECT		3,000		3,000
INVENTORY FOR DEFENSE APPLICATIONS TO ENSURE RELIABILITY OF SHORT LEAD TIMES		10,000		10,000
LOW COST MILITARY GLOBAL POSITIONING SYSTEM (GPS) RECEIVER		4,000		3,200
METAL INJECTION MOLDING TECHNOLOGICAL IMPROVEMENTS		1,000		800
MILITARY LENS FABRICATION AND ASSEMBLY		4,000		3,200

Source: Explanatory Statement, Division A, Department of Defense Appropriations Act Fiscal Year 2010, p 257.

What is important to note again is that earmarks are not adding anything to the budget. The defense bill, for instance, starts with its 302(b) allocation and subdivides that money among various accounts such as Navy Personnel, Operations & Maintenance-Army, Other Procurement-Air Force, etc. This establishes the baseline budget for all critical functions in the Department of Defense. Funding amounts for various programs and procurements stem from those baseline budget figures. Earmarks do not add to that bottom line. Rather, they direct the department to spend the money in a certain way.

The table above references the account for Defense Production Act Purchases. The Defense Production Act⁷² was passed in 1950 in part to "authorize the President to control the civilian economy so that scarce and/or critical materials necessary to the national defense effort are available for defense needs."⁷³ In the table above, if the "Budget Request" column includes a number, it means the President included it in his request. Then one can see what numbers the House and Senate decided on along with the final recommendation stemming from the joint conference report. If the President's request column is blank in a certain line, it means that particular spending item is Congressionally directed—an earmark. The responsible executive agencies then must spend their funding in accordance with these directives. Therein lays the main point of contention between the executive and legislative branches when it comes to earmarks. The executive branch would much rather have no congressional direction and would

⁷² Public Law 81-774.

⁷³ Stuart B Nibley, "Defense Production Act: The Government's Old but Powerful Procurement Tool." *Legal Times*. April 1, 2002.

prefer to spend its entire budget as it sees fit. If earmarks are removed, it does not affect the budget at all. It just removes some of Congress's influence over the President and some would say that is a dangerous precedent while others would call that prudent. Of course the 302(b) allocations could be reduced by a corresponding earmark dollar amount which would effectively lower agency budgets. However, it is probably safe to assume that agencies would prefer to have a larger budget with earmarks as opposed to a smaller budget without them.

As indicated in the Office of Management and Budget's (OMB) definition of an earmark earlier in this paper, the executive branch's position is that Congressional earmarks "circumvent" the regular budget process. That is a matter of debate and also rests on the assumption that the executive branch is the sole retainer of wisdom when it comes to spending our nation's resources. However, part of the problem with earmarks is that they have been shrouded in mystery. In the above table, take note of the "High Performance Thermal Battery Infrastructure Project," which directs spending of \$3,000,000. Up until a few years ago, that is about the only information the public would have on that particular earmark. However, the Democratic Party instituted reform measures in 2007, after taking back control of the House, by instituting new transparency measures.⁷⁴ Now, as a result of those reforms, the end of the explanatory statement includes tables that show who specifically made Congressional earmark requests. So with the thermal battery example one can see that the request was submitted by Congressman C.W. Bill Young:

⁷⁴ Katie Grant, "Pelosi, Hoyer and Obey Announce Further Earmark Reforms," The Office of Majority Leader Steny Hoyer. <http://www.majorityleader.gov/content/pelosi-hoyer-and-obey-announce-further-earmark-reforms> (accessed October 22, 2010).

Table 2

DPA	Extremely Large, Domestic Expendable and Reusable Structures Manufacturing Center	\$7,840,000	Aderholt; Griffith	Cochran; Shelby; Wicker
DPA	Flexible Aerogel Materials Supplier Initiative	\$2,400,000	Kennedy	Reed; Whitehouse
DPA	Goodrich Terahertz Spectrometer	\$4,000,000		Dodd; Lieberman
DPA	High Homogeneity Optical Glass	\$3,200,000		Casey; Specter
DPA	High Performance Thermal Battery Infrastructure Project	\$3,000,000	Young (FL)	
DPA	Inventory for Defense Applications to Ensure Reliability of Short Lead Times	\$10,000,000	Murtha	
DPA	Lightweight Small Caliber Ammunition Production Initiative	\$3,760,000	Taylor	Cochran; Wicker
DPA	Low Cost Military Global Positioning System (GPS) Receiver	\$3,200,000	Loebbeck; Latham	Grassley; Harkin
DPA	Metal Injection Molding Technological Improvements	\$800,000	Pascarell	
DPA	Military Lens System Fabrication and Assembly	\$3,200,000	Murtha	
DPA	Navy Production Capacity Improvement Project	\$3,200,000	Dent	Casey; Specter
DPA	Production of Miniature Compressors for Electronics and Personal Cooling	\$3,600,000	Rogers (KY)	
DPA	Radiation Hardened Cryogenic Read Out Integrated Circuits	\$1,600,000	Simpson	
DPA	Titanium Metal Matrix Composite and Nano-Enhanced Titanium Development	\$6,400,000		Byrd
DRUGS	Alaska National Guard Counter-Drug Program	\$2,400,000		Begich
DRUGS	Delaware National Guard Counter-Drug Task Force	\$300,000	Castle	Carper; Kaufman
DRUGS	Florida Counter-Drug Program	\$2,900,000	Putnam; Brown, Corrine (FL); Young (FL)	Nelson (FL)
DRUGS	Hawaii National Guard Counter-Drug Program	\$3,000,000		Inouye
DRUGS	HERON Maritime UAS for SOUTHCOM	\$9,340,000	Childers	Cochran; Wicker
DRUGS	Indiana National Guard Counter-Drug Program	\$2,400,000	Visclosky	

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Source: Explanatory Statement, Division A, Department of Defense Appropriations Act Fiscal Year 2010, p 437.

However, even with these increased transparency measures, it is quite a cumbersome task to research earmarks. The explanatory reports can be hundreds of pages long and are not indexed. It should be remembered that in addition to the defense bill examples denoted here, there are eleven other annual appropriation bills. Additionally, there is no supporting material made readily available to justify why a Congressionally directed spending decision was made, such as \$3,000,000 for thermal batteries. It is just a little easier to figure out who made the request, but additional information would have to come from the respective Member's office. It is little wonder then that the typical citizen resorts to what is distilled through the media when it comes to forming an opinion about earmarks. Only graduate students and policy wonks probably take the time to delve into the issue. Thankfully, however, outside groups like Taxpayers for Common Sense do a great job of creating databases that make research a bit more feasible, capitalizing on the modicum of increased transparency.

To finish with the budget cycle discussion, once a conference report and its accompanying statements are reported back to the House and Senate, they may not be amended in either chamber. Some of the criticism over earmarks in the past revolved around the fact that the explanatory statements are not statute and are not directly voted on. An executive order signed by President George W. Bush addressed this and will be covered later in this paper. As a result of that executive order, Congress now includes the explanatory statements in the statutory language of the appropriations bill by referral, essentially saying "see attached." Before this development, it could be said that executive agencies found it in their interest to comply with the wishes of Congress by abiding to the

direction given in the explanatory statements. Now the net result is that earmarks are passed as law, assuming the President signs the bill. After Congress sends the bill to the President, he has ten days to sign or veto the measure. If he takes no action, the bill automatically becomes law at the end of the ten day period. If the President vetoes the bill, he sends it back to Congress which may override the veto by a two-thirds vote in both houses. While there have been numerous threats over vetoing appropriations bills over earmarks, it has historically never been an issue.⁷⁵

The bulk of this discussion focused on the regular appropriations process, but it is worth noting that there are other appropriation measures. The other two main types are continuing resolutions and supplemental appropriations measures. Continuing resolutions are simply legislative tools to keep the government functioning at last year's funding level in the event the appropriations bills are not finished by the end of the current fiscal year. Supplemental appropriations are typically made to address unforeseen disasters like earthquakes but have also been used to fund things like the war effort in Afghanistan and Iraq.⁷⁶

Appropriations measures may also provide transfer authority to modify previously established funding such as switching money from a personnel to maintenance account. However, Congress is very wary about the executive branch moving money around on its own accord, so these types of moves between accounts must be done by statute.

