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**Earmarks in the Federal  
Budget Process**

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## **Introduction**

With lobbying scandals, congressmen under indictment, and “bridges to nowhere” drawing public attention, the congressional practice of earmarking expenditures has gained great political salience in recent years. Though the 109th and 110th Congresses, as well as the Bush Administration, have attempted reform, the issue is likely far from resolved and will remain an issue through the 2008 election.<sup>1</sup> This Briefing Paper seeks to provide necessary background for public debate over earmarking reform and for new scholarship on the subject. Part I explores similarities and differences among multiple, competing definitions of the term ‘earmark.’ Part II first describes the processes through which earmarked expenditures arrive in the federal budget and, second, explains the impact of recently implemented reforms and those alternative reforms that have been proposed. Part III aggregates and synthesizes the available empirical data on the volume of earmarks in the federal budget and advances a few tentative conclusions about the rising use of earmarks. Part IV catalogues the normative arguments against and in favor of current practice.

### **I. Defining Earmarks**

The verb “‘to earmark’ derives from the “old herdsman’s practice of cutting a notch in the ears of swine or cattle as a mark of ownership.”<sup>2</sup> Although themes of personal ownership and even swine-herding may resonate with contemporary observers of

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<sup>1</sup> Both Republican John McCain and Democrat Barack Obama list further slashing earmarks and increasing transparency in the earmarking process as priorities on their presidential campaign websites. *See* McCain for President Webpage on Government Spending, <http://www.johnmccain.com/Informing/Issues/4a3ab6fe-b025-42b1-815b-13c696a61908.htm> (last visited Mar. 1, 2008). *See also* Obama for President Webpage on Fiscal Policy, <http://www.barackobama.com/issues/fiscal/> (last visited Mar. 1, 2008).

<sup>2</sup> Tim Weiner, *Sending Money to Home District: Earmarking and Congressional Pork Barrel*, N.Y. TIMES, July 13, 1994, at A01.

earmarking in the federal budget process, this Part seeks a more current definition of the term. In the context of federal budgeting, the term ‘earmark’ is used in two distinct ways. First, it may refer to an expenditure paid from the general fund that has been specified to apply to a particular local project, usually within the congressional district of the provision’s author. Earmarked appropriations include many projects that are typically referred to as “pork.” Second, an earmark may refer to the dedication of a discrete revenue stream to a particular program within the federal budget, regardless of whether that program is local or national in scope.<sup>3</sup> Earmarked revenues are used to fund programs of various sizes, ranging from Social Security and Medicare to conservation projects funded from General Service Administration property sales. Earmarked revenues may fund programs that relate directly to the source of the funding, such as the dedication of Postal Service revenues to Postal Service operations, or programs that bear little relation to the source of the funding, such as the dedication of customs duties to the Child Nutrition Program.<sup>4</sup>

Although the practice of earmarking revenues is also the subject of an important policy debate,<sup>5</sup> this briefing paper focuses on earmarks in the appropriations process.

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<sup>3</sup> See GAO, *A Glossary of Terms Used in the Federal Budget Process* 46 (2005), available at [www.gao.gov/cgi-bin/getrpt?GAO-05-734SP](http://www.gao.gov/cgi-bin/getrpt?GAO-05-734SP) (2005). Earmarked collections therefore include trust fund receipts, special fund receipts, intragovernmental receipts, and offsetting collections credited to appropriation accounts. These collections may be classified as budget receipts, proprietary receipts, or reimbursements to appropriations. See THE U.S. FEDERAL BUDGET PROCESS: AN OVERVIEW AND GLOSSARY OF TERMS 90 (G.I. Maltese ed., 1995).

<sup>4</sup> GAO Fact Sheet, *Budget Issues: Earmarking in the Federal Government* 3-5 (1990).

<sup>5</sup> While increasing the visibility of cost-sharing arrangements and ensuring a minimum level of programmatic funding, the GAO argues that earmarked revenues diminish the capacity to annually adjust program priorities (since statutory provisions often make it more difficult to shift funds between programs), lengthen the time it takes to make necessary modifications in an individual program’s funding level, increase the likelihood of over-funding certain programs (since a decrease in programmatic needs is not directly linked to the associated revenue formula), and impair deficit reduction efforts by guaranteeing minimum spending levels. *Id.* at 2-16. Others suggest that the increasing practice of earmarked revenues is part of a broader “new outlook” on budgeting that tends to limit the flexibility of future budget makers as they realize that past decisions have already committed resources to particular goals and projects. ANNETTE E. MEYER, *EVOLUTION OF UNITED STATES BUDGETING* 196 (2002).

Among practitioners and scholars, no single definition of the term *earmark* is universally accepted. According to *Congressional Quarterly's American Congressional Dictionary*, because all appropriations set aside funds for some “purpose, use, or recipient,” under the broadest definition “virtually every appropriation is earmarked.”<sup>6</sup> More specific definitions of the term tend to differ in the extent to which they emphasize four factors commonly attributed to earmarks: specificity of the entity receiving funding, congressional origin, exemption from normal competitive requirements for agency funding, and presence in statutory text. As one might expect, the emphasis that various observers of the budget process place on each of these factors is largely a function of their own institutional interests or normative views about what is the most pernicious dimension of the practice of earmarking.

*a. Specificity of the Recipient*

Earmarks are sometimes referred to as ‘federal spending with a zip code attached.’ For many, the salient feature of an earmark is its parochial character – the fact that, in specifying the entity receiving funding, the earmark benefits a particular congressional district or even a single group or organization. In general, the word ‘earmark’ may refer to any element of a spending bill that allocates money for a very specific project, location, or institution. While some commentators refer generally to earmarking as “dedicating appropriations for a particular purpose,”<sup>7</sup> some attempts at reform in the Senate have sought to more narrowly define an earmark as “a provision that specifies the

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<sup>6</sup> WALTER KRAVITZ, CONGRESSIONAL QUARTERLY'S AMERICAN CONGRESSIONAL DICTIONARY 87 - 88 (3d ed. 2001).

<sup>7</sup> See THE U.S. FEDERAL BUDGET PROCESS: AN OVERVIEW AND GLOSSARY OF TERMS 90 (G.I. Maltese ed., 1995); STANLEY E. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1998, at 209 (1997).

identity of an entity to receive assistance and the amount of the assistance.”<sup>8</sup> Congress’s most recent earmark reform law adopted a similarly narrow definition, focusing on spending items directed “to an entity, or targeted to a specific State, locality or Congressional district.”<sup>9</sup>

For many, however, a line item expenditure need not be classified as an earmark simply because it includes specific spending instructions.<sup>10</sup> Many defense spending bills, for example, include a very detailed accounting of how each dollar will be spent – like directives specifying the purchase a particular kind of fighter jet – as a matter of standard procedure. The Congressional Research Service therefore narrows its definition depending on the context, considering a defense spending item to be an earmark only if Congress adds money to the department's request “at a level of specificity below the normal line item level.”<sup>11</sup>

*b. Congressional Origin*

Another important dimension of an ‘earmark’ involves its congressional origin. If one begins from the normative premise that it is the role of Congress to articulate general policy goals and allow the Executive to carry out specific actions, then earmarks represent instances of Congress stepping out of its proper place in the separation of powers. As a result, OMB defines earmarks as specified funding for projects, activities, or institutions not requested by the executive, or as add-ons to requested funds which

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<sup>8</sup> This definition appears in legislation proposed by Senators Lott and Feinstein, S. Res. 365, 109<sup>th</sup> Cong. (2006), and by Senator McCain, S. 2265, 109<sup>th</sup> Cong. (2006). Neither proposal has since become law.

<sup>9</sup> 110 P.L. 81 (2007). This Act also imposes restrictions on congressionally directed limited tax benefits and limited tariff benefits, in addition to “spending items.”

<sup>10</sup> See, e.g., Daniel Engber, *What’s an Earmark*, SLATE, April. 6, 2006, <http://slate.msn.com/id/2139454/>.

<sup>11</sup> Congressional Research Service, Memorandum, *Earmarks in Appropriations Acts: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005* (Jan. 26, 2006).

Congress directs for specific activities.<sup>12</sup> On its public website, OMB stresses this notion of congressional encroachment and how the earmark process “curtails the ability of the Executive Branch to properly manage funds.”<sup>13</sup>

As one might expect, legislative supporters contend that the term ‘earmark’ should not be restricted to congressional decisions because the executive branch frequently diverts funding to specific projects for many of the same parochial reasons as legislators.<sup>14</sup> Some defenders of Congress seek to apply the term in reference to agency justifications for specific program-funding levels sent to the pertinent appropriations subcommittees in the weeks following the president’s public budget outline.<sup>15</sup> They also suggest that an “executive earmark” occurs after the congressional appropriations process, when officials divert money from an agency's discretionary fund towards projects “in some key district or state” for political gain.<sup>16</sup> Finally, the notion of a presidential earmark may also apply to spending programs that are perceived to arise out

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<sup>12</sup> *Id.*, at 3.

<sup>13</sup> Office of Management and Budget, Earmarks, <http://earmarks.omb.gov/> (last visited March 1, 2008).

<sup>14</sup> For a broader argument that legal thinkers typically overstate the parochial character of Congress vis the executive, see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006).

<sup>15</sup> Jackie Calmes, *In Search of Presidential Earmarks: Park, A Capitol Hill Staple, Also Is White House Custom, But Much Tougher To Track*, WALL STREET J., Feb. 21, 2006, at A6. Senator Richard Shelby, a member of the Senate Appropriations Committee and then-chairman of its subcommittee for commerce, justice and science programs, noted that throughout the budget process “the administration always wants specific things” – from abstinence sex education to school vouchers for Washington D.C. – and takes various actions to secure the desired funding. Evidently, this presidential practice has continued in this year’s budget, despite recent improved restraint from Congress. See Robert Pear, *Bush, Vocal Foe of Earmarks, Embraces Them in His Budget*, NEW YORK TIMES, Feb. 10, 2008, at A01.

<sup>16</sup> *Id.* Interestingly, in the wake of 2007’s new congressional earmark disclosure requirements, some members of Congress have found this type of executive earmark particularly helpful in their efforts to divert funds to their preferred projects, while still being able to claim their legislation to be “earmark-free.” As Rep. Rahm Emanuel (D-IL) has explained, a member of congress lobbying an executive branch official on behalf of his constituents does not technically have to register his requests as earmarks, even if the end result is the same. John Solomon & Jeffrey H. Birnbaum, *Pet Project’s Veil Is Only Partly Lifted: Lawmakers Find Other Paths to Special-Interest Funding*, WASHINGTON POST, Sept. 9, 2007, at A01.

of personal or idiosyncratic priorities of the President, such as President Bush's decision to spend \$24 million on the Laura Bush 21st Century Librarian program.<sup>17</sup>

While there might be some tension between the legislative and executive branches in defining what should count as an earmark, Congress's most recent attempt at earmark reform seems to accept earmarks of a congressional origin as the focus of the debate. In fact, the Honest Leadership and Open Government Act of 2007 jettisons any attempt to broadly define "an earmark" and instead employs the term "congressionally directed spending item" in its place.<sup>18</sup>

*c. Exemption from the Normal Competitive Requirements for Agency Funding*

For many observers, a salient feature of earmarks involves funding directives in substantive areas that would ordinarily demand some sort of competitive bidding process. OMB also emphasizes this trait in its definition, explaining that a Congressional earmark "circumvents the merit-based or competitive allocation process" through which government funds are ideally distributed.<sup>19</sup> On this view, departure from the rigorous review of a disinterested agency is an essential characteristic of earmarks. Thus, *Congressional Quarterly's American Congressional Dictionary* refers to "common usage," distinguishing earmarks from other appropriations by reference to the specified funding of certain activities such as "research projects, demonstration projects, parks, laboratories, academic grants, and contracts."<sup>20</sup>

*d. Presence in Statutory Text*

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<sup>17</sup> *Id.* In contrast, Citizens Against Government Waste never considers "executive earmarks" when it makes its tally of pork spending, including only specific items added by members of Congress. Engber, *supra* note 8. See generally Citizens Against Government Waste website, at [www.cagw.org](http://www.cagw.org).

