



BIPARTISAN POLICY CENTER

**Written Testimony
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Chairman Sessions, Ranking Member Slaughter, and members of the committee: Thank you for inviting me to testify on the subject of congressional earmarks. I appreciate the opportunity to share some specific thoughts on the constitutional basis for congressionally directed spending, dispel some misconceptions, and explain the essential role of directed spending in addressing our nation's long list of tough challenges. I will then suggest some additional approaches to ensure that a return of earmarks does not suffer from some of the abuses that occurred in the past.

During my testimony I will focus on the following points:

- 1) Under the Constitution, it is Congress that has the authority and obligation to direct how money shall be expended from the U.S. Treasury. Members of Congress are adequately informed and responsible to play a role alongside the Executive Branch in prioritizing the critical needs faced by their constituents.
- 2) Congressional earmarks do not increase federal spending, and comprise a nominal portion of total federal outlays. Between fiscal years 1996 to 2006, direct Congressional spending accounted for 0.80% to 1.10% of total spending.¹
- 3) The earmark process spiraled out of control in the mid-2000's creating a legacy of mistrust that must be addressed. Congress was well on the way to implementing necessary guardrails when the moratorium was adopted, but more must be done.
- 4) The restoration of an effective system of congressionally directed spending will increase Congress' capacity to take on tough issues like deficit reduction that are critical to the national interest and often controversial with constituents.

Summary

Congressional earmarks serve an important role in the functioning of the legislative process. This necessity has become acutely apparent given the increasingly high levels of polarization and gridlock that have come to define the institution.

¹ Rob Porter, Sam Walsh, "Earmarks in the Federal Budget Process", Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 16 (last updated April 1, 2008), 30.

Given Congress's responsibility and the power over spending that the Constitution specifically delegates to the legislative branch, it is both obvious and reasonable that Congress should exercise some control over the expenditure of money for important projects in Members' congressional districts, subject to a carefully crafted set of rules and requirements.

Concerns to be Addressed

For those who support legislative collaboration, there are 3 main critiques that must be addressed to create an effective and responsible system of direct spending:

- 1) The process requires more robust transparency and rigorous vetting;
- 2) The cost and the number of earmarks will get out of hand undermining coordinated investment and critical research;
- 3) Legislators will champion earmarks for their own financial gain

Requirements implemented last decade substantially addressed the matter of personal benefit requiring that members certify that their spouse (and in the case of the Senate, their immediate family) have no financial interest in the earmark². Equally important was the House prohibition against directing earmarks to for-profit entities. Additional reforms requiring enhanced transparency and improved vetting provide a foundation for the further improvements that are necessary to restore the process.

Recent History and Reforms

We have witnessed what can happen when the earmark process is left largely unbounded. Within the ten-year span of fiscal years 1996 to 2006, total earmark spending increased from \$12.5 billion in 1996 to a high of \$29 billion in 2005³. The actual number of earmarks for that same period swelled from a low of around 1,000 in 1996 to a peak of 14,000 in 2005⁴.

To attempt to stem a process that was spiraling out of control, beginning in 2006, House leadership instituted requirements designed to increase transparency and accountability. The following year, Congress passed the Honest Leadership and Open Government Act of 2007. As a result, the House and Senate had very similar, though not identical, rules in place prior to the moratoria.

Under these rules, House members were required to explain the purpose of the request and identify the recipient of the earmark to the committee of jurisdiction. A list of earmarks was then included in either the text of the relevant legislation, its accompanying report, or printed in the *Congressional*

² CRS Report "Earmark Disclosure Rules in the House: Member and Committee Requirements", Megan S. Lynch (May 21, 2015), 3.

³ "Congressional Pig Book 1996," Citizens Against Government Waste, <https://www.cagw.org/Content/pig-book-1996>; "Congressional Pig Book 2017," Citizens Against Government Waste, <https://www.cagw.org/reporting/pig-book>.

⁴ Ibid.

Record. In addition, the House Appropriations Committee required that members post the relevant information on their website with an explanation of the earmark's value⁵.

