BACKGROUND BRIEF:  
EARMARKS AND THE EARMARKING PROCESS  

March 2008

Over the last decade, the congressional practice of directing federal funding to specific purposes or projects through the appropriations process known as "earmarking" has become increasingly prevalent, with steadily increasing amounts of federal funding directed through this means. As the practice of earmarking has expanded, so too have abuses of the public trust, as members of Congress have earmarked funds for friends, family members, and campaign contributors without proper oversight or transparency. Following high-profile convictions of politicians and lobbyists for abuse of the earmarking process and the exposure of earmarks for projects of questionable merit, legislation to reform the earmarking process has recently been enacted, and further efforts are under way.

This background brief will examine the history of earmarking, consider the problem involved in defining and reforming the process, address some general misunderstandings about how earmarks relate to spending and the budget-making process, discuss and evaluate efforts undertaken to date, and lay out some guidelines for reform in order to bring the earmarking process out into the open and expose conflicts of interest and corruption in the future.

Definitions and Limitations

There is no single statutory or other definition of earmarks that is accepted by all practitioners of and commentators on the budget-making process. According to the American Congressional Dictionary\(^1\), "virtually every appropriation is earmarked." But an earmark is generally understood to be a species of appropriation – one characterized by a spending request:

- Generated by one chamber, and usually one member, of Congress
- Not pursuant to a previous authorization
- Added to an appropriations or spending bill during conference
- Appearing not in the bill's text but in an accompanying committee or manager's report, not subject to hearing, debate, or separate vote
- Directed at a single and usually a specific beneficiary, project or recipient

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But even this general characterization excludes items that might fairly be called earmarks – the
entire and considerable category of specified spending requests issued by the executive branch,
for example. It is the last of these points that must be defined more specifically if earmarks as a
whole are to be measured and evaluated in a comprehensive way. How specific must a spending
request be to qualify as an earmark? Must it set funds aside within an agency account for a
program, project, activity, institution, location (or more than one of these)? 2 This question is
often answered differently not only by the appropriations subcommittees involved with a given
spending bill, but often within the definition applied by each bill, for the purposes of that bill
only.

Furthermore, bill and report language is often imprecise or unclear regarding the nature and even
level of funding (e.g., in the use of a term such as "up to" a specified amount) of putative
earmarks. Another complication is the "limitation" – language that is precise regarding how
funding may not be used. These definitional factors confound those seeking to quantify
congressional earmarks and the amount of spending directed by them across the federal
government.

**Earmarks and the Budget Process**

It is in the appropriations process that earmarks are requested, included, and enacted. The
appropriations subcommittees take up the spending amounts allocated to them in the budget
resolution and sub-allocate these amounts to the federal agencies and programs within their
jurisdictions. The full appropriations committees then mark up the several subcommittee
spending bills and send them to the House or Senate floor for a full vote, then to conference, and,
when compromise is reached, back to the two full chambers for a final vote. Each of the twelve
spending bills goes through this process.

The process operates more or less as follows: every member of Congress is given the opportunity
each year to submit a list of requests for funding for special projects to the appropriations
subcommittee of jurisdiction. Appropriations committees and subcommittees sometimes even
have rules forms for members to fill out for these purposes, with deadlines (see Appendix A).3

Information about the operation of the earmarks evaluation and approval process – how much
money each member is allocated for earmarks; how much each appropriations subcommittee is
permitted, how these decisions are made and by whom – is largely unknown, since "all
congressional communications is [sic] exempt from the Freedom of Information Act [and]
Appropriations Committees prohibit members from commenting on the authorship of specific
provisions."4 As the Sunlight Foundation writes:

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2 Earmarks and Limitations in Appropriations Bills, CRS Report 98-518, December 7, 2004, Sandy Streeter. See:

3 House Appropriations Chair Rep. David Obey, Dear Colleague Letter, February 9, 2007. See:

4 All About Pork, op. cit.
The language used [for earmarks] is often written by lobbyists who have been hired to obtain the federal funding for a project from a particular legislator. Some members of Congress offer online “Appropriations Request Forms” where an earmark-seeker can send their request for funds directly to the member’s office. But for most this is still a highly secretive process.\(^5\)

For earmarks, the key phase of the process is in the drafting of conference reports. These reports accompany but do have the statutory status of spending bills. Federal agencies are not legally required to follow report language\(^6\). But, as a report by Citizens for Government Waste puts it, "[I]f agencies ignore the committee reports, there are veiled and not-so-veiled threats from appropriations committee members regarding the agency's future budget." \(^7\) Accordingly, when in doubt, most agencies will be strongly inclined to honor the congressional intent expressed in these reports, even if the reports themselves are not the letter but only the spirit of the law.

One reason earmarks are so prevalent in appropriations or omnibus conference reports is a significant lack of transparency in these budgeting processes. These bills are often massive volumes, written during late hours, and shortly before vote on final passage, meaning that full scrutiny of the earmarks in them is all but impossible. Even in the best of circumstances, most members will not have the opportunity to read through the underlying spending bill, let alone the accompanying report. And only in the rare circumstance will outside watchdog groups and the media have access to these reports in advance of a vote – a key deficiency in being able to hold members of Congress accountable.

The budget process is replete with opacity and unaccountability, and the earmarking phenomenon is a textbook case. Until very recently, no records were kept of which members had requested which earmarks. And still today, the semi-formal process by which earmarks are requested, decided upon, and added to spending bills is far from transparent.

**Common Misunderstandings About Earmarks, Pork, and Spending**

Consequently and understandably, misapprehensions about the earmarks process abound. As noted above, earmarks are not easily defined and therefore difficult to quantify in both number and dollar terms, especially in the aggregate, across all spending bills and committees. This difficulty is evidenced by the disparate range of numbers of earmarks and their dollar value reported by those seeking to quantify them. For example, the Sunlight Foundation reports that "[i]n 2004 there were 14,211 of them, costing some $52.69 billion dollars," while Citizens Against Government Waste's "2004 Pig Book" identified a record 10,656 projects in the 13 appropriations bills that constitute the discretionary portion of the federal budget for fiscal 2004, costing taxpayers $22.9 billion." The Heritage Foundation estimated in January 2008 that

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\(^5\) See: [http://www.sunlightfoundation.com/earmarksFAQ](http://www.sunlightfoundation.com/earmarksFAQ)

\(^6\) "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency," *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). The Supreme Court reiterated in 2005 that "language contained in Committee Reports is not legally binding". *Cherokee Nation v. Leavitt*, 543 U.S. 631, 646 (2005).

"[s]ince 1996, the number of annual earmarks has leapt from 958 to 11,738 [in FY 2008].”

Nevertheless, it is universally agreed that the value of earmarks runs into the ten of billions of dollars annually. While this seems like a large number, it is in fact, only a tiny fraction of one percent of all federal government spending. More importantly, many commentators are under the mistaken impression that earmarks are additive — that each dollar spent pursuant to an earmark is an additional dollar of spending, over and above the amount provided in a given spending bill prior to earmarking.

Despite the attention that earmarks and earmark reform receive, not many people fully understand what earmarks are and how they work. An earmark is not necessarily "pork” — a common euphemism usually meaning additional wasteful spending — it is merely a procedural mechanism by which members of Congress can direct more generally appropriated funds to specific projects. So if the Department of Defense is regularly appropriated $500 million for a weapons research project, an individual member might insert an earmark in the appropriations legislation, for example, to direct $10 million of that research to be performed at the laboratory at Los Alamos.

Now, if the $10 million earmark were eliminated, there would not be a $10 million budget savings. The total federal budget would not be cut by $10 million. Rather, the Department of Defense — administered by the executive branch — would still receive a total of $500 million for weapons research and would be free to spend that $10 million in any way it saw fit. That is, earmarking enables Congress to direct more specifically how general appropriations are spent. They do not require or involve new and additional federal spending; they are "budget-neutral".