<sup>18</sup> 110 P.L. 81 (2007).

<sup>19</sup> Office of Management and Budget, Earmarks, <http://earmarks.omb.gov/> (last visited March 1, 2008).

<sup>20</sup> WALTER KRAVITZ, CONGRESSIONAL QUARTERLY'S AMERICAN CONGRESSIONAL DICTIONARY 87 - 88, 181 (3d ed. 2001).

While legislative language may explicitly designate any portion of a lump-sum amount for particular purposes,<sup>21</sup> instructions for targeted spending are more commonly found in Appropriations Committee reports accompanying appropriations bills<sup>22</sup> or in the managers' joint explanatory statement accompanying final conference reports.<sup>23</sup> Although both committee reports and managers' statements lack the force of law, these documents help explain congressional intent and usually have effect since agency heads must annually defend their allocations and could be penalized if they ignored lawmaker's directives. Appropriations Committees often expect (and sometime require) agencies to adhere to House and Senate instructions in committee reports unless stated otherwise in the joint explanatory statement or the statutory language.<sup>24</sup>

Whether such spending instructions constitute earmarks is a subject of disagreement. Some observers of the budget process only use the term to apply to line items in appropriations bill. For example, a recent Congressional Research Service study of earmarks across annual appropriations bills included only statutory earmarks in its operative definition of earmarks for eleven of the thirteen bills.<sup>25</sup> For others, however,

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<sup>21</sup> See THE U.S. FEDERAL BUDGET PROCESS: AN OVERVIEW AND GLOSSARY OF TERMS 90 (G.I. Maltese ed., 1995).

<sup>22</sup> See Part II *infra*.

<sup>23</sup> According to one scholar, during the nineteenth century earmarks were often placed directly in the law. After the Budget and Accounting Act of 1921, most earmarks were included in legislative reports. ROY T. MEYERS, STRATEGIC BUDGETING 153 (1994). A March 6, 2006 Congressional Research Service report found that more than 95 percent of all earmarks during the past fiscal year were merely contained in the reports of congressional committees and legislative managers rather than written directly into law. See Robert Novak, *How to Erase Earmarks*, CREATORS SYNDICATE, March 27, 2006, available at [http://www.realclearpolitics.com/articles/2006/03/how\\_to\\_erase\\_earmarks.html](http://www.realclearpolitics.com/articles/2006/03/how_to_erase_earmarks.html) (last visited Mar. 1, 2008).

<sup>24</sup> Congressional Research Service, Memorandum, *Earmarks in Appropriations Acts: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005* (Jan. 26, 2006). For example, the conference report accompanying the FY2005 Agriculture Appropriations Act specifically states that any items addressed in either the House or the Senate Appropriations Committee reports, but not mentioned or resolved in the conference report, are considered adopted.

<sup>25</sup> See Part IIIa *infra*; see also GAO, *A Glossary of Terms Used in the Federal Budget Process* 46 (2005), available at [www.gao.gov/cgi-bin/getrpt?GAO-05-734SP](http://www.gao.gov/cgi-bin/getrpt?GAO-05-734SP) (describing the application of the term earmark to "directions included in congressional committee reports but not in the legislation itself" as merely a "colloquial" use.).

targeted spending in committee reports and managers' statements are the essential example of earmarks, insofar as it implicates heightened concerns over transparency and accountability.<sup>26</sup>

## II. Earmarks and the Budget Process

### a. Traditional Practice

Earmarked appropriations may theoretically enter the federal budget at three points in the congressional process: the authorizing committee,<sup>27</sup> the appropriations subcommittee or the conference committee. Most frequently, however, earmarks originate in the appropriations subcommittee, beginning with a letter from a member of Congress to the subcommittee chair. Because they know the subcommittee chair will delete a fair portion of their requests, most members inflate the number of requests they submit beyond what the needs of their districts truly require.<sup>28</sup> For example, in 2005 the House Appropriations Committee received almost 35,000 earmark requests,<sup>29</sup> and one appropriations bill alone generated over 25 funding requests per House member.<sup>30</sup> The

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<sup>26</sup> See, e.g., Sandy Streeter, *Earmarks and Limitations in Appropriations Bill*, Congressional Research Service, Report No. 98-518 (Dec. 7, 2004).

<sup>27</sup> A notable example of earmarks at the authorization stage was the 2004 Transportation Reauthorization, which two researchers claim contained over 4,000 earmarks, many of which (such as the Blue Ridge Music Center in Virginia and the "Renaissance Square" performing arts center in New York) had little to do with transportation. Alison Acosta & Jonathan Swanson, *Federal Highway Spending Jumps the Shark*, Heritage Foundation Web Memo #548 (Aug. 4, 2004), [www.heritage.org/Research/Budget/wm548.cfm?renderforprint=1](http://www.heritage.org/Research/Budget/wm548.cfm?renderforprint=1).

<sup>28</sup> See SCOTT A. FRISCH, *THE POLITICS OF PORK: A STUDY OF CONGRESSIONAL APPROPRIATION EARMARKS* 16 (1998).

<sup>29</sup> David Baumann, *Here To Stay*, NAT'L J., Feb. 13, 2006, available at [http://www.govexec.com/story\\_page.cfm?filepath=/dailyfed/0206/021306ol.htm](http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0206/021306ol.htm) (last visited Mar. 1, 2008).

<sup>30</sup> Jonathan Weisman & Charles R Babcock, *K Street's New Ways Spawn More Pork: As Barriers With Lawmakers Fall, 'Earmarks' Grow*, WASH. POST, Jan. 27, 2006, at A1.

decision of which earmarks to include in the budget rests largely with the subcommittee chairs, whose power and secrecy have lent them the nickname of the ‘cardinals.’<sup>31</sup>

One rarely noticed aspect of earmarks is that they typically do not have the force of law. Subcommittee chairs may insert earmarks in the text of the appropriations bill, but it is more common for them to do so in the committee report on the bill,<sup>32</sup> a procedure that lacks the prerequisites of bicameralism and presentment. But despite the fact that the administrative agencies are not legally required to pay for projects earmarked in committee reports, they historically have done so to avoid being punished in the next year’s appropriations process.<sup>33</sup>

A lesson for executive officials who would attempt to resist earmarks in committee reports came in 1988. Reagan Administration officials attempted to organize the agencies to resist the dictates of committee report language, but failed dramatically. OMB director James Miller wrote a letter to all the federal agency heads urging them not to respond to provisions in the committee reports of appropriations bills. Miller employed the reasoning from the Supreme Court decision *I.N.S v. Chadha*,<sup>34</sup> arguing that committee report language was “neither voted on by Congress nor presented to the President, [so they] are not law.”<sup>35</sup> Miller then announced that the federal agencies would not respond to committee report language.<sup>36</sup> Congress responded with threats of

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<sup>31</sup> See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 212 (2000); FRISCH, *supra* note 23 at 17.

<sup>32</sup> SCHICK, *supra* note 26 at 212; FRISCH *supra*; Sandy Streeter, *Earmarks and Limitations in Appropriations Bills*, CRS Report No. 98-518 (Jan. 11, 1999).

<sup>33</sup> Streeter *supra*; SCHICK *supra* note 26, at 181; Sandy Streeter, *Appropriations Bills: What is Report Language?*, CRS Report for Congress No. 98-558 (June 26, 1998).

<sup>34</sup> 462 U.S. 919 (1983).

<sup>35</sup> JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* 37 (1996).

<sup>36</sup> *Id.*

retaliation and Miller soon capitulated, sending a second letter to the agencies reversing his original request.<sup>37</sup>

For the first time since then, the executive branch is once again attempting to challenge the authority of the earmarking instructions found in committee reports. In his 2007 State of the Union Address, President Bush strongly urged congress to drastically reduce earmarks, advocating a 50% cut in the number of earmarks by the end of the year and an end to the practice of inserting earmarks into committee reports instead of the bill's text.<sup>38</sup>

Even though Congress did significantly cut earmarks following the President's admonition, President Bush took his words one step further in 2008 and issued an executive order. The order reiterated not only his administration's dedication to reducing the number and cost of earmarks, but also the belief that all earmarks should be "included in the text of the bills voted upon by Congress and presented to the President." Pursuant to this, he ordered all agency heads to expend their funds solely on the basis of "the text of laws," ignoring any non-statutory sources of guidance from Congress, including committee reports or other communications with members of Congress.<sup>39</sup>

OMB, in a 2007 guidance memorandum to agency heads that can be viewed as a precursor to this executive order, sheds light on the President's intentions. In response to Congress's continuing appropriations resolution, which did make clear that "any language specifying an earmark in a committee report . . . shall have no legal effect with

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<sup>37</sup> The content of these threats is not clear from the available record. *See* KORN, *supra* note 28; JAMES C. MILLER III, FIX THE U.S. BUDGET! URGINGS OF AN "ABOMINABLE NO-MAN" 109 – 10 (1994).

<sup>38</sup> President Bush, 2007 State of the Union Address, January 23, 2007, *available at* [www.whitehouse.gov/news/releases/2007/01/20070123-2.html](http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html).

<sup>39</sup> Exec. Order No. 13,457, 73 F.R. 6457 (Jan. 29, 2008).

respect to funds appropriated,”<sup>40</sup> OMB further ordered agency heads to recognize that earmarks not only are to have no binding legal effect but are to be outright ignored. As the memo states, “this means that unless a project is specifically identified in statutory text, agencies should not obligate funds on the basis of earmarks contained in Congressional reports or documents, or other written or oral communications regarding earmarks.”<sup>41</sup> Whether the Bush Administration’s OMB will succeed where its Reagan counterpart ultimately failed is yet to be seen.

