

Revival Of Earmarks Will Streamline Legislative Process

By **Kathleen Hatfield and Paul Moorehead** (January 25, 2021)

The old adage that it is best not to watch laws or sausages being made might be said to apply to the federal appropriations process. Historically, specific items of spending — earmarks — were routinely included in annual spending bills to help persuade members of Congress to enact legislation.

Generally, an earmark is a provision in legislation that directs federal funds to a particular recipient at the request of one or several members of Congress.

More specifically, both the U.S. Senate and the U.S. House of Representatives in the 110th Congress, from 2007 to 2008, created rules to increase transparency in the earmark process and, in so doing, provided more explicit definitions of earmarks.

They each offered their own particular definitions that differ a bit, but both chambers basically require that any congressionally directed spending, tax or tariff benefit be considered an earmark if it would benefit a specific entity or state, locality, or congressional district rather than be provided through a statutory or administrative formula, or by utilizing a competitive award process.



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By What Legitimate Authority are Earmarks Derived?

Of course, the power to spend funds from the U.S. Department of the Treasury — including earmarks — is vested by the U.S. Constitution in the Congress. Not by accident, the framers decided to spell out the powers of the Congress in Article 1, Section 9.

Their elucidation of the powers held by the other two branches of government trailed behind, in subsequent articles, underscoring in both structure and language how authority over the power of the purse was delegated to lawmakers in the legislative branch as opposed to unelected appointees or staff working in the executive agencies.

This was deliberate and made clear that allocating federal funds is properly left to the branch closest to the people: Congress. The language reads in part: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." As Sen. Robert Byrd, D-W.Va., the longest-serving senator in U.S. history and chairman of the Senate Committee on Appropriations for a decade, once wrote:

The legislative control of the purse is the central pillar — the central pillar — upon which the constitutional temple of checks and balances and separation of powers rests, and if that pillar is shaken, the temple will fall. It is ... central to the fundamental liberty of the American people.

James Madison thought similarly. In Federalist No. 58 he wrote:

This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives

of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

Earmarks have been and — we argue — should once again be considered a just and salutary measure by which the needs of the American people can be addressed effectively, in a transparent, accountable and fair manner.

Value and Traditional Use of Earmarks

Contrary to popular belief, until the Senate and House instituted the existing earmark ban in the 112th Congress, from 2011 to 2012, earmarks had been utilized honestly and successfully by many members of Congress for decades. The funding was essential to support specific, much-needed projects in their districts.

Nearly all held the belief that, as their constituents' representatives in Congress, they understood the economic, social and structural needs of their communities far better than elected officials from other states — including the president and his appointees housed in the federal departments.

Even some members of Congress who later became president, like Lyndon Johnson, understood the practical utility and critical attributes of earmarks. He understood that specifically targeted funding could provide critical investments in agriculture, education, transportation, health care, water and other unique projects that perhaps would never otherwise be funded.

He also understood that the process of directing such funding for the benefit of a member and his constituents gave that particular congressman a reason to move that particular bill expeditiously through Congress.

Since its imposition, the earmark ban has contributed greatly to the mind-numbing legislative gridlock that currently grips the country — gridlock that has left congressional leadership without an important tool by which to build consensus.

Lack of congressionally directed spending has greatly undermined the ability of congressional leaders to motivate a majority of their members to work together to achieve a common goal. The resulting gridlock applies to spending as well as nonspending bills alike, e.g., federal highway and transportation bills.

Indeed, it seems particularly ironic that earmarks, the great majority of which contributed mightily to the building of essential roads, bridges, schools and rural hospitals across this country for decades, were eliminated when declared wasteful spending.

Yet, it is exactly the resulting gridlock and lack of congressionally directed spending that has contributed in large part to the dangerous deterioration of America's critical infrastructure, day after day, year after year, leaving no collective method by which to reach agreement on how to address it — even when a probable majority of members of Congress on both sides of the aisle not only recognize the need to rebuild the nation but continually express their own individual desire to make it happen.

The most knowledgeable and experienced members of Congress, meaning many who served both before and during the earmark moratorium, today believe strongly that the earmark ban was an egregious mistake. It has not led to greater transparency in spending; instead, it has resulted in so-called plus-ups in general spending for federal agencies, where agency

officials, in turn, can award funds to particular entities with limited congressional oversight.

And, while the earmark ban was supposed to end noncompetitive awards, some federal agencies have raised the practice of awarding sole-source contracts to a fine art using the often unsubstantiated justification that only certain awardees can fulfill these particular contracts' requirements.