Much of the recent debate surrounding earmarks overlooks or contradicts this fact about federal earmarks and spending levels. The objective of earmark reform should not be decreasing federal spending — because it will not be successful. As federal budget expert Stan Collender writes, "The talk that you can reduce federal spending by eliminating earmarks is flat wrong."


9 Taxpayers for Common Sense FY 2008 Earmark Database. http://www.taxpayer.net/budget/fy08earmarks/fy08databasemain.html. The difficulty in aggregating statistics on earmarks is explicitly acknowledged by the Congressional Research Service, in the CRS memo of January 26, 2006, op. cit. See Appendix B.
[T]here is no dispute about one thing: All an earmark does is allocate part of the funds being appropriated. That means that eliminating an earmark only eliminates the allocation and not the spending. The appropriation, the law that actually provides the funds for the government to spend stays at the original level regardless of whether the earmark stays in place. The only thing that changes is that the decision about how and where to spend the funds shifts from Congress to the executive branch agency that administers the funds.

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Regardless of what is said about “fiscal responsibility” and spending the people’s money wisely, the issue is not about how much to spend. The dispute is over who gets to make the decision.  

The foregoing does not mean that earmarks are never pork. One person's vital local medical facility or research lab is another person's idea of an unnecessary, wasteful, or even abusive spending project. This judgment can, of course, be made of any spending provision, whether it is one everyone would agree is "earmarked" or one introduced in a transparent standalone bill advanced through the standard committee process.

In the current anti-earmarking frenzy, it should not be overlooked that some earmarks have proved invaluable. In particular, the commission appointed to develop recommendations to move forward effectively in Iraq – the Iraq Study Group – was the result of an earmark added by Rep. Frank Wolf (R-VA). Rep. Rahm Emanuel (D-IL), among others, pointed out in August 2007 in the New York Times the upside to earmarks and focused on the real culprit – secrecy:

Putting all earmarks in the same boat, as critics often do, distorts the debate and does a disservice to the public. Not all earmarks are equal. For six years, some members of Congress provided secret earmarks for lobbyists in exchange for campaign contributions, foreign trips and, in some cases, outright bribes. The core of the problem was that the earmarks were hidden from the press and the public. There was no opportunity to review either their sponsorship or their merit before their passage.  

Another misapprehension about earmarks is that they are the exclusive province of the legislative branch. In fact, many of the specifically directed spending line-items in budgets proposed by presidents are functionally indistinguishable from legislative earmarks – and no more transparent. For example, the Laura Bush 21st Century Librarian Program was one of 580 administration drop-ins, worth $15.6 billion, in last year's appropriation for military construction and veterans affairs.

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Recent Earmark Reform Efforts

History is replete with cases of congressional influence peddling, self-dealing and conspicuously wasteful spending. But three such cases involving earmarks have drawn close scrutiny and given rise to calls for reform. Jack Abramoff, who bragged that appropriations committees were "earmark favor factories," steered campaign cash to and hired staffers from members of both parties in return for earmarks. Former Rep. Duke Cunningham (R-CA) admitted to taking $2.4 million in bribes in exchange for earmarks. But "[n]othing better illustrates the meltdown in spending restraint than earmarking, the process by which members secure special pork projects such as Alaska's infamous $223 million 'bridge to nowhere,' approved in an earmark requested by Sen. Ted Stevens (R-AK)." Cumulatively, these scandals led directly to two federal felony convictions and a still-ongoing federal investigation of Stevens.

The scandals cited above led to the first serious congressional efforts to reform the practice of earmarking. In September 2006, the GOP-led House adopted institutional rules requiring the disclosure of earmarks and their sponsors in all appropriations, authorization, and tax expenditure measures reported by any committee. This rule expired at the end of 2006, but in its first week in power, on January 4, 2007, the new House Democratic majority approved H. Res. 6, which requires members to submit written requests for earmarks to the chairman and ranking minority member of the relevant committee that includes a member's name, name of the intended recipient the earmark, the purpose of the earmark, and a certification that the member or his or her spouse has no financial interest in the earmark.