⁷⁵ Streeter, "The Congressional Appropriations Process: An Introduction," 2.

⁷⁶ Sandy Streeter, "Advance Appropriations, Forward Funding, and Advance Funding." United States Senate Budget Committee. Available at <http://budget.senate.gov/democratic/crsbackground/advanceapprop.html> (accessed October 6, 2010).

However, the executive branch may move money between activities in a particular account, which is known as reprogramming. Congress also has rules in place that govern reprogramming actions and they usually involve some sort of notification. Otherwise an agency could divert congressionally directed funding to something else. Each appropriations subcommittee handles reprogramming a little differently.⁷⁷

EARMARKING

It is important to be familiar with the appropriations process and budget cycle in order to understand how earmarks fit into the equation. However, understanding the mechanics of the process does little to explain how particular earmarks are chosen. For that, one truly needs to be inside a Member's office or a part of the professional committee staff to gain an appreciation of the process and decision-making involved. The following discussion is caveated with the fact that it is based on experiences within the office of Congressman C.W. Bill Young, as it pertains to the defense appropriations bill, along with what happens at the Defense Appropriations Subcommittee. Every Member office and other subcommittees will have different procedures on how they handle earmarks.

The earmark cycle typically begins in January. Every entity, be it a corporation, small business, or non-profit, that is interested in an earmark fills out an earmark request form by a certain deadline that is unique to a particular Member's office. For simplicity, Congressman Young uses a form that mirrors what is required for submission to the

⁷⁷ Sandy Streeter, "Advance Appropriations, Forward Funding, and Advance Funding." Online.

Defense Appropriations Subcommittee. Along with a description of the project, the form includes spaces asking for things like which budget line the money will come from, what existing program it could fall under, and which office within the Department of Defense will be responsible for executing the program along with requisite contact information. An earmark request has a lot better chance of succeeding if all those details are filled out. It is not feasible for Congressman Young's staff to do accounting and contact research for the hundreds of requests that come in. Forms that are mostly blank will probably find themselves in the recycling bin. This is where good lobbyists are a factor and a company will pay a lobbying firm to do that kind of research and find an appropriate executive branch recipient of an earmark along with the required accounting data. In this sense, lobbyists are akin to lawyers helping a client navigate the legal process, by filing an appropriate motion and such. Having good contact information at the Department of Defense is also one of the first levels of the vetting process. It allows the staff to have a conversation with the respective office to determine if the subject of the earmark is something the agency could actually want or use. Contrary to popular opinion, most Members want an earmark to provide something of value. Though sometimes the executive and legislative branches do not see eye to eye on an earmark, it is much more desirable that they do.

After the earmark requests are submitted, the requestors will generally seek an appointment with the staff in order to brief them on the project and answer any questions. This is another form of vetting and is also where a good lobbyist can also be helpful in crafting the delivery in a concise and articulate manner. Good, logical presentations, of

course, increase the chances a request will move forward. Interestingly, non-profits tend to fare worse in this arena. It is purely anecdotal, but it seems like a fair amount of them want to float by on the nobility of their proposed charity or project, be it helping veterans, saving children, or ending hunger. Having seen far too many fraudulent non-profits, the staff is wary about groups without a history and solid business model.⁷⁸

As can be imagined, Congressman Young's office receives a lot of meeting requests, due to his seniority, position on the committee, and quite frankly his success with earmarks in the past. Large corporations like General Dynamics, Lockheed Martin, and the like will typically even send their Chief Executive Officers or at least a senior Vice President to brief Congressman Young, thank him for his support, and/or try to get him to change his mind on something like funding a competitor's project. Rarely though, do large corporations discuss earmarks. Rather, they discuss items that are in the base budget like additional C-17s, tanks, ships, etc. While they do receive occasional earmarks, a few million dollars is largely irrelevant in the context of their revenue. Usually when a large corporation receives an earmark it is to fund a capability that Department of Defense did not request, an example being the Predator UAV.

In any case, earmarks will not dictate the success or failure of a large corporation. They can, however, be extremely critical to a small business. In this sense a Congressional earmark can be viewed as a source of small business incubation. Big corporations have the capacity and resources to petition large agencies like the Department of Defense directly. Small businesses do not, and often their Congressman

⁷⁸ Author.

or Senator is the only means of breaking into something like the defense industry which has a high barrier to entry.

Once all the meetings are concluded, the staff begins to rank order the hundreds of submissions, cutting out the nonsensical ones and drawing upon experience and judgment to cull the list to a couple dozen or so. That first cut is then shown to the Congressman for his input. If there is any political calculation that the staff is not privy to, generally this would be where it is inserted. After Member direction is given, the staff continues to refine and vet the list, which may include actual visits to offices or factories of intended recipients. On occasion this has resulted in interesting discoveries, like a company that has a receptionist and not much else. Site visits are extremely useful in verifying the authenticity of a company. Again, perhaps contrary to popular opinion, the last thing Congressman Young wants is for the media to discover an earmark that went to a company that subsequently folded and vanished with not much to show for it. However, mistakes do happen and sometimes despite good intentions a business or a non-profit will fail. Successful earmarks result not only in jobs, but a good service or useful product from a company that ultimately becomes self-sustainable.

One such success story stems from the thermal battery earmark highlighted earlier. Several years ago, a company called Enser approached Congressman Young with an earmark request. Their mission statement was to design, develop, qualify, and manufacture highly reliable thermal batteries for a wide range of military applications. Most people do not know what a thermal battery is and neither did the Congressman or staff. However, the company described what they do. In short, thermal batteries are a

critical component to missiles--everything from Sidewinders to ICBMs. These batteries are much different than a typical Duracell battery. They need to lie dormant, possibly for decades, but become activated instantly when triggered to deliver a prescribed amount of power for a set period of time to empower a missile's electronic systems. Suffice it to say, there is not much commercial application for this type of technology and it is essentially a niche defense industry that is strategically important. Congressman Young and his staff recognized this. There are also very few companies in the United States that provide this type of service and the Air Force, for instance, has had a significant increase in demand for thermal batteries over the last decade.

The thermal battery earmarks that Congressman Young put forth resulted in jobs for his district, a successful company, and the expansion of a supply base for a critically needed component, using funds from a procurement account designed specifically to maintain critically-needed defense industries. Without the earmarking process it is doubtful Enser would have survived and the Air Force would have been much worse off without it. Enser is a small company of chemical engineers with a good idea. They did not have the political clout, resources, or lobbyist muscle to get noticed by the Defense Department themselves. Instead, their Congressman provided the opportunity and recognized the utility of their product along with the overall strategic importance.⁷⁹

After the Congressman makes a decision on the final list of defense earmark submissions for the year, his staff submits each request to the Defense Appropriations

⁷⁹ Enser Corporation, "Welcome to Enser." Home Page. Available at <http://www.ensercorp.com/> (accessed November 11, 2010).