*b. The Honest Leadership and Open Government Act of 2007*

In 2007, the 110th Congress passed the Honest Leadership and Open Government Act. This law contained Congress’s long-awaited ethics, lobbying, and earmarks reform initiatives, in response to the lobbying scandals of recent years.<sup>42</sup> The centerpiece of the earmark reform portion of the legislation is a requirement that before all bills and joint resolutions can be brought for consideration, they must be accompanied by a list of each earmark within it and the name of the requesting lawmaker. That list of earmarks then must be made publicly available in searchable format on the internet for forty-eight hours prior to the vote.<sup>43</sup>

Beyond that, any lawmaker that requests a congressionally directed spending item, limited tax benefit, or limited tariff benefit, in any bill, joint resolution, or conference report, must provide the following information in a written statement to the chair and ranking member of whichever committee has jurisdiction: (1) the name of the requesting

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<sup>40</sup> 110 H.J. Res. 20

<sup>41</sup> M-07-10, Memorandum for the Heads of Departments and Agencies, Rob Portman, Director of OMB, Feb. 15, 2007, *available at* <http://management.energy.gov/February15GuidanceMemorandum.pdf>.

<sup>42</sup> Tory Newmyer, *Senate Moves on Ethics Bill*, ROLL CALL, Aug. 2, 2007.

<sup>43</sup> 110 P.L. 81 (2007). To be clear, this Act technically only reformed the earmark procedures of the Senate. The House did adopt nearly identical reforms to their rules on the first day of the 110th Congress in H.Res. 6 § 404 (2006). The main difference is that the House rules do not require internet publication of the earmark list. *See* Jack Maskell, *Lobbying Law and Ethics Rules Changes in the 110th Congress*, CRS Report for Congress (Sept. 7, 2007), *available at* [http://assets.opencrs.com/rpts/RL34166\\_20070907.pdf](http://assets.opencrs.com/rpts/RL34166_20070907.pdf).

lawmaker; (2) if applicable, the name and location of the intended recipient or beneficiary of the item, or those entities reasonably expected to benefit from the limited tax or tariff benefit; (3) the purpose of the earmark; and (4) a certification that the lawmaker and his or her immediate family does not have a financial interest in the item. Only some of this information, however, needs to be made available to the public on the internet.

Principally, the certification letter, along with the name of the requesting member ought to be posted on the aforementioned searchable congressional website. The law does not require Congress to publicly disclose the stated “purpose” behind the earmark request, and the actual recipient does not need to be disclosed if withholding it would be “consistent with the need to protect national security.”<sup>44</sup>

While the legislation clearly envisions that most earmarks would be requested at the appropriations committee level, it does provide procedures for the insertion of earmarks later in the process. If an earmark is inserted into a bill that is already under consideration through an amendment, the list of earmarks and requesting lawmakers must be updated and submitted to the Congressional Record “as soon as practicable.”<sup>45</sup>

If an earmark is added to the conference report, it comes under special scrutiny. Under the statute, a senator may raise a point of order against any provision in a conference report that constitutes “new directed spending.” New directed spending is defined as any item that consists of “a specific provision containing a specific level of

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<sup>44</sup> 110 P.L. 81 (2007). On the Senate Appropriations Committee website, a page is dedicated to “Financial Disclosures,” and it is here where all certification letters from members can be found. The letters, however, often lack specificity. Instead of listing each individual earmark requested and a specific statement certifying a lack of pecuniary interest in the item, the letters typically are a generic one sentence affair: “I certify that neither I nor my immediate family has a pecuniary interest, consistent with the requirements of Paragraph 9 of Rule XLIV of the Standing Rules of the Senate, in any congressionally directed spending that I requested from the Committee on Appropriations” for this fiscal year. *See generally* United States Senate Committee on Appropriations: Financial Disclosures, <http://appropriations.senate.gov/senators.cfm> (last visited Mar. 22, 2008).

<sup>45</sup> 110 P.L. 81 (2007).

funding for any specific account, specific program, specific project, or specific activity when no specific funding was provided for [it] . . . in the measure originally committed to the conferees by either House.”<sup>46</sup> If the point of order is sustained by the Presiding Officer, the provision would be stricken. The point of order can be waived by a three-fifths majority vote.<sup>47</sup>

In the months subsequent to the Act’s passage, critics voiced concerns regarding Congress’s compliance with the new requirements. For example, during the debates over the Defense Authorization Bill in July of 2007, Senator Jim DeMint complained that while the bill did disclose earmark sponsors, the committee with jurisdiction over the legislation had failed to post on the internet the certifying letters from each sponsoring lawmaker, asserting their lack of financial interest in the earmark, as is required by law.<sup>48</sup>

Representative Jeff Flake also argued that the spirit, if not the letter, of the Act was being violated by certain practices in the House. For one, Flake criticized the practice of permitting committee chairmen to insert their own pet-project earmarks into the original drafts of spending bills. Since the committee chairman would have been technically the author of the bill, his spending requests would be considered part of the “starting-point bill” and were therefore technically not considered earmarks. Rep. Flake, for example, criticized House Appropriations Committee Chairman David Obey for certifying a bill to

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<sup>46</sup> This definition has proven to be a point of contention in the application of this law. For example, Sen. DeMint raised a point of order challenging what he claimed were \$2 billion in additional earmarks added to the Water Resources Development Act in the conference report, but the Senate parliamentarian ruled that the point of order was not available to him in this situation, because the WRDA was an authorization bill, rather than an appropriations bill. 153 Cong. Rec. S. 11974 (daily ed. Sept. 24, 2007) (statement of Sen. DeMint). Peter Cohn, *Critics Content Loopholes are Diminishing New Earmark Rules*, NAT’L J., Oct. 9, 2007. Because of this apparent loophole, Senator DeMint has proposed legislation that the point of order be available against a much broader category of new items: “any item contained in a conference report that includes or consists of any matter not committed to the conferees by either house.” 153 Cong. Rec. S. 10629, Aug. 1, 2007.

<sup>47</sup> 110 P.L. 81 (2007).

<sup>48</sup> John Solomon & Jeffrey H. Birnbaum, *Pet Project’s Veil Is Only Partly Lifted: Lawmakers Find Other Paths to Special-Interest Funding*, WASHINGTON POST, Sept. 9, 2007, at A01.

be earmark-free, even though it contained \$35 million in funding for a special space project that the bill's author had inserted in the original draft.<sup>49</sup>

*c. The Federal Funding Accountability and Transparency Act of 2006*

Even after the earmarking process itself is complete, the disclosure requirements do not end. In Fall 2006, Congress passed the Federal Funding Accountability and Transparency Act of 2006, popularly known as the Coburn-Obama Bill, which aimed to increase the transparency and public accessibility of information regarding earmarks and all government spending. It mandates that OMB create a public website that would provide a searchable database of “all federal awards.”<sup>50</sup> That would include all “grants, subgrants, loans, cooperative arrangements . . . forms of financial assistance, contracts, subcontracts, purchase orders, task orders, and delivery orders” awarded by the federal government in excess of \$25,000. The website is required to list the amount of the award, the recipient's name, the recipient's parent entity, which Congressional district the recipient is located, and through what program or agency the award was made.<sup>51</sup>

While the website is not limited to earmarks exclusively and fails to list the individual congressional sponsor for each item, supporters hailed the bill's passage as a significant victory in the battle for earmark reform. Though it does nothing to increase transparency *during* the earmarking process, the bill's principal co-sponsor, Senator Tom Coburn, explained that its aim was to “chang[e] the culture in Washington” by allowing “every

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<sup>49</sup> *Id.*

<sup>50</sup> This website can be found at: <http://www.usaspending.gov/>.

<sup>51</sup> 109 P.L. 282 (2006).

American . . . to know how their government spends their money, and then to hold elected officials accountable for those decisions.”<sup>52</sup>

*d. Other Attempts at Reform During the 109th Congress*

Before the passage of earmark reform in 2007, the 109th Congress contemplated various reforms to the earmark process. Most of these proposals aimed at bringing greater transparency to the process of burying earmarks in committee and conference reports without attribution to the responsible lawmaker or opportunity for consideration by the full body.<sup>53</sup> Pieces of these proposals were eventually incorporated into The Federal Funding Accountability and Transparency Act of 2006 and The Honest Leadership and Open Government Act of 2007, though many have yet to become law.

For example, Senators Lott and Feinstein offered a proposal that focused on the inclusion of earmarks in conference reports, a process that typically lacks transparency. In its original form, their proposal would have required (1) a 60-vote point of order to sustain provisions in conference reports not approved by either chamber, (2) a list of earmarks in conference reports along with attribution to individual lawmakers and a written justification for the proposal, and (3) twenty-four hours of public notice before consideration of a conference report.<sup>54</sup> On March 29, the Senate passed the Lott-Feinstein proposal as part of the Legislative Transparency and Accountability Act of 2006 in a modified form: items (2) and (3) listed above were included; item (1) regarding

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<sup>52</sup> Press Release, Sen. Barack Obama, Senate Passes Coburn-Obama Bill to Create Internet Database of Federal Spending (Sept. 8, 2006), [http://obama.senate.gov/press/060908-senate\\_passes\\_c/](http://obama.senate.gov/press/060908-senate_passes_c/) (last visited Mar. 1, 2008).

<sup>53</sup> For an exhaustive comparison of the three most prominent reform proposals to each other and the status quo, see Sandy Streeter, *Comparison of Selected Senate Earmark Reform Proposals*, CRS Report for Congress (March 6, 2006), available at [http://assets.opencrs.com/rpts/RL33295\\_20060306.pdf](http://assets.opencrs.com/rpts/RL33295_20060306.pdf).

<sup>54</sup> S. 2349, 109<sup>th</sup> Cong. (2006) (unmodified version), available at <http://thomas.loc.gov/cgi-bin/query/D?c109:1:./temp/~c1096t80G7>.

earmarks passed by only one chamber did not.<sup>55</sup> The House did eventually pass its own version of the bill, including item (2) but not item (3).<sup>56</sup> The Senate rejected the amended House version of the bill, sending it to conference committee where it apparently died.<sup>57</sup>

In addition to the Lott-Feinstein proposal, other measures were proposed in the Senate and perhaps might be revisited in the future. A proposal by Senator McCain focused on the appropriations process. One piece of his proposal focused on committee reports: it would bar federal agencies from obligating funds in order to implement any earmark included in a congressional committee report. A second piece of his proposal would allow any senator to raise a point of order against any earmark in an appropriations bill that had not been specifically authorized. A point of order having been raised, sixty senators would need to vote in support of the earmark lest it be stricken from the bill and the amount of total spending in the bill reduced by that amount.<sup>58</sup> Senator McCain's proposal is unique in that it could lead to a reduction in total spending rather than just a reduction in earmarked spending.<sup>59</sup> This feature, if exploited by budget hawks in the Senate, could alter the strategic dynamics of budgeting in important ways. First, it would empower authorizers and disempower appropriators because authorized earmarks would not be deemed out of order. Indeed, one criticism made of this proposal is that it focuses too exclusively on earmarks in the appropriations process rather than the authorization process. Noting that many wasteful projects, such as the infamous "bridge to nowhere," originate in the authorization process, some have suggested that this was a self-serving

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<sup>55</sup> S. 2349, 109<sup>th</sup> Cong. (2006). See also Jeffrey H. Birnbaum, *Senate Passes Lobbying Bill*, WASH. POST, Mar. 30, 2006, at A1.

<sup>56</sup> H.R. 4975, 109<sup>th</sup> Congress (2006).