In the Senate, a list of earmark requests and Senators making each request was required to be posted in a searchable format on the Internet 48 hours prior to a vote on legislation or a conference committee report. Senators were also empowered to raise a point of order against any earmark inserted in a conference committee report which could only be overridden by a three-fifths majority vote.⁶ In the four-year period beginning the year just before the first reforms, earmark spending declined by over 40%⁷.

Regrettably, these reforms did not go far enough. When a very Senior Senator sought to build a very big bridge to a very small and isolated community, earmark opponents pounced. Despite the fact that Congress ultimately rejected the project, the House Republican Conference placed a moratorium on earmarks and, in February of 2011, the Senate Appropriations Committee announced its own ban.

Fiscal Implications of Earmarks

The argument against earmarks often falsely asserts that the process increases overall federal spending. It is critical to understand that agency budgeting is a zero-sum game. If Congress directs \$10 million in earmarks to a \$1 billion agency appropriation, that agency then has \$990 million remaining to allocate. Even in fiscal year 2006, when earmarking was at its peak just prior to implementation of reforms, earmarks constituted just over one percent of all federal outlays⁸. It is also necessary to recognize that members of the Executive Branch, like members of Congress, have unique interests, commitments and views on which specific problems demand federal investment. While I hold our nation's public servants in high-esteem, it is not clear to me that their judgment or the processes by which the Executive Branch makes spending decisions is more efficient, transparent or rigorous than proposals made by members of Congress and approved by the entire body. Finally, one is hard pressed to argue that the elimination of earmarks has resulted in a new era of fiscal probity. While not suggesting a direct causal linkage, it must be acknowledged that the federal debt has increased by over \$5 trillion since the earmark moratoria took effect.

⁵ CRS Report "Earmark Disclosure Rules in the House: Member and Committee Requirements", Megan S. Lynch (May 21, 2015); 1,3.

⁶ <https://www.congress.gov/bill/110th-congress/senate-bill/1>

⁷ Doyle, Richard B., "The Rise and (Relative) Fall of Earmarks: Congress and Reform, 2006-2010" (March 4, 2011). Public Budgeting & Finance, Vol. 31, Issue 1, 7. Available at SSRN: <https://ssrn.com/abstract=1784071> or <http://dx.doi.org/10.1111/j.1540-5850.2011.00971.x>

⁸ Rob Porter, Sam Walsh, "Earmarks in the Federal Budget Process", Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 16 (last updated April 1, 2008), 30.

Good Government and Making Congress Work

The ability of a member of Congress to demonstrate her priorities, fight for the compelling interests of her constituents and simply exhibit the ability to get something done is essential to the delicate balance that is the basis of our nation's stability and success. One of the many unique aspects of American democracy is the obligation of members to vote in the national interest while being elected by local interests. When people assert that members of Congress should have the courage to take "tough votes," what they are often calling for are votes that are critical for the Country's future but likely to be unpopular with present constituents. Mr. Chairman, I do not need to inform you that no member of Congress gains local support for authorizing the use of military force, voting to increase the debt ceiling or reducing the growth of entitlement spending. But the country depends on Congress's ability to make responsible choices when facing these kinds of critical issues. The fact that direct congressional spending creates investment in the legislative process and engagement in the hard work of governing a divided country is not something to take for granted.

It must also be recognized that the earmark moratorium has not achieved the goal of creating greater transparency around project specific spending. Ironically, the practice of seeking congressionally directed spending was at its most transparent following the 2006-2007 reforms. Since then, the process has been taken out of public view with members of Congress having to petition, lobby, cajole and sometime pressure federal agencies to consider local priorities. An explicit process for earmarks would provide the public with far greater transparency than the current practice.

Addressing Continued Concerns About Congressionally Directed Spending

As noted earlier, some oppose earmarks because they fundamentally mistrust the give-and-take that is foundational to the legislative process. For this segment of the electorate, members speaking in private, taking a fact-finding trip, renting an apartment in Washington, or having direct influence over spending are all forms or sources of potential corruption. For those who seek less governmental action regardless of the issue, opposition to earmarks makes good sense.