Subcommittee—via an online database—along with an accompanying ethics letter stating that the Congressman or his spouse will not benefit financially from that project. The committee staff then largely takes over. True work for appropriations actually begins shortly after the President submits his budget request. A team of about a dozen budget analysts make recommendations to the majority and minority clerks on the President's funding level requests and any changes that should be made. They look at milestones, historic obligation rates, and are fairly analytical about their recommendations. The job of the clerks is to then inject political "math" into the recommendations which are then presented to the Chairman and Ranking Member for their initial input.⁸⁰

While the regular budget analysis is analytical in nature, earmarks are admittedly more art than science. The committee staff predominantly relies upon their own personal experience and will make recommendations to cull earmarks that are obviously wasteful. When they do this, they have no idea what lobbyists were involved or who donated to who's campaign. The staff tries to be professional and impartial but when in doubt, they defer to the recommendations coming from the staff of the Members. Sometimes Members do intervene in the process or they make requests to help other Members out. To the staff, the reasons are unknown, but it is extremely rare to have knowingly corrupt requests like happened with Duke Cunningham or earmark requests

⁸⁰ Tom McLemore, Interview by author. Longworth House Office Building, Washington D.C., November 9, 2010. Tom McLemore is the Minority Clerk for the Defense Appropriations Subcommittee. As such, he is primarily responsible to the current Ranking Member, Congressman C.W. Bill Young. Incidentally, the Defense Appropriations Subcommittee has a long history of being very bipartisan. This stems in large part from the personal relationships between Congressman C.W. Bill Young and the late John Murtha, though the spirit of cooperation continued unabated when Chairman Norman Dicks took over. Rarely in a hearing will there be any sort of partisan rancor—it is very business focused.

stemming from the PMA lobbying firm.⁸¹ Most people generally want to do a good thing, staff and Member included.⁸²

The actual dollar amount set aside for earmarks is largely the result of precedent. Though the amount of earmarks increased dramatically when the Republicans took over in 1994, the dollar amount since then has roughly been the same percentage. It is ultimately set by the party in majority. Within the Defense Appropriations Committee it has also been somewhat of a tradition to keep a 60/40 split between the majority and minority parties in terms of how many earmarks each gets. Of course, 2010 was a unique year with the House Republican moratorium on all earmarks. In addition, the transparency measures put in place by the Democrats have also been almost universally accepted as a good thing. However, they have not changed how earmarks have been allocated, which might lead one to conclude that the process was not fundamentally corrupt to begin with as many in the public might have suspected.⁸³

Another thing to keep in mind when determining if Congressional earmarks should go or not is the amount of actual vetting that takes place and the impact on small business. Right now there are 435 House offices and 100 Senate offices, all with both Washington based and local staffs. For the sake of argument, assume three people within each office deal with earmarks. So 535 multiplied by three equals 1605 pairs of eyes that

⁸¹The PMA Group is a defunct lobbying firm based in Washington D.C. It was founded and owned by ex-House Appropriations Subcommittee on Defense staffer Paul Magliocchetti. The firm's annual lobbying income climbed steadily to its 2006 peak at \$16,060,000. In November 2008 the PMA Group's offices were raided by the FBI. The subsequent investigation into illegal pay to play activities has led to the resignation of five of its senior lobbyists who started their own firm and brought clients with them. As a result, the firm ceased operations on March 31, 2009.

⁸² Tom McLemore, interview.

⁸³ Ibid.

vet earmarks. Additionally, those individuals are actually realistically available for small companies to approach. If earmarks go away, what replaces it? Will the Department of Defense hire 1600 people to vet earmarks and hold meetings with small companies? It is not impossible but in an era of impending budget cuts, highly improbable. Furthermore, who is to say that the Department of Defense would do a better job than the system currently in place? When it comes to acquisition decisions and program management, the Department of Defense has certainly had a string of failures with notable ones like the Air Force refueling tanker debacle in which a high-level department employee was ultimately fired for accepting graft.⁸⁴ It is foolhardy to believe that any sort of small business grant program that might replace earmarks would be absolutely corruption free and efficient. It is possible to imagine a scenario where a nameless bureaucrat shows preferential treatment to a company owned by a former colleague or something to that effect. At least with the earmarking process, a Member is held accountable to the electorate and there is far more scrutiny over an elected officials conduct.

⁸⁴ David Bowermaster, "Scandal Rocks Boeing; CFO Fired," GlobalSecurity.org. Available at <http://www.globalsecurity.org/org/news/2003/031125-boeing-scandal.htm> (accessed December 5, 2010).

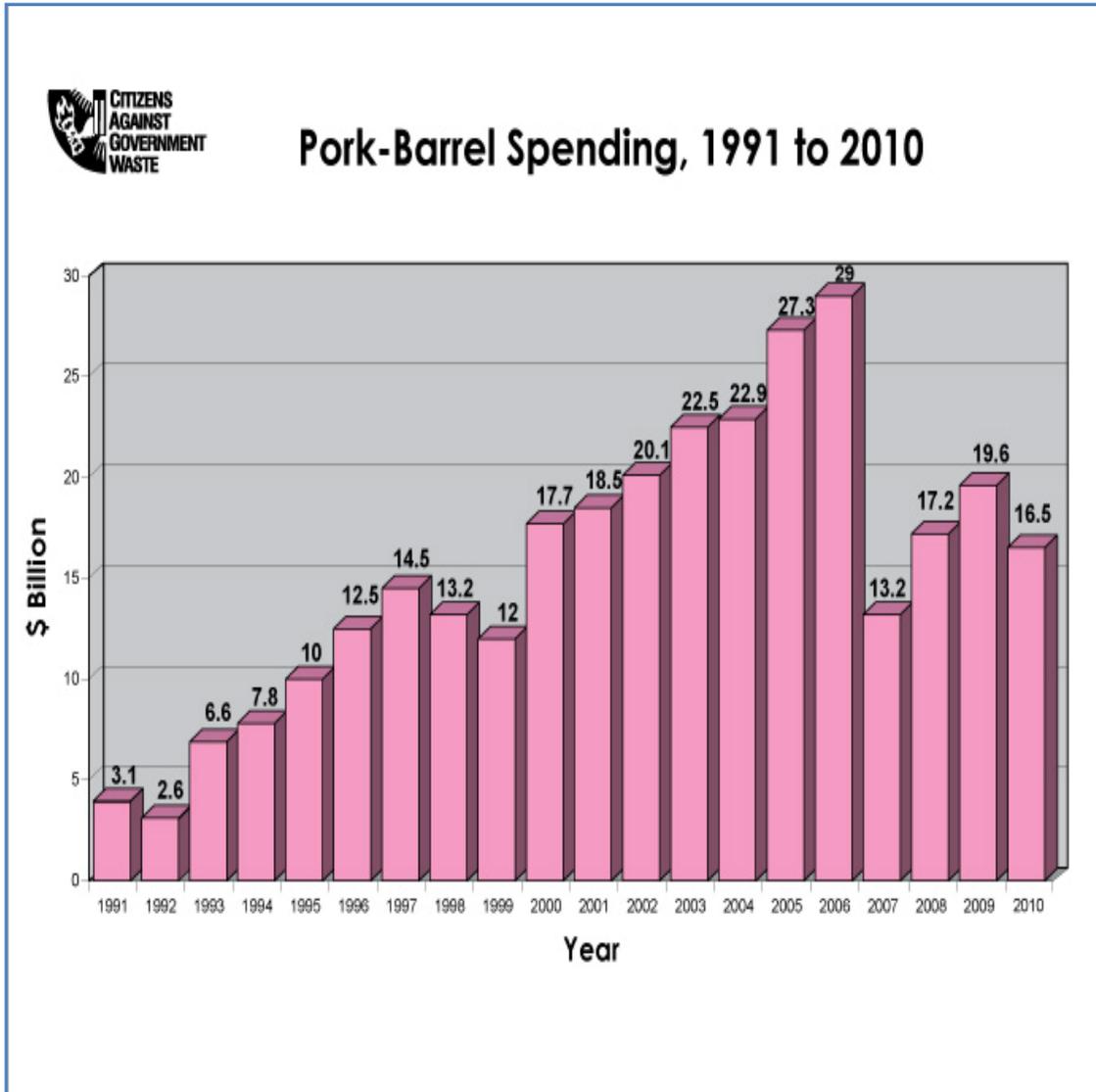
Chapter 6: Earmarks in Perspective

“Everything we hear is an opinion, not a fact. Everything we see is a perspective, not the truth.” --Marcus Aurelius

Up to this point this paper examined earmarks from a philosophical standpoint in terms of the role of government and also discussed the mechanics of how earmarks are created in the context of the greater budget process. Having done that, it is beneficial to put earmarks into perspective, starting with how much they actually cost. One of the dominant criticisms of earmarks is that they are wasteful spending, so just how much is important to grasp. Any figures and calculations will differ based on what definition of earmark is used. However, for the sake of argument, we will use figures from Citizens Against Government Waste.⁸⁵ That organization is decidedly against congressional earmarks and labels them as pork-barrel spending, so one can assume their cataloging of earmarks will be much more encompassing, resulting in a higher dollar amount. Thus we will err on the high side:

⁸⁵ Citizens Against Government Waste (CAGW) is a private, non-partisan, non-profit organization representing more than one million members and supporters nationwide. CAGW's mission is to eliminate waste, mismanagement, and inefficiency in the federal government. Founded in 1984 by the late industrialist J. Peter Grace and syndicated columnist Jack Anderson, CAGW is the legacy of the President's Private Sector Survey on Cost Control, also known as the Grace Commission.