<sup>57</sup> 152 Cong. Rec. S. 5027 (daily ed. May 23, 2006).

<sup>58</sup> Pork Barrel Reduction Act, S. 2265, 109<sup>th</sup> Cong. (2006).

<sup>59</sup> See OMB Watch, *Lobby Reform Continues to Overlook Budget Process*, [www.ombwatch.org/article/articleprint/3287/1/82](http://www.ombwatch.org/article/articleprint/3287/1/82) (last visited Mar. 1, 2008).

omission by Senator McCain, who would have taken over the Armed Services Committee in 2007.<sup>60</sup> Second, the rule that earmarks deemed out of order would be completely excised from the budget would pose difficult strategic problems for appropriators. Anticipating that some of their appropriations would be reduced by point of order votes, some appropriations subcommittees may be tempted to appropriate more funds than they would have otherwise to make up the shortfall.

One final reform came from the House Appropriations Committee, which had recently considered a proposal to limit the total number of earmarks each member of the House could request, thus allowing more time and consideration for each request by the subcommittees. At the time, the Committee had not specified how many earmarks each member would be allowed to request under the proposal.<sup>61</sup>

*e. Proposals for Further Reform*

The 110th Congress's earmarks reforms have been met with some criticism for not going far enough, both from inside and outside Congress.<sup>62</sup> Led by Representative Jack Kingston (R-GA), a group of House conservatives have introduced a resolution calling for the establishment of a Joint Select Committee on Earmark Reform to address some of the issues left unresolved by the 2007 Act.<sup>63</sup> The main purpose of the committee would

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<sup>60</sup> Jonathan Allen, *Power Struggle Over Pork*, THE HILL, Feb. 24, 2006.

<sup>61</sup> Peter Cohn, *Panel Considers Limits on Lawmakers' Earmark Requests*, CONGRESS DAILY, Jan. 23, 2006, available at [www.govexec.com/dailyfed/0106/012306cdpm2.htm](http://www.govexec.com/dailyfed/0106/012306cdpm2.htm).

<sup>62</sup> The conservative Heritage Foundation, citing private comments from Sen. Tom Coburn, has pinpointed six ways that the version of the 2007 Act that was made law was weaker than earlier drafts. (1) It removed a ban on "the trading of pork projects for votes." (2) It weakened "provisions aimed at stopping pork projects that financially benefit lawmakers." (3) It placed the power for enforcement of the earmark rules in the hands of the Senate Majority Leader, rather than the Senate parliamentarian. (4) It permitted certain "bills to be voted on without first disclosing pork projects." (5) It weakened a "provision requiring that pork projects be made available on the Internet before congressional votes." And, (6) it allowed earmarks hidden in tax, entitlement, and authorization bills to escape many of the new restrictions. Brian M. Riedl, *Congress Loads Spending Bills with Pork and Earmarks*, Heritage Foundation Web Memo #1660 (Oct. 11, 2007), <http://www.heritage.org/Research/Budget/wm1660.cfm> (last visited Mar. 1, 2008).

<sup>63</sup> 2007 H. Con. Res. 263.

be to produce a report on the effectiveness of the rule changes already instituted. Also, it would analyze the efficacy of certain proposed rule changes, including: (1) requiring full transparency, with earmarks listed in all bills at the outset of the legislative process; (2) barring earmarks from being added to bills after initial committee consideration; (3) allowing Members to offer amendments to remove earmarks “at subcommittee, full committee, floor consideration, and during conference committee hearings”; (4) requiring majority managers, minority managers, and bill sponsors to “certify the validity of earmarks contained in their bills”; (5) reassessing the treatment of earmarks coming from the executive branch through the president’s annual budget; (6) requiring Congress to comply with earmark disclosure requirements in more cases beyond appropriations; and (7) establishing new categories for earmarks, including ones for those that have a national scope, are military projects, or are local or provincial projects. Moreover, the resolution would call for a complete moratorium on all earmarks until the committee’s report is complete.<sup>64</sup> As of March 11, 2008, the resolution has 83 cosponsors, and it has been referred to the House Rules Committee.<sup>65</sup> Senator Jim DeMint introduced a similar resolution as an amendment to this year’s budget resolution, calling for a one year moratorium on both appropriations and authorizations earmarks in the Senate. Though all three leading presidential candidates — Senators Clinton, McCain, and Obama — voted in favor of the resolution, it garnered only 29 votes and failed.<sup>66</sup>

In the meantime, some House conservatives have called for a unilateral Republican earmark moratorium in hopes of strengthening the party’s political hand going into the 2008 election and forcing the Democratic leadership back to the table. A unilateral

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<sup>64</sup> *Id.*

<sup>65</sup> 2008 Bill Tracking H. Con. Res. 263.

<sup>66</sup> Lori Montgomery, *Presidential Contenders Show Up For Budget Votes*, WASH. POST, Mar. 14, 2008, at A05. *See also Earmark Fight Heads to Senate*, ROLL CALL, Feb. 26, 2008.

earmark moratorium, however, is facing resistance from other GOP members who worry that the political cost of unilaterally forfeiting earmarks for their home districts would outweigh any potential political benefit. As Rep. Mike Simpson (R-Idaho) said, “I think [a unilateral moratorium] would be stupid. . . . You don’t unilaterally disarm yourself.”<sup>67</sup>

Sensing this political division, House Appropriations Chairman David Obey (D-Wisconsin) recently upped the ante by sending a letter to each member, asking them to check one of two boxes: one saying that the member “believe[d] ‘the House should suspend earmarks for the year’ and will ‘therefore be submitting no earmark requests’”; the other saying the member “believe[d] ‘the House should continue to provide responsible earmarks at a reasonable level.’” Obey says that any member who fails to return the letter and go officially on the record as supporting the earmark process would be forbidden from requesting any earmarks from his committee.<sup>68</sup> How this escalating conflict will end is yet to be seen.

Given the fact that this is an election year, as well as just the first full year after the implementation of the 2007 reforms, it is unclear how attempts at further reform will develop in the near future, if they develop at all. Though, given the history Senators McCain and Obama have with this issue, earmark reform is likely to retain a prominent role in public discussion.

### **III. Measuring the Growth of Earmarks**

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<sup>67</sup> Steven T. Dennis, *Anti-Earmark Push Lives On; McCain, House GOP to Meet*, ROLL CALL, Feb. 12, 2008. House Oversight and Government Reform Chairman Henry Waxman is so far the lone House Democrat to have personally foresworn earmarks and joined the call for a one year moratorium. Steven T. Dennis, *Chances Dim for GOP-Only Earmark Moratorium*, ROLL CALL, Feb. 28, 2008.

<sup>68</sup> Patrick O’Connor, *Dave Obey Asks About Earmark Intentions*, POLITICO, Mar. 5, 2008, [http://www.politico.com/blogs/thecrypt/0308/Dave\\_Obey\\_asks\\_about\\_earmark\\_intentions.html](http://www.politico.com/blogs/thecrypt/0308/Dave_Obey_asks_about_earmark_intentions.html).

Advocates of earmark reform, hoping to lend urgency to the problem, often argue that the use of earmarks has grown dramatically over the past decade.<sup>69</sup> Although this claim is accurate with regard to the 1990s and early 2000s, the use of earmarks declined substantially in 2006 and 2007.<sup>70</sup> This Part attempts to synthesize the available empirical data on earmarks and to analyze recent fluctuations in the number of earmarked projects and their size relative to overall outlays and gross domestic product. We conclude that future trends in earmark usage are unclear and will ultimately depend on the longevity of recent reforms such as the 2007 House rule changes requiring that earmark sponsors' names be disclosed and that congressmen "justify the public need for the expenditures, and certify that they won't benefit financially from them,"<sup>71</sup> Bush's 2007 State of the Union Address, which "threatened to veto any bill 'that does not cut the number and cost of earmarks in half,'"<sup>72</sup> and his 2008 executive order "directing agencies to ignore any earmarks that are . . . not included in the text of bills themselves."<sup>73</sup> Future research will be required in order to analyze the efficacy of these reforms so as to determine whether the recent decline in earmarks is evidence of a trend or a mere aberration reflecting temporary political circumstances.

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<sup>69</sup> For example, Senator McCain, a leading proponent of earmarks reform, referred to the "enormous growth in earmarks" and cited the CRS data described below showing that the number of earmarks has risen nearly 300% from 1994 to 2005 in testimony before the Senate Rules Committee. John McCain, Hearing to Examine Procedures to Make the Legislative Process More Transparent, Statement Before the Senate Rules Committee (Feb. 8, 2006), *available at* <http://rules.senate.gov/hearings/2006/McCainTestimony.pdf>.

<sup>70</sup> See *infra* Part III section b.

<sup>71</sup> Stephen Slivinski, *A Reality Check on Earmark Reform*, BUS. WEEK, Jan. 22, 2007. This proposal may, but will not necessarily, discourage some politicians from using earmarks. See *id.* (arguing that the impact of this change will be "minimal" because "the problem isn't that members of Congress don't want their names affiliated with most earmarked projects. It's that so many of them do").

<sup>72</sup> Stephen Spruiell, *Budgeting for a Fight*, NAT'L REV., Feb. 15, 2008. See also *supra* TAN 38.

<sup>73</sup> Spruiell, *supra* note 73; see also *supra* TAN 39. Democrats criticized Bush's earmarks announcement as "meaningless political posturing and called it hypocritical because they said [Bush] did not challenge earmarks when Republicans controlled Congress earlier in his presidency." S.A. Miller, *House Democrats Refuse To Ban Pork; GOP Gains Likely Election Issue*, WASH. TIMES, Feb. 8, 2008.

*a. Data Sources*

Two organizations have generated comprehensive empirical data on the use of earmarks in the federal budget: the Congressional Research Service (CRS) and Citizens Against Government Waste. The CRS produced a memorandum in January 2006 that tallied the use of earmarks in the thirteen appropriations bills for FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, and FY2005.<sup>74</sup> This dataset was updated to reflect FY2006 data provided by another report released in March 2006.<sup>75</sup> Unfortunately, the CRS stopped collected data on earmarks after this point, making FY2007 data unavailable.<sup>76</sup> Aside from failing to include FY2007 data, the two available CRS memoranda also contain substantial methodological limitations. First, the CRS staff generally looked for earmarks only in the text of the appropriations bills and in the reports of the conference committees. Recognizing that many earmarks originate in the reports of the House and Senate Appropriations Committees, the CRS memoranda looked at committee reports only for two appropriations bills that are particularly well-known for using that device: Agriculture and Foreign Operations.<sup>77</sup> Thus, the CRS data admittedly omits from its count earmarks contained in the committee reports of the other eleven appropriations bills. Second, the CRS data uses different methods and different personnel for tallying earmarks across the thirteen appropriations bills.<sup>78</sup> The aim was to maintain consistency within each of the thirteen bills over time, but the result is that

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<sup>74</sup> Congressional Research Service, Memorandum, *Earmarks in Appropriations Acts: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005* (Jan. 26, 2006), available at <http://www.fas.org/sgp/crs/misc/m012606.pdf> [hereinafter CRS Memo]. The report also contains data for FY2004 and FY2005 for the fourteenth appropriation bill, homeland security.