Thus, the executive branch has been empowered to allocate funding for state, local and other projects and programs without proper congressional oversight or approval. The October 2020 final report of the House Select Committee on the Modernization of Congress provides an insightful assessment of the problem at page 234:

While Congress continues to negotiate funding levels for Federal agencies and programs, the decision-making on who receives competitive discretionary grants is being done by unelected executive branch officials. No one knows a district's needs better than the Member elected to represent their community. But the current system does not acknowledge this reality and leaves the funding decisions up to executive branch officials that are more disconnected from a community's needs.

In other words, federal agency employees living and working in Washington, D.C., on behalf of the nation as a whole cannot possibly know the specific needs of each congressional district, particularly those in the nation's more rural, remote and impoverished areas.

Bridge to Nowhere Portends Loss of Earmarks

In 2005, a transportation bill authorized some \$233 million to build a bridge in place of a ferry that connected the town of Ketchikan, Alaska, with Gravina Island, home to the Ketchikan International Airport and about 50 residents at that time.

The provisions were reportedly negotiated by the chairman of the House Committee on Transportation and Infrastructure, Rep. Don Young, R-Alaska. He came under severe criticism for seeking such a large amount to benefit a small and relatively unpopulated island. Nicknamed the Bridge to Nowhere, the project gained public attention and of those other members of Congress who staunchly opposed the idea.

Tom Coburn Takes on Goliath

In the Senate, Tom Coburn, R-Okla., a practicing obstetrician, strongly opposed funding the Bridge to Nowhere and railed against it, raising both its profile and his own. In doing so, he locked horns with longtime appropriator Sen. Ted Stevens, R-Alaska. His opposition to the funding of the bridge, and other projects he labeled pork-barrel spending, eventually earned him the moniker Dr. No.

His opposition to earmarks in general, and the Bridge to Nowhere in particular, resulted in the reallocation of funding for the bridge and fueled tremendous antipathy toward earmarks. Within only a few years, the effort to reform and then eliminate earmarks gained steam.

Earmark Reform in the 110th Congress, From 2007 to 2008

The House and Senate instituted formal earmark disclosure requirements in their standing rules, first applied in the 110th Congress, to increase transparency in the earmarking process.

The House and Senate Rules still require that any member submitting an earmark, should they be reinstated, must submit a written statement that contains the name of the member, name and address of the earmark recipient, purpose of the earmark and a certification that the member has no financial interest in the earmark.

Earmark Reform in the 111th Congress, From 2009 to 2010

In 2009, both Senate and House members were required to explain on their personal websites the purposes of their earmark requests and why the earmarks would constitute a valuable use of taxpayer funds.

In 2010, House Democrats in the majority sought further to diminish concerns over claims of wasteful spending by prohibiting earmarks to for-profit entities. However, earmarks were retained for nonprofits and state governments.

Earmark Reform in the 112th Congress, From 2011 to 2012

Unlike Johnson, after President Barack Obama won the presidency, he promised during his State of the Union address in January 2011 to veto any bill that contained earmarks.

At the same time, Republicans who had gained control of the House in the 2010 elections, led by the new, anti-earmarking Speaker of the House John Boehner, R-Ohio, instituted their own ban on earmarks.

Senate Democrats, led by Majority Leader Harry Reid, D-Nev., were conflicted. Reid fought for retention of congressionally directed spending and, according to press reports, told Obama to back off.

However, then-Appropriations Committee Chairman Daniel Inouye, D-Hawaii, felt he had no choice but to implement a ban like the House for at least two years, asserting:

The President has stated unequivocally that he will veto any legislation containing earmarks, and the House will not pass any bills that contain them. Given the reality before us, it makes no sense to accept earmark requests that have no chance of being enacted into law.

The ban itself was never codified in the formal rules of either chamber, but was established by party rules and committee protocols, and it continues to be enforced by congressional leadership, according to the Congressional Research Service.

The CRS writes, for example, that the rules of the House Republican Conference for the 112th Congress included a standing order labeled earmark moratorium, which stated, "It is the policy of the House Republican Conference that no Member shall request a congressional earmark, limited tax benefit, or limited tariff benefit, as such terms have been described in the Rules of the House."

The CRS advises that this language has been included in orders adopted by the conference in the 113th, 114th, 115th and 116th Congresses, from 2013 to 2020.

Likewise, Inouye issued a press release stating that the Senate would implement a two-year moratorium on earmarks. Additionally, the Senate Republican Conference adopted a resolution on Nov. 14, 2012, which included its earmark moratorium.

Per the CRS, it stated:

Resolved, that it is the policy of the [Senate] Republican Conference that no Member shall request a congressionally directed spending item, limited tax benefit, or limited tariff benefit, as such terms are used in Rule XLIV of the Standing Rules of the Senate for the 113th Congress.

The rule was then adopted by Senate Republicans in each Congress through the 116th Congress, from 2019 to 2020.

Lack of Earmarks Increases the Use of Continuing Resolutions and Omnibus Spending Bills

Without earmarks, individual members of Congress have less direct skin in the game, so should leadership wish to postpone action on one or all spending bills, members may be less inclined to object — partly because their role in making such decisions has diminished.