Table 3



Source: Citizens Against Government Waste, "Pork-Barrel Report," Available at <http://www.cagw.org/reports/pig-book/#trends>

According to CAGW's calculations, there were \$16.5 billion in earmarks for fiscal year 2010. To the average citizen that seems like a staggering amount, especially if one believes all of the \$16.5 billion is wasteful or "pork-barrel" spending. To put that figure in context, however, one needs to look at total federal outlays, such as is compiled by the Heritage Foundation:

Table 4

The Federal Budget, 1990–2010						
IN BILLIONS OF INFLATION-ADJUSTED DOLLARS (2010)						
	Discretionary Spending	Entitlement Spending	Net Interest Spending	Total Spending	Total Revenue	Surplus/ Deficit
1990	\$821	\$932	\$302	\$2,056	\$1,693	-\$363
1991	836	935	305	2,075	1,653	-422
1992	806	979	301	2,085	1,647	-438
1993	793	987	292	2,071	1,697	-375
1994	781	1,035	293	2,109	1,816	-293
1995	765	1,038	326	2,129	1,898	-230
1996	731	1,079	331	2,140	1,993	-147
1997	735	1,088	328	2,151	2,121	-29
1998	735	1,143	321	2,199	2,291	92
1999	750	1,181	302	2,233	2,398	165
2000	787	1,218	285	2,290	2,593	302
2001	811	1,258	257	2,326	2,487	160
2002	902	1,359	210	2,471	2,277	-194
2003	988	1,415	183	2,586	2,134	-452
2004	1,042	1,440	186	2,668	2,188	-480
2005	1,087	1,481	206	2,775	2,417	-357
2006	1,102	1,530	246	2,878	2,609	-269
2007	1,098	1,531	250	2,879	2,709	-170
2008	1,155	1,623	257	3,035	2,569	-467
2009	1,258	2,128	190	3,576	2,140	-1,436
2010	1,375	2,034	209	3,618	2,118	-1,500

Source: The Heritage Foundation, “Federal Spending by the Numbers, 2010,” Available at <http://www.heritage.org/research/reports/2010/06/federal-spending-by-the-numbers-2010>.

Focusing on fiscal year 2010, the federal government spent \$1,375 billion on discretionary spending and \$3,618 billion total. Using the \$16.5 billion earmark figure from Citizens Against Government Waste, “pork-barrel” spending in 2010 amounted to 1.2% of discretionary spending or .46% of total federal spending—less than one half of one percent. Even assuming that the entire earmark amount was wasted spending, when viewed in perspective of the entire federal budget, the amount of time spent arguing and posturing over earmarks seems hardly worth the effort. If one assumes that at least some of the earmark money contributed in a useful manner, the amount of true waste as a percentage of the budget grows even smaller. That makes the argument over targeting earmarks for fiscal reform truly insupportable. Even if all earmarks were eliminated and budgets were correspondingly trimmed, it would have a negligible impact on the fiscal picture.

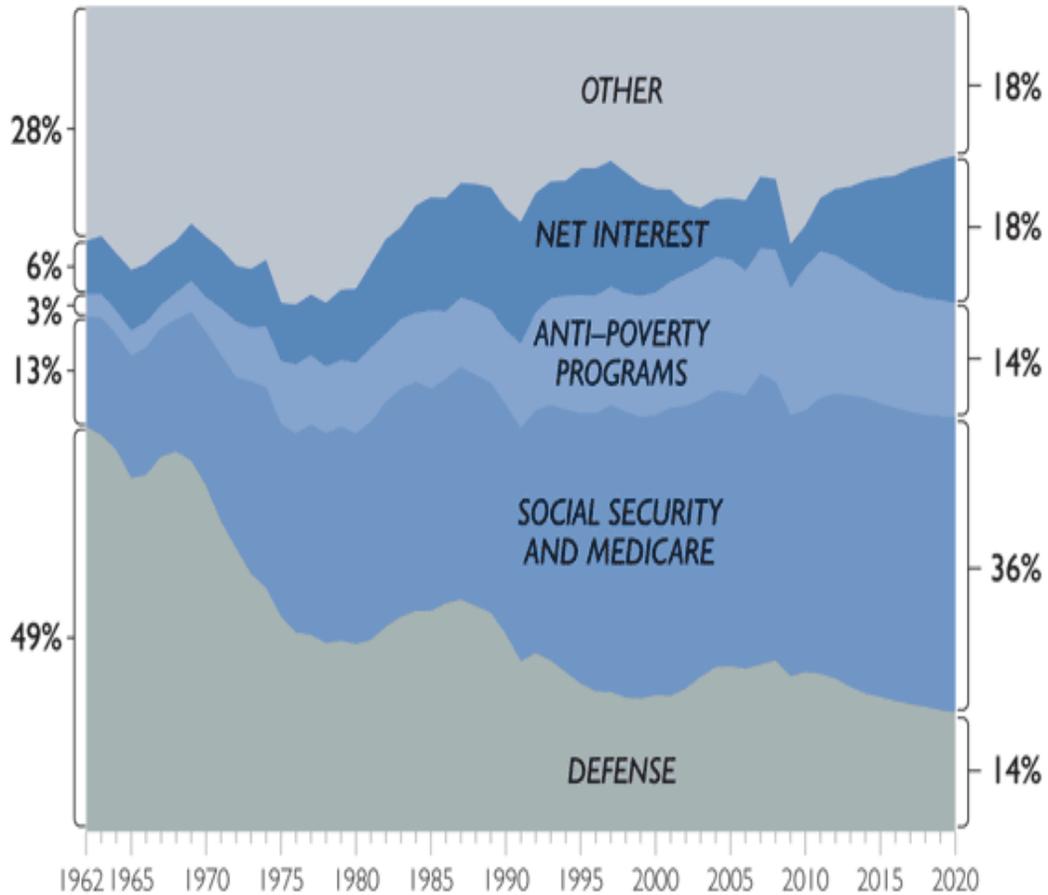
However, as discussed earlier, earmarks do not impact the budget bottom line, which only adds additional scrutiny to those who chase earmarks as a budgetary fix. Total spending ceilings for the House and Senate Appropriation Committees are set by the 302(a) allocation and subsequent 302(b) distributions—earmark decisions happen much later in the budget cycle and only direct funding instead of creating new spending. To truly tackle spending, one needs to look at the entire budget which includes directed spending that falls outside of the annual budget appropriations cycle. Directed spending is automatic, as

established by formula in statutory authorization language, and covers entitlement programs like Social Security, Medicare, and Medicaid. In addition to the federal spending table above which places entitlement spending in a separate category, the Heritage Foundation uses data from the Office of Management and Budget to create a useful graph that projects how Social Security and Medicare funding will crowd out other spending:

Graph

Social Security and Medicare Are Crowding Out Other Spending

COMPOSITION OF FEDERAL SPENDING



Source: Office of Management and Budget, *Budget of the United States Government, FY 2011, Historical Tables, Table 3.2*, at <http://www.whitehouse.gov/omb/budget/Historicals> (April 26, 2010). Figures for FY 2011 through 2020 represent current-policy baseline projections calculated using Congressional Budget Office, "The Budget and Economic Outlook: Fiscal Years 2010 to 2020," January 2010, at http://www.cbo.gov/ftpdocs/108xx/doc10871/BudgetOutlook2010_Jan.cfm (April 26, 2010).

Source: The Heritage Foundation, "Federal Spending by the Numbers, 2010," Available at <http://www.heritage.org/research/reports/2010/06/federal-spending-by-the-numbers-2010>.

By the year 2020, Social Security, Medicare, and interest payments on the debt are projected to amount to 54% of federal spending. If one's interest is in truly taming deficit spending, it would seem to make more sense focusing attention on 54% of the budget rather than the .46% that congressionally directed spending makes up. It is also not rational to assume that earmarks are the cause of our current budget deficits if they amount to such a small percentage of spending.