<sup>75</sup> Congressional Research Service, Memorandum, *Earmarks in FY2006 Appropriations Acts* (Mar. 6, 2006), available at [http://www.ombwatch.org/budget/images/CRS\\_2006\\_earmarks.pdf](http://www.ombwatch.org/budget/images/CRS_2006_earmarks.pdf) [hereinafter CRS Update].

<sup>76</sup> See John Fund, *Earmark Cover-Up*, WALL ST. J., Mar. 26, 2007.

<sup>77</sup> CRS Memo, *supra* note 75, at 3 – 4.

<sup>78</sup> *Id.*

estimating the *aggregate* level of earmarks over time from the CRS data is a perilous step that the CRS itself does not attempt.<sup>79</sup>

The second organization to tally the aggregate use of earmarks is the Citizens Against Government Waste (CAGW), an advocacy organization that aims at the elimination of what it considers wasteful federal spending.<sup>80</sup> Unlike the CRS, the CAGW data includes projects from all the committee reports and appears to employ a consistent methodology across all the appropriations bills. However, the CAGW data is limited in other respects. Most important is the fact that the CAGW does not count all earmarks but rather only those expenditures that it regards to be “pork,” publishing a tally of pork projects in its annual *Pig Book*. The CAGW tally of pork contains only those projects that meet at least one of the following seven conditions:

1. Requested by only one chamber of Congress;
2. Not specifically authorized;
3. Not competitively awarded;
4. Not requested by the President;
5. Greatly exceeds the President’s budget request or the previous year’s finding;
6. Not the subject of congressional hearings; or
7. Serves only a local or special interest.<sup>81</sup>

Unfortunately, the CAGW does not indicate whether it has included *all* spending projects that meet one of these criteria or whether it is excluding some on other grounds. This question is important because, as shown below, the number of pork projects counted by CAGW is substantially smaller than the number of earmarks counted by the CRS, despite the fact that the combination of these seven criteria seems broad enough to reach

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<sup>79</sup> The CRS data may also be biased by “imprecise or unclear language in the enacted bill or joint explanatory statement” and an inability to account for potential later rescissions of earmarks. CRS Update, *supra* note 76, at 4. Moreover, the value of earmarks is nominal and thus does not account for inflation. *Id.* For a description of these methodological limitations, see UNITED STATES GOV’T ACCOUNTABILITY OFFICE, CONGRESSIONAL DIRECTIVES: SELECTED AGENCIES’ PROCESSES FOR RESPONDING TO FUNDING INSTRUCTIONS 7 (2008), available at <http://www.gao.gov/new.items/d08209.pdf>.

<sup>80</sup> See generally Citizens Against Government Waste website, [www.cagw.org](http://www.cagw.org).

<sup>81</sup> CITIZENS AGAINST GOVERNMENT WASTE, PIG BOOK 2, available at [http://www.cagw.org/site/DocServer/07\\_pig\\_book.pdf?docID=1981](http://www.cagw.org/site/DocServer/07_pig_book.pdf?docID=1981).

virtually any earmark. For example, because the President's budget does not typically contain large numbers of local projects, it seems likely that only a small number of earmarks would fail to meet the condition of not having been "requested by the President."<sup>82</sup> In sum, it appears that the CAGW is excluding a significant number of earmarks from its total without explaining why, a possibility that casts some doubt on our ability to use their data to measure confidently the absolute level or rate of change in the use of earmarks.

*b. Results*

As the last section has shown, neither the CRS Memorandum nor the CAGW *Pig Book* is a completely reliable measure of the use of earmarks in the federal budget. Nevertheless, we proceed on the theory that it is better to have imperfect empirical data with known limitations than no data at all. Further, despite the fact that the two data sources have different types of shortcomings, they both give quite similar answers to a few of the most important questions about trends in the use of earmarks, allowing us to advance a few tentative empirical conclusions:

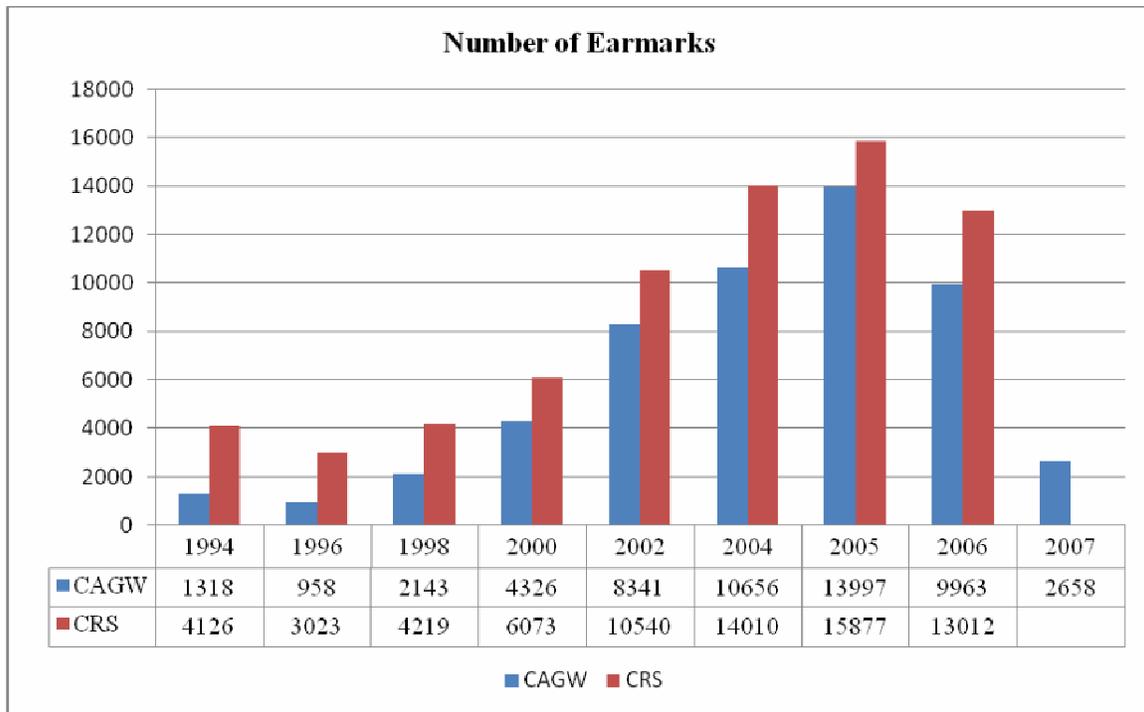
*i. Over the Past Decade, the Number of Earmarks in the Federal Budget Peaked in 2005 but Fell Afterwards*

Both datasets show a substantial increase in the annual number of earmarks from 1994 to 2005. During that time, the number of earmarks rose 285% in the CRS data from 4,126 to 15,877. The number of pork projects in the CAGW data rose even more, by 962%, from 1,318 to 13,977. However, the number of earmarks decreased in 2006, falling roughly 18% according to the CRS data (to 13,012) and 29% according to the

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<sup>82</sup> When the President earmarks funds for a local purpose, the spending does not typically appear in any public budget document. See Calmes, *supra* note 15.

CAGW data (to 9,963). And, in 2007, the number of earmarks fell an astonishing 73% from their 2006 levels according to the CAGW data (to 2,658).



*ii. The Dollar Amount Per Earmark Dropped Substantially in the mid-90s and Early 2000s, but Has Risen Since*

Both datasets also show a substantial *decrease* in the dollar amount of each earmark, even as measured in current dollars, from 1994 to 2005. In the CRS data, the average earmark fell from \$5.63 million in 1994 to \$2.99 million in 2005. In the CAGW *Pig Book*, the average pork project fell from \$5.92 million in 1994 to \$1.95 in 2005.

Although no scholar has examined this trend, we present four interrelated hypotheses for the declining value of earmarks during this period. First, a greater specificity in the drafting of earmark provisions may have led not only to an increased number of projects, but also to a much smaller amount per earmark. What once might have been a single

assignment of funding may have been divided into several detailed and particularized directives.

Second, the declining value of earmarks may have been driven by a change in the composition of earmarks. In other words, the greatest growth in earmarked spending may have occurred in subject areas that lend themselves to smaller projects. For example, the CRS data shows that there has been rapid growth in earmarks in the appropriation bills for Labor, HHS and Education and for Transportation, but that the average value of earmarks in these category are comparatively small.<sup>83</sup>

Third, one might speculate that, as the use of earmarks has increased, legislators have come to view the political value of small and large earmarks differently. It is plausible that, in light of their experience, legislators now prefer a large number of small earmarks to a small number of large ones.

Finally, the political culture in Congress may have changed such that all Members now expect to receive some quantity of earmarks in order to assure their vote for an appropriations bill. Scholars suggests that the prevalence of earmarked funds has led to a “cooperative norm” and the “promotion of an enclave mentality” in Congress,<sup>84</sup> where lawmakers work together to spread pork among their districts. Relatedly, some commentators suggest that the increase in smaller-sized earmarked projects may be attributed to the growing number of “mouths to feed” in Congress.<sup>85</sup> Such an explanation

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<sup>83</sup> The number of earmarks in the Labor, HHS and Education bill rose from 5 in 1994 to 3014 in 2005, but the average value of earmarks in this category was \$390,000 in 2005. A similar phenomenon can be seen in the Transportation Appropriations bill. Earmarks in that category went from 140 in 1994 to 2094 in 2005. The average value of those earmarks was a relatively small \$1.56 million in 2005. *See* CRS Memo, *supra* note 75; *but see* CRS Update, *supra* note 76 (showing the discontinuation of this trend).

<sup>84</sup> Brian Knight, *Parochial Interests and the Centralized Provision of Local Public Goods: Evidence from Congressional Voting on Transportation Projects*, 88 J. PUB. ECON. 845, 846 (2004); A. PREMCHAND, *GOVERNMENT BUDGETING AND EXPENDITURE CONTROLS: THEORY AND PRACTICE* 159 – 60 (1983).

<sup>85</sup> *See* Steve Ellis, *The Explosion of Earmarks on Capitol Hill*, Taxpayers for Common Sense, <http://www.taxpayer.net/budget/katrinaspending/catospeech.htm> (last visited Mar. 1, 2008).