However, if the goal is to create an effective and transparent system that encourages members to openly pursue projects to address constituent needs, there are several additional safeguards Congress should consider beyond the reforms that were instituted several years ago. A number of these suggestions also provide incentives that would bring additional transparency and deliberation to key aspects of the overall legislative process. As a general proposition, the goal of these reforms is to have direct spending follow regular order and ensure that the public has effective access to review spending decisions.

Options for Improving Process of Earmarks

Below I offer a menu of possibilities that Congress could consider. Several of these ideas have been promoted by former Congressman John Porter (R-IL) in collaboration with California State University Professors Scott Frisch and Sean Kelly.

- I. Transparency – Members of Congress should desire attention for their efforts to address key constituent concerns. Opportunities to regularize this public awareness include:
 - **Make Information Easily Accessible** - Require that all earmarks are posted both on individual member web sites and a publicly accessible subcommittee website at least 15 days prior to markup with an explanation of the project and description of why the request is a valuable use of taxpayer funds. (Prior to the moratorium, the House Appropriations Committee required posted explanations). Additionally, require posting, on a publicly accessible website, a list of all earmarks that were included in legislation (including which member originally requested along with the above information) after it is adopted at the committee, chamber, and final conference report stages.
 - **Require Regular Order & Deliberation:**
 - Prohibit earmarks from being included in bill report language in lieu of being incorporated in the base text of a bill. This will ensure that earmarks are subject to amendment before the entire House/Senate and that any unsuitable projects can more easily be struck.
 - Prohibit insertion of earmarks not previously requested into manager’s amendments on the floor.
 - Prohibit insertion of earmarks not previously requested into Omnibus bills. Requiring earmarks to be considered through regular order serves the interests of transparency and accountability, and provides an incentive for Congress to conduct its most fundamental functions through the committees and established processes.
- II. Instituting a More Robust Vetting Process – Earmarks should undergo the same scrutiny as other legislative provisions.
 - **Expert Review and Deference** - Professional subcommittee staff should vet project requests, including soliciting comments from executive branch employees who implement the programs. Earmarks should not be attached to programs that make funding decisions based on expert

peer review. The tradition of exempting the National Science Foundation, the National Institutes of Health, and other federally funded scientific research should be continued.

- **Require Authorization before Appropriation** - Allow earmarks only in instances where a particular program has been specifically authorized. This requirement would provide an important incentive for enacting authorizations and ensure that both authorizers and appropriators are engaged in the process. Ideally, Congress would authorize projects within a certain program and lay out criteria by which projects are considered. Limits could be placed on the number and cost of projects, state matching requirements could be specified where appropriate, and other requirements could be established.
- **Evaluate Spending & Ensure Tax Payer Value** – While most federal spending could be more rigorously evaluated, heightened concern over earmarks argues specifically for a methodical evaluation of these expenditures. Congress should instruct the GAO or other suitable entity to review and audit projects. A “claw-back” provision should be considered to protect tax payers from any misuse of funds.

III. Setting Reasonable Limits on Direct Spending – Even with an improved process, direct spending should remain a tiny fraction of overall spending.

- **Prohibit For-Profit Earmarks** – Codify, in both the House and Senate, prohibition on earmarks to for-profit companies and limit to federal, state, local, and tribal governments.
- **1% Spending Limit** - Appropriations subcommittee bills should limit project funding to keep overall earmark spending below 1% of total federal spending.
- **Numerical Limit** - Limit the number of earmarks that any member can request.

Conclusion

Mr Chairman and members of the Committee, the constitutional prerogative for members to direct resources toward constituent priorities is not a begrudging “skid greasing” to be done in the shadows, but rather a core aspect of our democratic design that members of Congress should pursue openly, proudly and be held accountable for. Congress should rightly reclaim this legitimate legislative tool and establish a transparent and deliberative process that can regain the public trust.