DEALING WITH THE DEFICIT

As a useful counterpoint against blaming earmarks for the current economic challenges, it is worthwhile to examine the reasons our country got into its current fiscal predicament. There was no single seminal event. Rather, the process took decades and the abbreviated explanation is that the country spent far more than it took in. This is the product of two diametrically opposed American ideals: a disdain for paying taxes and propensity to spend. The situation was exacerbated by the tendencies of politicians to postpone decisions as much as possible—quite simply, it never politically popular to propose raising taxes or cutting programs. As a result, big problems like adequately funding Social Security have not been addressed nor have our current wars been adequately financed. By the end of 2010, the deficit is projected to be 62% of the GDP, higher than it has been at any point since World War II. Perhaps more troubling is the fact that it went from 40% to 62% of GDP in a few short years. Based on current policies, in a best case scenario, the deficit is expected to rise to 80% of GDP by 2035. In a worst case scenario,

the debt will grow to 87% of GDP by 2020 and 185% of GDP by 2035, which would be much higher than the record of 109% set in 1942.⁸⁶

As such, budget watchers are understandably concerned with the direction our country is going, a sentiment echoed in the November 2010 elections. As a cautionary note, in the spring of 2010, Greece's debt reached 115% of its GDP, which started a near European market meltdown. Though no one expects the United States to collapse suddenly, our nation is facing a dire set of economic circumstances. The so called "Great Recession" coupled with demographic pressures of aging baby-boomers will have far reaching effects. For instance, rising interest payments on the debt will squeeze out discretionary spending. Health care expenses will continue to grow and will consume a greater portion of the budget. Baby boomers will also start drawing Social Security. Right now, the country is already spending about 68% more than it is taking in from tax revenue and the problem will only get worse with time if no action is taken.⁸⁷

In such a situation, it is tempting to find a bogeyman and earmarks provide an easy scapegoat for some. However, a cynic might also say that by chasing earmarks, lawmakers avoid having to deal with the real difficult issues, some of which were previously mentioned. Those issues have also been known for years, so perhaps the true problem comes down to a lack of political will. Both spending cuts or tax raises are politically unpopular. To try and address the problem President Obama appointed a bipartisan "National Commission on Fiscal Responsibility and Reform" which proposed a

⁸⁶ Steve Strobbridge, Phil Odom, and Kathy Beasley, "Dealing with the Deficit," *Military Officer*, October 2010, 20-28.

⁸⁷ Ibid.

comprehensive plan on Dec 1, 2010.⁸⁸ The solutions are presented are difficult and call for sacrifices from all generations. Proposals range from raising the Social Security eligibility age, to cutting discretionary spending, to raising taxes.⁸⁹

To tackle this vexing issue, the Commission was charged with coming up with a wholesale solution to the nation's budgetary problems, with all options on the table. The fiscal commission had its last public meeting in September 2010 and some of the announcements then give an indication of what the final proposal may look like in December.⁹⁰ Additional disclosures in recent days have already generated considerable debate.

The Commission's goal was to produce a plan to cut trillion-dollar deficits to sustainable levels by 2015. Targeting waste by increasing government oversight is a relatively popular option that will likely be proposed, yet it will not amount to much of an overall savings. That means there will likely have to be major cuts or changes to popular federal programs that include various tax credits, farm subsidies, and education—all of which are enjoyed by constituents. The biggest challenge though will be in curtailing the large entitlement programs such as Social Security, Medicare, and Medicaid, which

⁸⁸ National Commission on Fiscal Responsibility and Reform, "The Moment of Truth," Available at <http://www.fiscalcommission.gov/news/moment-truth-report-national-commission-fiscal-responsibility-and-reform> (accessed Dec 7, 2010).

⁸⁹ Strobridge, "Dealing with the Deficit," *Military Officer*, 20-26.

⁹⁰ Walter Alarcon, "Fiscal Panel Poised To Target Earmarks," The Hill. Available at <http://thehill.com/homenews/administration/121751-fiscal-panel-poised-to-target-earmarks> (accessed October 5, 2010).

represent the largest proportion of the expected rise in future debt. There will be no easy answers.⁹¹

As part of this wholesale review of spending, it is right for the Commission to consider earmarks. Senator Coburn (R-OK) stated that one of the biggest problems with politicians, is putting "parochial concerns ahead of the long-term interests of the country."⁹² Earmarks in his opinion are a symptom of that problem and along with others on the panel such as former Senator Alan Simpson (R-WO), he believes they should be eliminated or severely curtailed. However, those of a similar mindset acknowledge that attacking earmarks will be politically difficult and even if successful, will represent only a modest amount of savings.⁹³

EXECUTIVE BRANCH EARMARKS

If Congressional earmarks are to be curtailed, as a matter of perspective, it is only fair to acknowledge that the executive branch also has earmarks. This fact, however, hardly receives public scrutiny despite the fact that executive earmarks are functionally equivalent to Congressional ones. They are just much harder to identify. Presidential or agency originated earmarks may be requested explicitly within the President's budget to Congress; they could be within an agency's spending plan; they might appear in contracting decisions; or they may just be part of an effort to make sure certain geographic areas benefit. None of this is necessarily nefarious, because at the end of the day, some

⁹¹ Alarkon, "Fiscal Panel Poised To Target Earmarks," The Hill.

⁹² Ibid.

⁹³ Ibid.

entity somewhere, will be the recipient of federal funds. It is the same result as a Congressional earmark, it just differs in who is making the decision.⁹⁴

There are several examples that can be cited. For instance, the Bush Administration set aside \$24 million for the Laura Bush 21st Century Librarian program. The Administration also requested \$10 million for Preserve America grants and \$50 million for the Helping America's Youth Initiative.⁹⁵ Additionally, \$204 million was set aside for teaching sexual abstinence and millions of dollars from the budget of the Army Corps of Engineers were steered to various water and wetlands projects. Maybe all those items are worth it and maybe they are not. What is almost certain is that they are functionally the same as if a Congressman or Senator made those requests. Many will appear only in closely held supplements separate from the public budget books. Also, the President does not necessarily even have to earmark. Once agencies get funding from Congress, political appointees can steer money to particular areas. That is why lobbyists spend just as much time at federal agencies as they do with Congress.⁹⁶

The practice of executive earmarking is carried on by both parties. For instance, the Obama Administration passed an economic stimulus plan that had over 1,400 pages and it was touted as being earmark and special interest free. However, despite the publicity, it includes such specific language like an insurance exemption for companies

⁹⁴ Clinton Brass, Garrett Hatch, and Eric Petersen, "Bush Administration Policy Regarding Congressionally Originated Earmarks: An Overview," CRS Report for Congress (Nov 17, 2008): 2. www.crs.gov (accessed September 7, 2010).

⁹⁵ Jackie Calmes, "In Search of Presidential Earmarks," *The Wall Street Journal*. Available at http://online.wsj.com/public/article/SB114048474700578604-1uImGVxZNMwm9RzLyHregMY3Hjk_20070220.html?mod=tff_main_tff_top (accessed October 15, 2010).

⁹⁶ *Ibid.*

that work on recreational boats longer than 65 feet. It also requires the Transportation Security Administration to purchase 100,000 uniforms from U.S. apparel makers. Despite the no earmark claims, it includes dozens of narrowly-defined programs that send money to specific areas or cater to specific special interests. By some people's definition, that is exactly what an earmark is and what Congress gets repeatedly lambasted for. It is little wonder then that some Members of Congress defend their ability to earmark and assert the power of the purse while attempting to limit the executive branch. The Constitution is also on the side of Congress in this regard. At the minimum then, it would appear to be somewhat hypocritical to limit any discussion of earmarks to only the legislative branch.⁹⁷

NEGATIVE EARMARK PERCEPTIONS

Despite the apparent hypocrisy between legislative and executive earmarks, there is some reason why Congress receives so much more negative scrutiny. The majority of it stems from the appearance of "pay to play" politics, which is far more difficult to show in the executive branch. Additionally, due to the fact they face election every two years, Congressmen are almost continuously campaigning and raising funds for the next election. They are, therefore, put in the spotlight for possible impropriety far more often and have to be wary about separating normal Congressional activity from fund-raising. Sometimes that is easier to say than do.