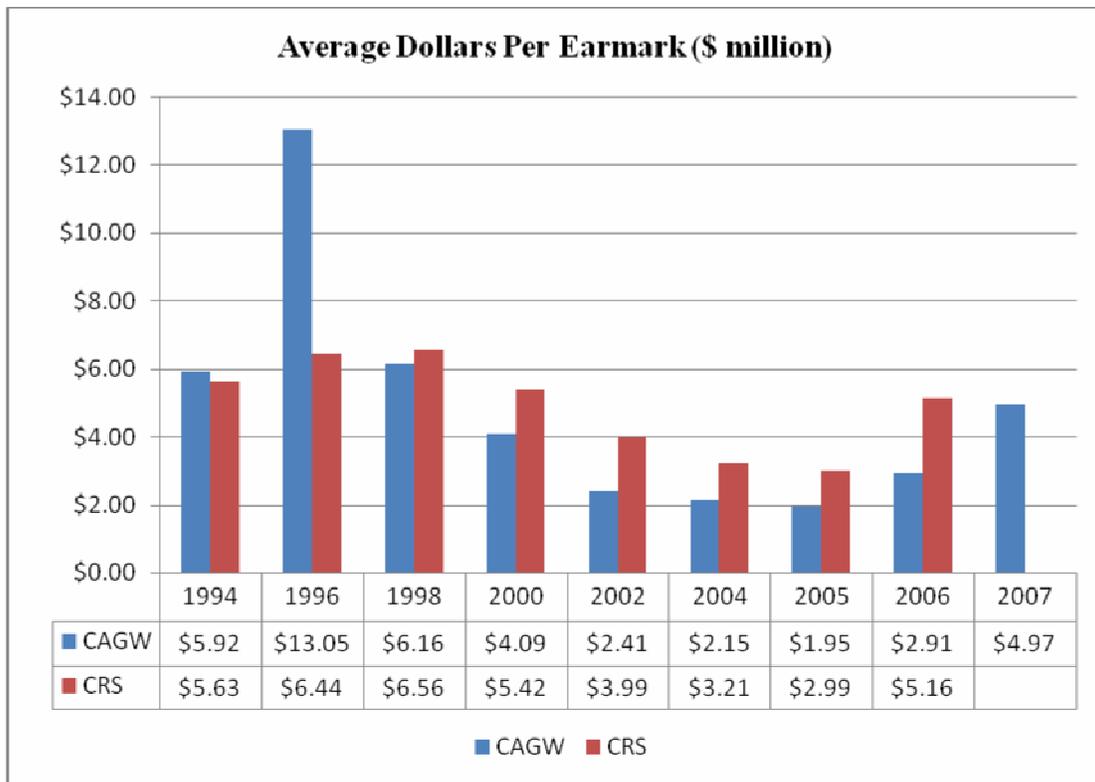
is consistent with what appears to be a growing acceptance of earmarking among rank-and-file lawmakers and with the more than doubling in registered Washington lobbying firms between 1999 and 2004.<sup>86</sup>

However, the average size of earmarks appears to have increased to roughly its 1994 level over the past two years. In 2006, the average earmark increased from \$2.99 million to \$5.16 million, an increase of 72.6%. CAGW data shows an increase from \$1.95 million per earmark in 2005 to \$2.91 million in 2006 (a 49% increase), and again to \$4.97 million per earmark in 2007 (a 70.8% increase from 2006). The cause of this dramatic increase is uncertain, although a reversal of any the aforementioned four factors may explain the change. In particular, transparency rules or similar changes in the political environment<sup>87</sup> may have encouraged politicians to eliminate smaller, potentially unnecessary earmarks. And even if they are not entirely eliminating smaller earmarks, politicians may be responding to transparency rules and the like by finding ways to combine earmarks so it appears as if they are individually responsible for less “pork,” even if the overall value is the same.

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<sup>86</sup> *Id.*

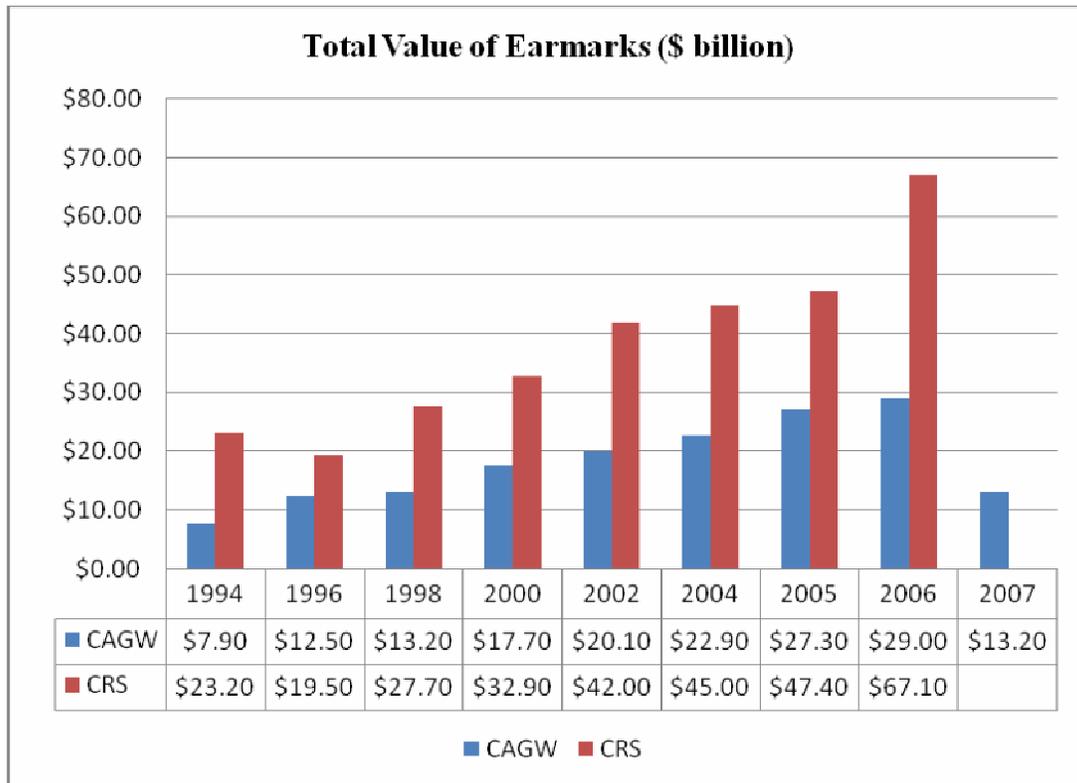
<sup>87</sup> A related explanation is that the publicity surrounding recent earmark-related scandals discouraged politicians from seeking excessive amounts of pork. *See infra* note 108.



*iii. The Size of Earmarks in Current Dollars Rose Substantially in the Last Decade but Sharply Dropped Off in 2007.*

Both data sources show that the amount of spending devoted to earmarks, in current dollars, rose substantially from 1994 to 2006. According to the CRS, the value of earmarks rose by 289%, from \$23.2 billion in 1994 to \$67.1 billion in 2006. According to the CAGW *Pig Book*, the value of pork projects rose 367% over the period, from \$7.8 billion in 1994 to \$27.3 billion in 2006. However, the CAGW data also shows a dramatic, 54.5% drop in the total value of earmarks from 2006 to 2007 (\$29 billion in 2006 to \$13.2 billion in 2007). This drop can be partially explained by a confluence of multiple factors: difficulty passing the 13 appropriations bills; scandals involving abuse

of earmarks; enactment of transparency rules; and a pledge by Democrats to cut the amount of earmarks usage in half.<sup>88</sup>



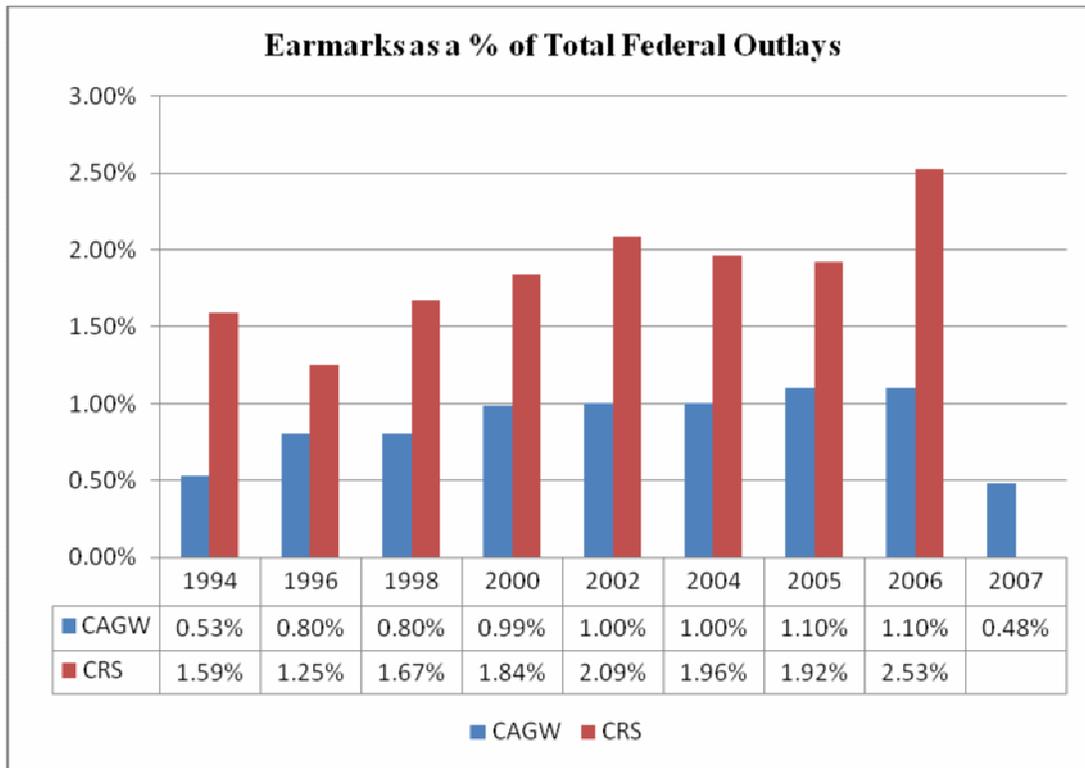
iv. *Earmarks Rose As a Percentage of Total Federal Outlays Until 2007*<sup>89</sup>

Both datasets show earmarks rising as a percentage of total federal outlays until falling in 2007. In the CRS data, earmarks rose 57.2%, from 1.59% of federal outlays in 1994 to 2.53% in 2006. The CAGW data also show earmarks doubling as a percentage of outlays, from 0.53% in 1994 to 1.10% in 2006. The CAGW data suggests that, after

<sup>88</sup> See Peter H. Stone, *Earmark Heartburn*, NAT'L J., Mar. 31, 2007. See also *Tough Choices, Madam Speaker: The 110th Congress*, THE ECONOMIST, Jan. 6, 2007, ("Democratic bigwigs . . . have pledged to strip out all 'earmarks'. . . . Around 10,000 such pieces of pork, worth around \$17 billion, are to be filleted out. The 2008 budget will allow earmarks, but only after new rules are put in place that will require politicians to attach their names to them.").

<sup>89</sup> Data for total federal outlays came from the White House Office of Management and the Budget, *Historical Tables, Budget of the United States Government, Fiscal Year 2007*, available at <http://www.whitehouse.gov/omb/budget/fy2007/>.

2000, earmarks leveled off as a percentage of outlays until 2007, when the percentage dropped from 1.10% to .48% (a 56.4% decline).