Though a notable reform, the House rule has two significant shortcomings. First, it does not require publication of the information collected to be disclosed on the Internet, impeding the breadth of access to the information and the ease of its use. Second, the rule does not require full public disclosure of all requests prior to consideration of legislation, limiting the ability to hold substantive debate and hold legislators accountable before earmarks are approved.

Soon thereafter, on January 18, the Senate approved its own set of rules governing earmarks in the Legislative Transparency and Accountability Act of 2007 (S. 1). S. 1 requires disclosure of the same information required by H. Res. 6, but the version of the bill enacted into law (The Honest Leadership and Open Government Act of 2007) omitted the mandate that the information be made available to the general public on the Internet for at least 48 hours prior to consideration.

The earmark reform cause was also taken up by President Bush. In his 2007 State of the Union, Bush urged Congress to "cut the number and cost of earmarks at least in half by the end of this session." In April 2007, the Office of Management and Budget published the first-ever online database of federal earmarks. It provides aggregate data on the number and cost of earmarks for FY 2005 and estimated FY 2008 appropriations by agency, office, and account, with details on individual earmarks, enabling sorting earmarks by state, in many cases, providing the statutory or report language where the earmark appeared. The database does not, however, identify the individual earmark sponsors in Congress and often does not indicate the ultimate beneficiary of the earmark. It also does not include executive branch earmarks – those requested by the president.

In his 2008 State of the Union, Bush noted progress by Congress toward this goal but said it was insufficient:

[I]f you send me an appropriations bill that does not cut the number and 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.

Thus far in 2008, earmark reformers in Congress, led by Sen. Jim DeMint (R-SC), have focused efforts on a wholesale moratorium on earmarks. A House-proposed moratorium offered by Minority Leader John Boehner (R-OH) was narrowly defeated on February 7 by a vote of 196-204. As of this writing, Sen. DeMint has offered a full one-year moratorium on considering bills with earmarks as an amendment to the Senate budget resolution. The amendment has garnered bipartisan support in both the House and Senate, including the remaining presidential candidates, Sens. Hillary Clinton (D-NY), Barack Obama (D-IL), and John McCain (R-AZ).

But some in Congress, notably appropriators such as Rep. David Obey (D-WI), chair of the House Appropriations Committee, have criticized DeMint's moratorium amendment as hypocritical grandstanding:

For the Republican Party leadership to belatedly give us lectures on earmarks is, in my view, akin to reformed alcoholics giving lectures on temperance…The previous Republican leadership was notorious for using earmarks as enticements in order to get their membership to vote for bills that individuals may otherwise not be inclined to vote for.

It is unlikely the DeMint amendment will succeed during the budget resolution debate, as both the Senate Majority and Minority Leaders have expressed opposition.

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18 http://earmarks.omb.gov/
20 http://clerk.house.gov/evs/2008/roll032.xml
**Conclusion: Guidelines for Earmark Reform**

While the proposed one-year moratorium might help to give Congress the space and time to enact more meaningful reforms, the message of the amendment misses the mark. As noted above, the central issue is not how many earmarks Congress enacts or how much money is dedicated via the earmarking process. The proper focus should instead be guided by the following principles:

- The process by which earmarks are requested and secured must be standard across all committees in both chambers, must be simple, and must provide ample time and opportunity for review and comment
- Earmarks must be clearly written and subject to hearings, oversight, and, where feasible and appropriate, competitive bidding
- Members must have sufficient time to evaluate earmarks on the merits prior to voting, including receiving full information about the earmark, its substance, sponsors, and beneficiaries
- Citizens and the media must be afforded easy access to searching earmarks on the Internet and the opportunity to comment on proposed earmarks before they are enacted.

Relevant and useful efforts at reforming the earmarking process must ultimately focus on the merits of each individual earmark and changes in rules that facilitate debate, scrutiny, informed evaluation, and, in the end, informed voting by members of Congress.