⁹⁷ Michael Grabell, and Christopher Weaver, "In Stimulus Bills, Earmarks by Any Other Name," MSNBC. <http://www.msnbc.msn.com/id/29025047/> (accessed November 8, 2010).

Just this year, The House Ethics Committee exonerated Chairman Norm Dicks, Representative Moran and five other defense subcommittee members of allegations that they had abused their offices by selling earmarks to donors. In so doing, it drew heavily on promises such as these by lawmakers. There are rules in place that bar linking campaign donations with legislative acts, for obvious reason, and the Members had to demonstrate that those functions were indeed separate. However, the investigation also concluded that the wall of separation was extremely thin, with key staff involved in both fundraising and legislative activity. Sometimes that is unavoidable, especially with the electoral cycle in the House. It also extremely difficult to prove a corruption case and investigators must find credible evidence of a quid pro quo between donations and earmarks, such as was discovered with Duke Cunningham, a Republican of California, who had a ledger of prices for legislative favors.⁹⁸

Democrats are also not above scrutiny when it comes to “pay to play” politics. A well-known example is the now defunct PMA Group which brought a great deal of attention to late Chairman Jack Murtha and other Democrats on the Defense Appropriations Subcommittee. The culmination was the House ethics investigation mentioned earlier. The PMA Group was founded by Paul Magliocchetti, who spent a decade working on the subcommittee under Chairman Murtha. In November 2008, the PMA Group's offices were raided by the FBI and subsequent investigations into illegal

⁹⁸ Jeffrey Smith, "Thin Wall Separates Lobbyist Contributions and Earmarks," The Washington Post. <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/06/AR2010030602374.html> (accessed October 11, 2010).

pay to play activities led to the resignation of five lobbyists and ultimately shuttered the firm on March 31, 2009.⁹⁹

While the actions of the PMA Group are certainly condemnable, it is also very easy to draw broad conclusions about impropriety. For instance examining a chart of donations from the PMA Group and its clients might lead one to conclude everyone on the Defense Appropriations Subcommittee is on the take:

⁹⁹ Lindsay Mayer, "Congressmen Overseeing Defense Budget Got \$8 Million from PMA Group and Clients," OpenSecrets.org: Money in Politics. <http://www.opensecrets.org/news/2009/03/congressmen-overseeing-defense.html> (accessed November 2, 2010).

Table 5

Members of the House Defense Appropriations Subcommittee who have received contributions from PMA Group and the firm's clients:

Name	Total
John P. Murtha (D-Pa)	\$2,378,552
Pete Visclosky (D-Ind)	\$1,369,298
Jim Moran (D-Va)	\$997,348
Norm Dicks (D-Wash)	\$536,330
C. W. Bill Young (R-Fla)	\$460,750
Rodney Frelinghuysen (R-NJ)	\$359,041
Todd Tiahrt (R-Kan)	\$351,565
Kay Granger (R-Texas)	\$347,450
Hal Rogers (R-Ky)	\$249,499
Jack Kingston (R-Ga)	\$199,750
Marcy Kaptur (D-Ohio)	\$144,300
Allen Boyd (D-Fla)	\$143,000
Sanford D. Bishop Jr. (D-Ga)	\$93,500
Maurice Hinchey (D-NY)	\$80,000
Steven R. Rothman (D-NJ)	\$74,000
Carolyn Cheeks Kilpatrick (D-Mich)	\$13,500

Source: Lindsay Mayer, "Congressmen Overseeing Defense Budget Got \$8 Million from PMA Group and Clients," OpenSecrets.org: Money in Politics. <http://www.opensecrets.org/news/2009/03/congressmen-overseeing-defense.html> (accessed November 2, 2010).

However, those dollar amounts include the clients of PMA Group who themselves probably have not done anything untoward. The simple fact of the matter is that Members are always going to be put in the position of soliciting money for campaigns and the most likely donors are going to be companies with disposable incomes. Unless campaign financing is dramatically altered, the status quo will remain and the public will have to trust that their representatives are acting in a proper and honorable fashion. The good thing is that if they are discovered to be acting inappropriately, they can be voted out of office. The same cannot be said for a political appointee in the executive branch.

The negative climate over earmarks, punctuated by scandals like the PMA Group, has also created political opportunity. Republicans in the House took the opening and attempted to seize the moral high ground by instituting a complete moratorium on all earmarks. Congressman Eric Cantor, the current Minority Whip, is one of the leading advocates of making the earmark moratorium permanent, especially in light of the outstanding Republican performance in the November elections. Cantor's message typically revolves around reining in spending and eliminating waste as a message to frustrated voters that Washington is cleaning up its act. He also acknowledges the controversy over banning all earmarks and admits there are rational arguments to defending them. However, he rightfully points out that earmarks are perceived anathema to the voting public. Rather than trying to change public opinion, he accepts that perception is reality. Perhaps that is the prudent thing to do. Furthermore, Cantor

espouses a philosophy that if politicians cannot be trusted to solve the small problems they cannot be trusted to solve the larger ones.¹⁰⁰

IN DEFENSE OF EARMARKS

Of course critics of Cantor will say that he is merely a political opportunist who capitalized on public sentiment to his advantage, despite the fact that earmarks do not amount to much spending. In fact, in 2009, Democrats made a concerted effort to rebrand earmarks as a positive thing. Congressional leaders attempted to educate voters about why there is nothing inherently criminal about directing projects to constituencies and that most earmarks fund worthy projects. Speaker Nancy Pelosi even defended earmarks as an appropriate function of Congress, but pledged to cut the number of them and increase transparency in the earmarking process. Democrats also claimed—probably rightfully so—that Republicans are hypocritical with their current outrage over earmarks, since the number of earmarks rose dramatically under Republican stewardship of the House.¹⁰¹

However, Republicans have hardly been uniform in their position on earmarks which was epitomized by debates between Senator Mitch McConnell and Senator Jim DeMint. Senator Jim DeMint is allied with the Tea Party and calls Congressional earmarks a symbol of out of control deficit spending. Senator Mitch McConnell and other senior Republicans were put in the uncomfortable position of defending earmarks which

¹⁰⁰ Eric Cantor, "Opinion: A Step Toward Curing Washington's Spending Disease--Eliminating Earmarks," Politico. <http://www.politico.com/news/stories/1010/43514.html> (accessed October 19, 2010).

¹⁰¹ Washington Times, "Democrats Brand Earmarks As Good," Washington Times. Available at <http://www.washingtontimes.com/news/2009/mar/09/top-democrats-cite-earmarks-as-worthy-projects> (accessed November 1, 2010).

they fully believe are proper but politically unpopular. Senator Daniel Inouye and many Democrats share McConnell's view. Almost universally, they highlight the fact that earmarks represent about 1% of the budget and do not increase spending. They also describe several projects that were the result of Congressional earmarks that the executive branch did not want. Examples include the first aircraft carrier and the first Predator UAV. This draws attention to the fact that the executive branch does not have a monopoly on foresight or wisdom. Neither of those two programs were wanted by the executive branch, but of course over time, both have proved invaluable in wars past and present. Defense spending aside, earmarks fund a plethora of disease research projects and worthwhile infrastructure improvements. They are also a way someone in the district—the small guy with a good idea—can get a shot of breaking into the system. All of those are accurate statements, but the political reality raises questions on what will happen with earmarks in the near future.¹⁰²

THE WAY AHEAD

In all likelihood, the future of earmarks will be decided by political compromise as opposed to any statutory change or legal challenge. The discussion over the item veto highlighted the constitutional issues and the last serious challenge to stem earmarks largely ended in failure. That was attempted by President George W. Bush when he issued Executive Order 13457, titled “Protecting American Taxpayers From Government

¹⁰² Special Report with Brett Baier, Producer Doug Rohrbeck, Fox News Channel. 8 Nov. 2010. Television.