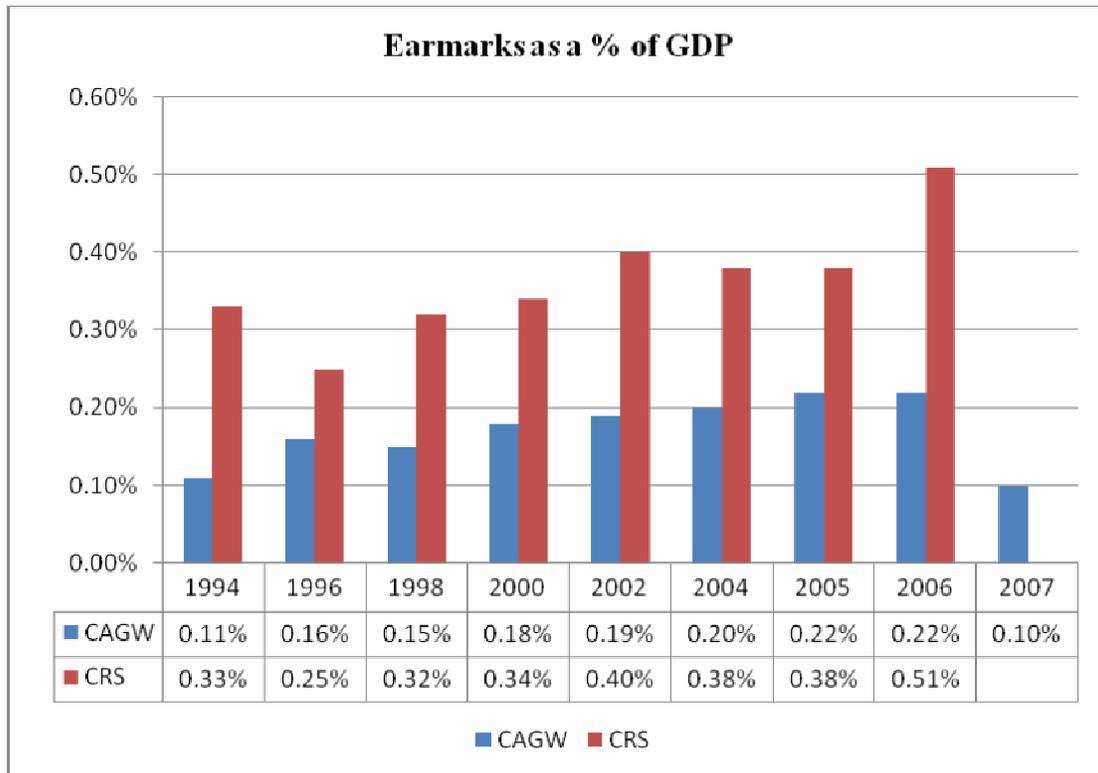


v. *Earmarks Also Rose As a Percentage of GDP Until 2007<sup>90</sup>*

Both datasets also show the value of earmarks rising as a percentage of GDP from 1994 to 2006, and then, according to CAGW, dropping in 2007. According to the CRS data, earmarks drifted upwards as a percentage of GDP during the late 1990s, and leveled off, to some extent, from 2002 to 2005. In 2006, earmarks increased as a percentage of GDP from .38% to .51%, resulting in an overall increase of 54.5% from 1994 to 2006. The CAGW data shows a similar trend of pork projects rising as a percentage of GDP

<sup>90</sup> GDP data came from the Bureau of Economic Analysis. See Bureau of Economic Analysis website, <http://www.bea.gov/index.htm>.

from 1994 to 2006; during that time, the overall percentage increased 98%, from 0.11% to 0.22% of GDP. But in 2007, the CAGW data indicates a 54.5% drop from .22% to .10%.



*c. Measuring the Distribution of Earmarks in Congress*

Several scholars have attempted to measure the distribution of earmarks within Congress along various characteristics of the Members and their districts. Scott Frisch analyzed the distribution of earmarks in the House of Representatives in the 103<sup>rd</sup> Congress (1993 – 1994). Frisch found that membership on the Appropriations Committee was worth, on average, four extra earmarks.<sup>91</sup> This result is consistent with anecdotal evidence for the importance of committee membership on legislators’ ability to

<sup>91</sup> FRISCH, *supra* note 28, at 86.

procure earmarks.<sup>92</sup> More surprisingly, when measuring the effect of seniority on earmarks, Frisch found a positive coefficient but not one that was statistically significant.<sup>93</sup> Frisch also found a statistically significant negative relationship between the average income in the districts and the number of earmarks received,<sup>94</sup> suggesting either that Members from poorer districts pursued earmarks more vigorously or that the appropriators in the 103<sup>rd</sup> Congress were on average more sympathetic to spending proposals in poorer districts.

Several scholars have confirmed the intuitive result that the distribution of earmarks favors the party in control of that chamber.<sup>95</sup> But however robust that result may be, it should not be overstated. It is also clear that members of the minority party also typically receive a substantial number of earmarks. Steven Balla et al have hypothesized that the majority party typically distributes earmarks to the minority party in order to deflect blame and to negate the minority party's ability to draw distinctions on the issue wasteful spending.<sup>96</sup> These scholars tested that hypothesis on a sample of higher education grants. They found that House members of either party were just as likely to secure earmarks but that the value of the earmarks received by majority party members was measurably larger. The authors claim that this result supported the blame avoidance hypothesis

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<sup>92</sup> See MEYERS, *supra* note 23, at 154 - 55. Indeed, one-time chairman of the Senate Appropriations Committee, Senator Robert Byrd, once remarked of his ability to earmark funding for a particular project: "I'm on the Appropriations Committee—if I can't do it, nobody can." *Id.* See also AARON WILDAVSKY & NAOMI CAIDEN, *THE NEW POLITICS OF THE BUDGETARY PROCESS* 167 (2001).

<sup>93</sup> *Id.* Note, however, that Frisch did find a statistically significant relationship between seniority and earmarks when he took the military construction earmarks in isolation, suggesting that the effect of seniority may vary across the subcommittees. FRISCH, *supra* note 28, at 90.

<sup>94</sup> *Id.* at 86.

<sup>95</sup> See Steven D. Levitt & James M. Snyder, Jr., *The Impact of Federal Spending on House Election Outcomes*, 105 J. POL. ECON. 30 (1997); Thomas M. Carsey & Barry Rundquist, *The Reciprocal Relationship between State Defense Interests and Committee Representation in Congress*, 99 PUB. CHOICE 455 (1998); FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999); *but see* FRISCH, *supra* note 28, at 86.

<sup>96</sup> See Steven J. Balla et al, *Partisanship, Blame Avoidance, and the Distribution of Legislative Pork*, 46 AM. J. POL. SCI. 515 (2002).

because it was consistent with a strategy of giving minority party members sufficient earmarks to deflect blame while reserving the greatest value for majority party members.<sup>97</sup>

Among states, political scientist Brian Knight has produced evidence for the proposition that smaller states receive a greater per capita share of earmarked funds than do larger states because of their relatively higher per capita representation in the Senate.<sup>98</sup> Using a sample of Senate-initiated projects designated as pork by the CAGW, Knight found a statistically significant relationship between Senate representation per capita and CAGW projects, after controlling for a number of state fixed effects.<sup>99</sup>

#### **IV. Normative Arguments For and Against Earmarks**

##### *a. The Case Against Earmarks*

##### *i. The practice of earmarking leads to increased federal spending*

The increasing congressional practice of using earmarks to fund specific projects is frequently cited as “one reason federal spending has grown.”<sup>100</sup> Because committee chairs and individual sponsors often incorporate only earmarked funding from lawmakers who commit to voting for an entire spending bill, many junior members support omnibus appropriations measures totaling hundreds of billions of dollars primarily to secure

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<sup>97</sup> *Id.* at 523 – 24.

<sup>98</sup> Brian Knight, *Legislative Representation, Bargaining Power, and the Distribution of Federal Funds: Evidence from the U.S. Senate*, NBER Working Paper No. 10385 (Mar. 2004).

<sup>99</sup> *See id.* at tbl.5.

<sup>100</sup> *See* Edwin Feulner & Alison Fraser, *A Line in the Sand for Fiscally Responsible Lawmakers*, Heritage Foundation Web Memo #874 (Oct. 6, 2005) at <http://www.heritage.org/Research/Budget/wm874.cfm#>. *See also* John Campbell, *Hill Conservatives Chart a Path for the Future*, WASH. TIMES, Nov. 14, 2007 (referencing Senator Tom Coburn’s remark that earmarks are a “gateway drug to overspending”); Andrew Roth, *Getting Porker Protection*, NAT’L REV., Nov. 6, 2007 (“There’s an unwritten rule that you can have your pork, but only if you vote for the overall bill in which it is contained. This allows big bills to become even bigger bills.”); Andrew Woellner, *Spending on an Empty Wallet: A Critique of Tax Expenditures and the Current Fiscal Policy*, 7 HOUS. BUS. & TAX. L. J. 201, 227 (2006) (“[I]n order to increase the federal revenue and help deflate the budget, earmarks should be checked regularly and be restricted from use by lobbyists.”).

relatively small projects directed at their states or districts. A recent empirical study of congressional voting on transportation project funding suggests that, given current rules and procedures, each legislator's individual incentive to support own-district spending outweighs the more generalized incentive to oppose tax costs associated with aggregate spending, leading to a "tendency towards pork-barrel over-spending."<sup>101</sup> This phenomenon was vividly exemplified recently when the House passed an earmark-laden highway bill with the "Bridge to Nowhere" by an overwhelming 412 to 8 margin.<sup>102</sup>

*ii. The process of line-item appropriation corrupts Congress*

Critics of earmarking also argue that the practice has "allowed an 'every man for himself' ethos to permeate Congress," in which members and their staffs are preoccupied with funding hometown projects that often represent "unjustified giveaways to private businesses," rather than focusing on national issues.<sup>103</sup> Representative Jeff Flake (R – Ariz.) deemed earmarks "the currency of corruption," and former lobbyist Jack Abramoff even referred to the Appropriations Committee, where most earmarks are formed, as a "favor factory."<sup>104</sup> Indeed, critics charge that allowing lawmakers individually to allocate federal grants invites corruption.<sup>105</sup> For example, congressional e-mail messages recently made public reveal that each supporting lawmaker is given a personal fund for certain

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<sup>101</sup> Knight, *supra* note 84.

<sup>102</sup> Brian M. Riedl, *How Pork Corrupts Congress*, Heritage Foundation Commentary (Jan. 25, 2006), at <http://www.heritage.org/Press/Commentary/ed012506a.cfm>.

<sup>103</sup> Chris Edwards, *Both Parties Find Trough to Their Liking*, Cato Institute (Aug. 18, 2005), at [http://www.cato.org/pub\\_display.php?pub\\_id=4393](http://www.cato.org/pub_display.php?pub_id=4393). For a discussion of how earmarks distract Congress from more pressing national issues, see TAXPAYERS FOR COMMON SENSE, *ENDING THE EARMARK ATM 3* (2008) ("[T]he annual hunt for earmarks is resource-intensive, absorbing hundreds or even thousands of hours of congressional staff time to develop, obtain, and execute the earmarks, distracting lawmakers from other national priorities and pressing needs.").

<sup>104</sup> William H. Peterson, *Why Gridlock is Good: Republicans and Big Government*, WASH. POST, Oct. 17, 2006.