Thus, continuing resolutions have become more prevalent, leading to perpetual uncertainty about when the funding for each new fiscal year will be enacted. This lack of certainty, in turn, has heightened confusion for all parties involved — including the American people.

In their 2016 Congressional Pig Book, Citizens Against Government Waste determined that earmarks were contained in the financial year 2016 Consolidated Appropriations Act, which provided \$1.15 trillion in discretionary spending. The CAGW argued that "Throwing all earmarks into one large bill makes it more difficult to identify and eliminate earmarks than if Congress adhered to regular order and considered the 12 appropriations bills individually."

Again citing the House Select Committee on the Modernization of Congress' recent final report, at pages 237-239:

Lacking individual Member input on specific projects, Congress today often passes large, omnibus spending packages. And these omnibus spending bills ultimately defer the details of discretionary grant spending to the executive branch. ... As passage of individual appropriations bills has fallen ... the size and scope of the bills that do pass has steadily risen. ... This has been compounded by an often-dysfunctional appropriations process, which provides the executive branch further validation to engage in this unauthorized spending and the funding of projects that may not reflect communities' top priorities and greatest needs.

Increasing Frustration Leads to Discussion of Reintroducing Earmarks

As legislative gridlock has continued to grip the nation, leaving even the desperately needed COVID-19 relief package sitting in limbo until nearly the last day of 2020, members of Congress from both parties have decided to push to revive much-needed earmarks.

Their main arguments include that earmarks will enable Congress to reclaim its Article One power of the purse and change the dynamics of the appropriations process, likely making it easier to pass these bills when members of Congress know they can fund local projects requested by constituents in their own backyards.

In January 2020, senior House appropriators discussed whether the time had finally come to

reinstitute a new, more narrowly prescribed version of earmarks.

Support for the idea was led by then-House Appropriations Chairwoman Nita Lowey, D-N.Y., with backing from others, including Rep. Tom Cole, R-Okla., the Ranking Republican on the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies.

However, after weeks of discussion by the House in the spring of 2020, it was decided that earmarks would not be reintroduced in that election year, because some moderate House Democrats facing tight races in swing districts expressed hesitation.

For example, Rep. Max Rose, D-N.Y., who had flipped a New York district that President Donald Trump won in 2016, said he had a lot of questions. Those concerns, plus the fact that Senate Majority Leader Mitch McConnell, R-Ky., showed little interest in resurrecting earmarks, caused the House to delay their revival for another year.

Nevertheless, many appropriators in both the Senate and House remain uncomfortable with the earmark ban. In February 2020, even Republican Senate Appropriations Chairman Richard Shelby, R-Ala. was quoted in the press as saying, "Earmarks have become a pejorative term. But directed appropriations, where they're meritorious, I think that's a right Congress has had under the Constitution and shouldn't give up."

Similarly, as reported in Roll Call at about the same time, Cole advised that most Republican members of the House Committee on Appropriations would likely support earmarks, but acting in a bipartisan fashion would portend a greater chance of success.

He said, "I get the Democratic position that if we're all going to do this, we need to hold hands and jump off the cliff together." He added that any proposal should have more institutional discussion and a "genuine bipartisan recommendation to the leadership."

Later in the year, on Oct. 1, 2020, Cole concurred with observations offered by House Majority Leader Steny Hoyer, D-Md., and Majority Whip James Clyburn, D-S.C., at a hearing on proposed changes to House Rules for the current 117th Congress, including to allow earmarks.

Hoyer expressed a view held by many, including conservative Sen. Jim Inhofe, R-Okla., that the prohibition on congressionally directed spending gives too much power to the executive branch.

Clyburn similarly testified at the same hearing in support of restoring earmarks with safeguards. He argued that he represents many rural communities, each with its own challenges and needs. He said, "These communities have limited resources and are unable to hire grant writers and lobbyists. What these communities have is a congressman."

Commenting specifically on their testimony at the hearing, Cole expressed similar sentiments. In fact, he called the earmark ban a failed experiment. Echoing Clyburn, he said:

My opinion is we lost an important tool to help our constituents, who send us here, who are not in a position to get paid lobbyists so they rely on their Member to look after their interests — I think that's part of the [my] job.

At the hearing, Cole also said he believes there is no correlation between abolishing earmarks and balancing the budget, underscoring the fact that ending earmarks has failed to limit government spending.

Indeed, the final report issued by the House Select Committee on the Modernization of Congress, discussed in more detail below, recently found that even when earmark spending was at its highest point, in financial year 2006, earmarks accounted for less than 1.1% of all federal spending.