Spending on Wasteful Earmarks.¹⁰³ In part, the order directed agency heads to only expend funds that are in statutes as opposed to earmarks that appear in explanatory statements that do not carry the force of law, but were respected by tradition.¹⁰⁴

He offered his rationale for the Executive Order in his State of the Union address on January 28, 2008:

The people's trust in their government is undermined by congressional earmarks—special interest projects that are often stuck in at the last minute, without discussion or debate. Last year I asked you to voluntarily cut the number of earmarks and the cost of earmarks in half. I also asked you to stop slipping earmarks into committee reports that never come to a vote. Unfortunately, neither goal was met. So this time, if you send me an appropriations bill that does not cut the number or cost of earmarks in half, I'll send it back to you with my veto. And tomorrow, I will issue an executive order that directs federal agencies to ignore any future earmark that is not voted on by Congress. If these items are truly worth funding, Congress should debate them in the open and hold a public vote.¹⁰⁵

This was definitely an interesting strategy on the part of the executive branch, but Congress had several response options. Since executive orders do not carry the force of law, Congress can pass laws ignoring it. Or, Congress could include language in a statute stating something to the effect that, "Earmarks in a joint explanatory statement in House Report No. 110-XXX shall be effective as if enacted into law," thus incorporating the explanatory statements by reference. As it turns out, this was the simplest and most elegant

¹⁰³ George W. Bush, "Protecting American Taxpayers From Government Spending on Wasteful Earmarks," Executive Order 13457. <http://www.archives.gov/federal-register/executive-orders/2008.html> (accessed September 6, 2010).

¹⁰⁴ Ibid.

¹⁰⁵ George W. Bush. "State of the Union." Address, Joint Session of Congress from President of the United States, Washington D.C., January 28, 2008.

solution and has been adopted by most appropriation subcommittees, if not all. It solves the problem of explanatory statements not being law and effectively renders the President's executive order moot.¹⁰⁶

While an outright ban on earmarks may or may not happen, increased transparency rules are highly probable and no one argues that they are a bad thing. As mentioned previously, Democrats enacted significant transparency rules in 2007 which publicized earmark requestors. They also passed additional earmark reform rules in 2009:

1. Increased Executive Branch Review: When a Member submits a request for an earmark, the appropriate Executive Branch agency will be given 20 days to review the project to ensure that the earmark is eligible to receive funds and meets goals established in law.

2. Competitive Selection Required of Earmark Funding Directed to For-Profits: For any earmark intended to be directed to a for-profit entity, the Executive Branch will be required to ensure that the earmark will be awarded through a competitive bidding process.¹⁰⁷

What is interesting to note about these rules is that they attempt to address some of the remaining criticisms over earmarks, in i.e., that they are wasteful and uncompetitive. These rules put the onus on the executive branch to respond to Congress if an earmark is wasteful and it also requires a competitive process for for-profit earmarks. The exact implementation of the competition rule is unclear and it may very well be a competition with a single bidder, which obviously just plays lip service to the intent. However, it is a

¹⁰⁶ Thomas Nicola and T.J. Halstead, "Earmarks Executive Order: Legal Issues," CRS Report for Congress Feb 13 (2008): 3-6, 11. www.crs.gov (accessed September 19, 2010).

¹⁰⁷ Katie Grant, "Pelosi, Hoyer and Obey Announce Further Earmark Reforms," The Office of Majority Leader Steny Hoyer. <http://www.majorityleader.gov/content/pelosi-hoyer-and-obey-announce-further-earmark-reforms> (accessed October 22, 2010).

start, and is almost certain that the next Congress will, at the minimum, build upon this foundation.

Although Congress still has much unfinished work this year as far as appropriations are concerned, a look at the pending bills indicates that earmarks are not in danger of going away despite the House Republican moratorium. Senators are still earmarking along with House Democrats. For instance, the Senate Appropriations Committee delivered its fiscal 2011 Defense spending bill with \$2.6 billion in earmark requests spread over 762 projects. The House's version of the bill only contains only \$1.2 billion in directed spending spread over 458 programs.¹⁰⁸

Even with pressures from the Tea Party, Secretary Gates's desire to cut \$100 billion from the defense budget, and the looming budget deficit, it does not appear that Congress as a whole feels the timing is right to cut back on defense spending. Since the defense budget is the largest source of earmarks, that indicates, that for the foreseeable future, earmarks will be appearing in some capacity. As articulated throughout this paper, that is not necessarily an undesirable outcome. The real question is how much of the national dialogue earmarks will continue to dominate.¹⁰⁹

¹⁰⁸ John Donnelly, "Senate Defense Bill Peppered With Earmarks," CQ Today (Washington), September 20, 2010.

¹⁰⁹ William Matthews, "In U.S. Congress, Little Appetite for Defense Cuts – Yet," Defense News (Springfield), October 11, 2010.

Chapter 7: Conclusion

“There’s a skirmish of wit between them.” --*Much Ado About Nothing*. Act 1, Scene 1

William Shakespeare’s comedy, *Much Ado About Nothing*, explores numerous themes, one of which is an obsession over trivial matters. In that play, much time and effort revolves around unfounded accusations of the protagonist’s infidelity, which ultimately is inconsequential in the grand scheme of things anyway. In a not too dissimilar fashion, proponents of Congressionally directed spending, or earmarks, find themselves being defensive against wild accusations of corruption, gross wasteful spending, the cause of out of control deficits, and the symbol of everything that is wrong in Washington. Those accusations are generally coupled with a belief that somewhere, somehow, there is a pristine and logical method of dealing with issues such as the allocation of our country’s scarce resources. Right now the executive branch is winning that argument in the eyes of the public as it seeks to assert more authority into the spending process.

Our Founding Fathers created a balance of power system on purpose because they knew that all men are inherently fallible, and that no one has a monopoly on wisdom. There are simply too many variables, too many political actors, and too many uncontrollable events for either the executive or the legislative branch to dominate the legislative agenda entirely. Influence ebbs and flows between the two branches. In a system of checks and balances, that makes intuitive sense. The power and influence of the executive and legislative branches are also not static and through the actions of history and precedent there has been a great deal of evolution from what was written in the eighteenth century.

For instance, the Constitution specifically gives the legislative branch the power to declare war, raise and support armies, and provide and maintain a navy, yet today the President yields more influence and power when it comes to waging war. The Constitution also granted Congress specific powers such as the power to appropriate, from which it derives its power of the purse. That power remains one of its most effective in acting as an appropriate check on the executive branch. Whether one believes in earmarks or not, ceding any appropriation decision-making to the executive branch diminishes the power of the legislative branch, at least to a degree.

Aside from a philosophical argument over the role of government, a lot of the earmark debate boils down to a semantic argument over what is and what is not an earmark. Definitions are varied and are unequally applied to situations where the end result is the same. This largely means that earmarks are in the eye of the beholder and can be defined to suit a particular agenda or conspiracy theory. Those viewpoints are easily perpetuated in today's media environment and blogosphere.

Though there certainly have been cases of corruption, earmarks have become an obsession that confuse a method of directing funding with the value of what is being funded. There is no reason to believe that Congressionally-directed funding is wasteful and on the contrary, there a plethora of examples of good projects and initiatives. Furthermore, it is arguable that a representative should continue to be the best advocate for their constituents because they more intimately understand the needs of their community. It is also foolhardy to assume that an executive agency will not waste funds. The General Accounting Office is full of reports of fraud, waste, and abuse.

Perhaps one of the most important points over earmarks, even if you believe they are all wasteful, is that they amount to about one half of a percent of federal spending. It is a trivial amount and the inordinate amount of time spent discussing and worrying over them is very likely much ado about nothing. Transparency measures and similar efforts are of course prudent and nearly universally accepted as a good idea. That should probably be the limit of the debate over earmarks. Spending any more time on them diverts attention from other issues and in that sense earmarks can be considered as a red herring in order to avoid tackling larger and more uncomfortable issues. It is much easier to be heroic by attacking a fictitious boogeyman—it is far more difficult to challenge real daunting issues.