Such earmark reform efforts might go some distance toward making information available to the public and enabling citizens hold their elected leaders accountable for decisions about federal spending priorities. And by opening up federal spending debates, they might help restore the faith of citizens in the process by which and in the programs on which the federal government spends their money.
Dear Colleague:

As you are aware, the Appropriations Committee placed a moratorium on earmarks until a reformed process is put in place. While most congressional earmarks are worthwhile and provide critical funds for state, local, and community needs, the recent explosion in the number of earmarks set up a situation that was uncontrollable. While Congress should never cede all authority over funding decisions to the President or the staff of federal agencies, the earmarking process is clearly in need of reform.

To increase transparency in the process and restore public confidence, the House rightly acted to approve new rules. As you know, Rule XXI has been amended to require committees to include a list of congressional earmarks, limited tax benefits, and limited tariff benefits contained in the measure, along with the names of the Members requesting each earmark provided. Additionally, the Code of Official Conduct (House Rule XXIII) has been amended to require a Member who requests a congressional earmark, limited tax benefit, or limited tariff benefit to provide a written statement of the committee of jurisdiction identifying the recipient and purpose of the earmark and certifying that neither the Member nor the spouse has any financial interest in the earmark.

The Appropriations Committee will implement new procedures to ensure compliance with the House Rules. It is our goal to create an accountable, above-board, transparent process for funding decisions, and protect the Congress as an institution from the abuses that have harmed its credibility:

1. The Committee will have a universal deadline of Friday, March 16 for all requests. This will ensure that Appropriations Committee and staff have adequate time to vet all requests.

2. Each Member office will need to enter their appropriations requests into the Committee’s electronic database and provide the statement and certification now required by the Code.
Dear Colleague

of Official Conduct, on letterhead and signed by the requesting Member. The Committee will not consider any request from a Member if the certification is not provided. The Committee will retain the certifications and, as required by House rules, make those certifications available to the public in the case of any request receiving funding.

3. Perhaps most importantly, the Committee plans to reduce the dollar amount of earmarks in appropriations bills by 50 percent relative to the amounts planned in FY 2006. This reduction would not be applied to those accounts which by their nature are project-based, like the Corps of Engineers in which the President traditionally requests, and the Congress approves or amends the Administration’s proposed project list. However, the process has gotten out of hand. Again, I believe it is Congress’s prerogative to make spending decisions through the appropriations process, but the process needs to be reformed. By reducing the number of earmarks we can ensure that these projects are adequately vetted and evaluated.

Each of the subcommittee chairs will be sending out additional guidance on what they will require from Members about their requests.

Sincerely,

[Signature]

David R. Obey
Chairman

Appendix B
Memorandum

January 26, 2006


FROM: CRS Appropriations Team

Disclaimer. While an attempt has been made to comprehensively capture earmarks in accordance with the definition and methodology outlined, the figures reported here should not be regarded as definitive. Factors such as the possibility of using different definitions and methodologies for identifying earmarks, and the lack of clarity of some of the language in the documents consulted could contribute to different research results.

Agriculture Appropriations
Summary of Estimated Earmarks
(millions of current dollars)

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<th>Fiscal year</th>
<th>Total appropriation</th>
<th>Total $ value of earmarks</th>
<th>Earmarks as % of total appropriation</th>
<th>Number of earmarks</th>
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Notes: Earmarks are defined as any designation in an appropriation act or its accompanying conference report which allocates a portion of an appropriation for a specific project, location or institution, with the exception of those earmarks identified for USDA's Agricultural Research Service (ARS). Salaries and Expenses account. The total amount of earmarks to ARS Salaries and Expenses could not be directly derived from bill or report language. Data were provided by the ARS budget office on the number and amount of specific projects requested by the President and funded by Congress, and for projects funded by Congress but not requested by the Administration. The sum of these two figures represents the earmark number and amounts for this ARS account.