Democratic Majorities in Both Chambers of Congress in 2021

After Raphael Warnock and Jon Ossoff delivered the Senate to Democrats on Jan. 5, the revival of a new form of earmarks may have more potential to be enacted now than at any time since their elimination.

In December, referring to the bipartisan House Select Committee's final report, the Wall Street Journal, in an article posted on the Select Committee's website, described how the group was making a push to revive a form of earmarks that would be community-focused grants with more transparency and accountability, which the lawmakers hope will help restore Congress' role in making specific decisions about spending taxpayer money.

The new grants were included in Chapter 10 of the Select Committee's final report,[1] titled "Reclaim Congress's Article One Responsibilities," and states at page 217:

The executive branch has taken control of the purse strings, allocating funding for state and local projects and programs without congressional appropriations or approval. These dire circumstances led the Committee to examine why the executive branch has expanded while the legislative branch has not.

The report documents how the elimination of earmarks has resulted in less rather than greater transparency in federal spending, and how great dissatisfaction with the current lack of earmarks exists in both parties.

The bipartisan final report states at page 242:

Despite best intentions, the decision to end congressionally-directed spending has faced wide-spread backlash across the political spectrum. Scholars from the Heritage Foundation to the Congressional Institute to the Brookings Institution have called for the reinstatement of some form of Member-directed spending. Members, facing the frustration of not being able to fully advocate for their districts in the appropriations process, have also taken up the call to reinstate the Article One power of the purse.

The chapter then recommends that (1) all rules on congressionally directed spending be combined into the official rules of the House; (2) a single, sortable, public government website managed by the Clerk of the House be created where every detail of a new earmark-type procedure would be listed, and to which each member's website must be linked; and (3) a new competitive Community-Focused Grant Program would be established to consider projects that begin at the local level with community support.

However, the Select Committee recommended that grant projects not be included in Continuing Resolutions or be added as new, unvetted projects offered by amendment on the House floor.

Under the new grant program, public entities, including not-for-profits that serve a public interest, state, local and tribal governments, plus public entities collaborating with a member of Congress to identify a local priority, would be able to apply for grants by submitting a formal, standardized grant application to at least one member of Congress.

Each member would then decide which projects they would support by submitting a request to the appropriate congressional committee using a uniform system. For-profit entities would be prohibited from participating, as would relatives of members of Congress.

The bipartisan Select Committee argues that the CFGP is designed to provide accountability and transparency, with routine independent audits conducted by the inspector general of each relevant agency "to identify waste, fraud, and abuse and offer recommendations where funds should be reduced."

All requests would be capped to a combined total of 1% of discretionary spending, not including project-based accounts. The final report states that the purpose of the cap is "to prevent the inequitable distribution of funds where, for example, some Members are successful in directing vastly more funding to their district than other Members."

Finally, the report recommends that Congress aim to distribute grants equitably across states and geographic regions, between rural, suburban and urban areas, and throughout economic sectors. The report provides, too, that from time-to-time, major projects of national or regional importance may receive a larger-than-normal grant share.

Indications of Earmark Liberalization in 2021

Democratic majorities in both chambers make the prospect of congressionally directed spending more likely. Shortly before incoming House Appropriations Chair Rosa DeLauro, D-Conn., was elected, she confirmed that she would support the revival of earmarks.

Likewise, on Nov. 20, 2020, Hoyer told Roll Call that there would be an effort to bring back earmarks in the 117th Congress, and that sometime after the Appropriations Committee's new chair was elected, she would begin soliciting House lawmakers to "ask for congressional initiatives for their districts and their states."

In the Senate, old-school appropriators Patrick Leahy, D-Vt., and Shelby will change places, with Leahy becoming the Chairman and Shelby the ranking member. Both Leahy and Shelby have a long history of supporting earmarks.

Barring unforeseen developments, Leahy's Staff Director of the Appropriations Committee will be Charles Kieffer, who has managed the Democratic side of the Senate Committee on Appropriations under Chairmen Byrd, Inouye, Barbara Mikulski and Leahy.

A calm, quiet and savvy tactician, few if any personnel on Capitol Hill have his encyclopedic knowledge of how appropriations work. He has more than 42 years of experience in the appropriations process, including 20 years with the Senate Committee on Appropriations, 16 years with the Office of Management and Budget, and six years with the U.S. Department of Health and Human Services.

His time handling appropriations in the Senate occurred primarily under the tutelage of Byrd, whose enthusiastic support of earmarks was shared by his Democratic successors in the chairmanship of the committee.

Today, that support is shared by numerous Republican members still serving on the Appropriations Committee, including Shelby, Lisa Murkowski, R-Alaska, Roy Blunt, R-Mo., and others.

All of these developments augur well for the reform, if not elimination, of the earmark ban. Doing so should help undo some of the legislative gridlock that has stymied the legislative process in so many ways for so many years.

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[1] H. Rept. 116-562 (October 2020).