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Appendix A

C.W. BILL YOUNG
10TH DISTRICT, FLORIDA

COMMITTEE ON
APPROPRIATIONS
SUBCOMMITTEE ON DEFENSE
SUBCOMMITTEE ON
MILITARY CONSTRUCTION AND
VETERANS AFFAIRS

SELECT INTELLIGENCE OVERSIGHT PANEL

www.house.gov/young

Congress of the United States
House of Representatives
Washington, DC 20515-0910

2407 RAYBURN HOUSE OFFICE BUILDING
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(727) 893-3191

9210 113TH STREET
SEMIWOLE, FL 33772-2800
(727) 394-6860

March 19, 2010

Honorable Chet Edwards
Chairman
Military Construction, Veterans Affairs
and Related Agencies Subcommittee
House Appropriations Committee
H-143
Washington, DC 20515

Honorable Zach Wamp
Ranking Member
Military Construction, Veterans Affairs
and Related Agencies Subcommittee
House Appropriations Committee
1016 Longworth House Office Building
Washington, DC 20515

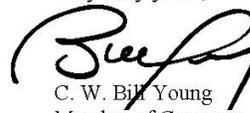
Dear Chairman Edwards and Ranking Member Wamp:

This is to request \$9,600,000 in funding for USCENTCOM Parking Garage Site Preparation in the Fiscal Year 2011 Military Construction, Veterans Affairs, and Related Agencies Appropriations Bill, Project Number NVZR083712A. The entity that will receive funding under this request is MacDill Air Force Base, Tampa, Florida. It is my understanding that this request will accelerate construction of a badly needed parking garage on the USCENTCOM compound by enabling site preparation to begin in fiscal year 2011 instead of 2012. I certify that this project does not have a direct and foreseeable effect on the pecuniary interests of me or my spouse.

According to current Republican guidance, Military construction requests are not considered earmarks and are permitted if the project is included in the military service's future years defense plan (FYDP), is accompanied by a valid DD form 1391, and is executable in fiscal year 2011. These rules are consistent with past practice to ensure all military construction requests are valid military requirements that have been formally programmed by the military into the military service's FYDP. Additionally, I hereby certify that to the best of my knowledge this request (1) is not directed to an entity or program named or that will be named after a sitting Member of Congress; (2) is not intended for a "front" or "pass through" entity; and (3) meets or exceeds all statutory requirements for matching funds where applicable. I further certify that should this request be included in the bill, I will place a statement in the Congressional Record describing how the funds will be spent and justifying the use of federal taxpayer funds.

With best wishes and personal regards, I am

Very truly yours,


C. W. Bill Young
Member of Congress

Appendix B

C.W. BILL YOUNG
18TH DISTRICT, FLORIDA

COMMITTEE ON
APPROPRIATIONS
SUBCOMMITTEE ON DEFENSE
SUBCOMMITTEE ON
MILITARY CONSTRUCTION AND
VETERANS AFFAIRS
SELECT INTELLIGENCE OVERSIGHT PANEL

www.house.gov/young

Congress of the United States
House of Representatives
Washington, DC 20515-0910

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March 23, 2010

Honorable Chet Edwards
Chairman
Military Construction, Veterans Affairs
and Related Agencies Subcommittee
House Appropriations Committee
H-143
Washington, DC 20515

Honorable Zach Wamp
Ranking Member
Military Construction, Veterans Affairs
and Related Agencies Subcommittee
House Appropriations Committee
1016 Longworth House Office Building
Washington, DC 20515

Dear Chairman Edwards and Ranking Member Wamp:

Pursuant to adoption of the House Republican Conference Resolution on March 11, 2010 and the March 22, 2010 revision of the March 17, 2010 exemption for military construction Member requests, I respectfully withdraw my previous request to accelerate construction of the USCENTCOM Parking Garage, project number NVZR083712A. To my understanding, the project will continue as currently programmed with a start date in FY2012 and USCENTCOM will maintain current ad-hoc measures to mitigate critical parking shortages until the project is complete.

With best wishes and personal regards, I am

Very truly yours,


C. W. Bill Young
Member of Congress

Appendix C

REVISED GUIDANCE

MARCH 22, 2010

Republican House Armed Services Committee Guidance Implementing the Republican Conference Earmark Moratorium

Note: this guidance revises and updates the guidance published on March 17 related to military construction requests. Since we now have confirmation that military construction projects included by Member request will be included in the transparency tables published by both the Appropriations Committee and the Armed Services Committee, Ranking Member McKeon believes Republican Members should withdraw any pending request to include a military construction project in the National Defense Authorization Bill.

Ranking Member McKeon fully supports the Republican Conference earmark moratorium. The following guidance is intended to capture the spirit and intent of the Conference ban on earmarks, as it applies to the HASC.

Instructions for Withdrawing Member Requests

Please send the following letter to 2120 Rayburn. We strongly encourage member offices to withdraw requests no later than end of business Friday, March 19th, even if the request was only submitted electronically.

March 15, 2010

The Honorable Ike Skelton, Chairman

The Honorable Howard P. "Buck" McKeon, Ranking Member

House Armed Services Committee

2120 Rayburn House Office Building

Washington DC, 20515

Dear Chairman Skelton and Mr. McKeon:

Pursuant to adoption of the House Republican Conference Resolution on March 11, 2010, I respectfully withdraw all of my previous member requests from committee consideration for the FY 2011 National Defense Authorization Act.

Sincerely,

XXX

Member of Congress

Changes or additions to law in the NDAA or accompanying report

HASC GOP Earmark Moratorium Guidance Revised March 22, 2010 Generally speaking, requests for bill or report language dealing with policy matters are not considered to be earmarks and are permitted, as long as the language does not direct funding.

For example, requests to modify Defense acquisition policy; to create a new military award; to direct a Government Accountability study; or to establish a new office in the Department of Defense would not be considered earmarks.

Programmatic requests

For HASC GOP Member purposes the term "programmatic requests" has no current definition. In keeping with the spirit of the moratorium, generally, Member requests to redirect funding are for the most part considered to be earmarks and are not allowed.

A GOP Member Requesting Support for the President's Budget Request

A request to fully support the President's budget request for any program is not an earmark as covered in House Rule XXI, clause 9(e).

For example, a request to fully fund the National Guard procurement account as requested by the President is not an earmark. However, any request to redirect the spending priorities within that program or add funding for a specific item within that account would be considered an earmark.

Changes to the President's Budget Request resulting from committee level national security policy decisions.

Changes to the President's Budget Request that in the absence of a specific Member request would have been made by the committee are not earmarks as covered by House Rule XXI, clause 9(e).

For example, the HASC has consistently believed that the Department of Defense needed more modern strategic airlift and has directed the procurement of more C-17 aircraft than the Department of Defense requested in recent years. The committee believed this increase filled a national strategic shortfall and was not based on a member request.

Another example in this category is the second engine for the Joint Strike Fighter, which the committee believes is a national security imperative to reduce the risk inherent in requiring the Air Force, Navy and Marines to fly a common aircraft. This broadly supported action has been included as a matter of policy, and not at the request of a single Member.

Conference rules prohibit a Member from requesting an earmark. Therefore, don't assume that a request will meet the test of a national security level policy decision. Please call HASC Republican committee staff at x68980 for guidance. The primary point of contact is Tom Hawley. His email is thomas.hawley@mail.house.gov

2 HASC GOP Earmark Moratorium Guidance Revised March 22, 2010 3

Military Construction Requests—Amended Guidance, March 22, 2010

Military construction requests will be treated as earmarks and Members are advised not to request such projects, even if they represent valid military requirements that have been formally programmed by the military into the military service's FYDP.

Land transfers

Land transfers are generally not considered earmarks, as committee practice requires that the military service agrees with both the transfer of the parcel in question and the terms of the transfer.

Code of Conduct

As Members strive to comply with the new Republican Conference earmark moratorium policy, they should also be cognizant of the ongoing requirements of the Code of Official Conduct and not engage in activities which could result in violations of the ethics rules.

Questions

Since Conference rules prohibit a Member from requesting an earmark, please call HASC

Republican committee staff with questions at x68980. The primary point of contact is

Tom Hawley. His email is thomas.hawley@mail.house.gov