<sup>105</sup> See, e.g., Chris Edwards, *Federal Aid to the States: Historical Cause of Government Growth and Bureaucracy*, CATO Institute (May 22, 2007) at <http://www.cato.org/pubs/pas/pa593.pdf> (linking a increases in lobbying fees to the prevalence of earmarks and noting that "[p]oliticians trade earmarks for campaign assistance, trips, sweetheart business deals, and general political support").

appropriations bills – usually at least several million dollars apiece – to distribute as he or she wishes. While explicit exchange of campaign donations for specified funding is difficult to prove, there is increasing sentiment that the practice of earmarking essentially results in “tax dollars being auctioned for campaign donations.”<sup>106</sup> Scandals involving various politicians taking bribes in return for earmarks can only contribute to these perceptions.<sup>107</sup>

Earmarks may also be used for another similarly inappropriate use: political entrenchment. A recent study of the use of earmarks by the 110th Congress reveals that members of the majority party “do considerably better than members of the minority party” in securing earmarks,<sup>108</sup> and those earmarks tend to be distributed to the most “electorally vulnerable members.”<sup>109</sup> Accordingly, the earmarking process may disrupt structures of accountability by granting vulnerable members of the majority party projects with which they can “buy” votes.

*iii. Earmarking invites members of Congress to make funding decisions that exceed their technical competence*

Critics of earmarking argue that the practice requires members of Congress to make decisions in areas that are highly technical in nature and thus outside their general

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<sup>106</sup> Riedl, *supra* note 103.

<sup>107</sup> See Eamon Javers, *Inside the Hidden World of Earmarks*, BUSINESS WEEK, Sept. 17, 2007, at 56 (“The sad history of earmarks features a long list of abuses: earmarks used by congressional leaders to buy votes on other legislation, earmarks sent to political donors, and earmarks used in outright bribery.”); Ramesh Ponnuru, *Against the Porkbusters – Conservatives Should Find Another Crusade*, NAT’L REV., May 28, 2007 (“Republican congressman Duke Cunningham, who took bribes in return for earmarks that benefited his bribers and went to jail for it, is Exhibit A.”); Danielle Knight, *Loading the Pork Train*, U.S. NEWS & WORLD REPORT, May 29, 2006 (“Earmarks are so intertwined with the corruption scandals on Capitol Hill that Rep. Jeff Flake, an Arizona Republican, calls them the ‘currency of corruption.’”); Woellner, *supra* note 100, at 227 (noting that “former California congressman Randy Cunningham acknowledged trading earmarks for \$2.4 million in bribes”).

<sup>108</sup> Erik Engstrom & Georg Vanberg, *The Politics of Congressional Earmarking* at 1 (2007), available at <http://ssrn.com/abstract=1081654>. See also *id.* at 16 (further noting that “[o]n average, majority party senators secure just over 100 earmarks, compared with just under 78 for members of the minority party”).

<sup>109</sup> *Id.* at 1 (“[T]here is strong evidence that electorally vulnerable members are targeted.”); see also *supra* TAN 92 – 100.

competence. For example, lawmakers frequently appropriate funds for certain types of scientific research in particular geographic areas without competitive peer review, even in the absence of initial inclusion of the program in the relevant agency's initial budget request. Such earmarking may undermine the authorization process and distort agency R&D priorities, properly considered as a unified whole.<sup>110</sup> Similar earmarks for funding in areas ranging from higher education<sup>111</sup> to national security<sup>112</sup> circumvent traditional merit-based formulas and competitive processes designed to allocate resources to the worthiest projects as judged by career professionals in the federal agencies. The result, according to a study by the Department of Transportation Inspector General, is that earmarked funds are often not "the most effective or efficient use of funds" and result in "projects considered by the agencies as low priority . . . being funded over higher priority, non-earmarked projects."<sup>113</sup>

iv. *Congressional earmarks undermine local decision-making and priorities*

Another argument advanced against earmarks is that they feed a congressional propensity to "micromanage" state and local affairs.<sup>114</sup> Many federal domestic

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<sup>110</sup> See Genevieve J. Knezo, *Research and Development: Priority Setting and Consolidation in Science Budgeting*, CRS Issue Brief for Congress IB94009 (Oct. 13, 2000); see also AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 20 (1994) ("[C]ongressional earmarks hamper agencies that seek to manage programs efficiently."). In some circumstances, earmarks establish new centers or institutions, implying long-term federal support.

<sup>111</sup> See David Minge, *The Case Against Academic Earmarking*, in *American Association for the Advancement of Science: Science and Technology Policy Yearbook, 2002*, available at [www.aaas.org/spp/yearbook/2002/ch12.pdf](http://www.aaas.org/spp/yearbook/2002/ch12.pdf). Prior to the 1980s, lump-sum appropriations to fund academic research were provided to funding agencies charged with allocating grants through the peer review process. Since such merit allocations often favored large, prestigious research universities, lawmakers representing smaller colleges and less-prestigious universities began to insert earmarks favoring these institutions into appropriations bills. See MEYERS, *supra* note 23, at 153.

<sup>112</sup> See Winslow Wheeler, *Don't Mind If I Do: Congress Says It's Going All Out for the Troops. Here's \$8.9 Billion in Pork That Say's It's Not*, WASH. POST (Aug. 22, 2004).

<sup>113</sup> DEP'T OF TRANSPORTATION, REVIEW OF CONGRESSIONAL EARMARKS WITHIN DEPARTMENT OF TRANSPORTATION FUNDS 5 (2007), available at [http://coburn.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=85049145-abf0-4af9-83c4-9189944808f7](http://coburn.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=85049145-abf0-4af9-83c4-9189944808f7) (last accessed Feb. 25, 2008).

<sup>114</sup> See Edwards, *supra* note 66.

discretionary programs distribute funding, with few limits imposed by the agency, according to general legislative guidelines, formulas, and provisions used to determine eligibility, the proper use of funds, and state and local allocations.<sup>115</sup> While some commentators suggest that elected officials often reduce agency discretion only when agencies have abused the flexibility they were initially given,<sup>116</sup> others concede that the degree of discretion granted to agencies is largely determined by the tactical actions of spending advocates.<sup>117</sup>

For many critics, because earmarked funds often encroach on open-ended block grants to the states, the practice represents a federal rebuke of the priorities set by local leaders more familiar with community needs and more closely tied to the wishes of their neighborhoods.<sup>118</sup> For example, a 1996 performance audit conducted by Pennsylvania's Legislative Budget and Finance Committee revealed the effect of congressional earmarks on state priorities:

[State planning] can be undermined when Congress targets specific highway projects for federal funding. The local planning organizations and the [Pennsylvania D.O.T.] are then put in the position of either giving the project a high priority on their transportation plans, which means that the monies are not available for other potentially more worthy projects, or rejecting the project...

The practice of Congress earmarking funds for specific purposes can significantly impact the Commonwealth's ability to fund the projects of greatest need. For

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<sup>115</sup> For example, absent earmarks, federal highway spending is allocated to each state using a complicated formula that considers population, miles of highway, fuel usage, and other quantitative factors in order to match surface transportation needs with available funds. Once the allocation is determined, each state may determine how and where this money will be spent in accordance with the federal guidelines. See Ronald D. Utt, *How Congressional Earmarks and Pork-Barrel Spending Undermine State and Local Decisionmaking*, Heritage Foundation Backgrounder #1266 (April 2, 1999), available at <http://www.heritage.org/Research/Budget/bg1266.cfm>.

<sup>116</sup> See IRENE RUBIN, *THE POLITICS OF PUBLIC BUDGETING* 234 – 52 (1993).

<sup>117</sup> See, e.g., Bernard T. Pitsvada, *Flexibility in Budget Execution*, *PUBLIC BUDGETING AND FINANCE* 83 (Summer 1983); Carroll J. Doherty, *Who Will Dole out Gulf Donations*, *CONG. Q. WKLY. REP.* (Sept. 22, 1990).

<sup>118</sup> See UTT, *supra* note 116. Some states have challenged this trend by attempting to assert their traditional right to distribute earmarked funds in accordance with local priorities. For example, Florida's Department of Transportation challenged the priority status of TEA-21 earmarks, but the U.S. Department of Transportation overruled the state's efforts. *Id.*

example, approximately 27.5 percent (\$1.32 billion of \$4.8 billion) of the total funding projected to be available for the highway and bridge component of the 1997-2000 Statewide Transportation Improvement Program is for specific projects earmarked by Congress. When only the funding available for major highway construction projects is considered, the percentage applied to earmarked projects rises to 84 percent (\$1.32 billion of \$1.57 billion). Most (70 percent) of this \$1.32 billion is for projects in central Pennsylvania. Rather than turn down these projects and risk losing the associated federal funding, the Department accepts the earmarked projects. The earmarking by Congress of funding for specific major construction projects therefore severely limits the ability of the Department and the State Transportation Commission to allocate funds to other projects that may be of higher priority.<sup>119</sup>

Sometimes federally earmarked funding is so misaligned with state needs that appropriated funds go unobligated for long periods of time. For example, both GAO and CRS studies of demonstration projects included in the 1987 highway bill found that, after five years, more than half of the earmarked projects were not included in state transportation plans – and about 64 percent of these funds had not been obligated – because state officials felt the projects would add little to address state needs.<sup>120</sup> In contrast to projects determined by the states through comprehensive review and analysis as well as consultation with local officials, many congressional earmarks tend to arise haphazardly in the few weeks or months leading up to a bill's enactment as votes are sought to ensure passage.

Since only certain Senators and Representatives sit on influential appropriations committees and subcommittees, the distribution of federally earmarked funds often tilts heavily towards certain states and districts. For example, the GAO study also concluded that in order to "pay" for extras received by fifteen states, the 1987 highway bill caused

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<sup>119</sup> *Performance Audit: Department of Transportation, Pursuant to Act 1981-95*, Pennsylvania Legislative Budget and Finance Committee 187 (June 1996). See also Edwards, *supra* note 103, at 1 (noting that earmarks “stimulate[] overspending by the states, require[] large bureaucracies to administer, and come[] with a web of complex regulations that limit state flexibility”).

<sup>120</sup> GAO, *Highway Demonstration Projects: Improved Selection and Funding Controls Are Needed*, RCED-91-14 (May 1991); J.F. Hornbeck, *Highway Demonstration Projects: Background and Economic Policy Issues*, Congressional Research Service Report to Congress No. 94-572E (July 15, 1994).

twenty-one states to receive substantially fewer highway funds than they would have received under the traditional formula.<sup>121</sup> As a result, critics charge that while many earmarked projects fail to match true priorities, such appropriations nevertheless “blanket the nation across almost all congressional districts,” most heavily concentrated in those areas represented by lawmakers on powerful appropriations committees.<sup>122</sup>

*b. In Defense of Earmarks*

*i. Earmarks are necessary to grease the wheels*

The few who have risen to the challenge of defending this much maligned practice argue that earmarked appropriations are a politically necessary means by which congressional leaders can hold together majority support for important legislation.<sup>123</sup> In this view, “it’s unrealistic to think you can have an effective representative democracy without pork.”<sup>124</sup> But given sharply diverging views regarding the proper role of government in society, such statements will remain highly contestable. Further, it is impossible to predict precisely what forces would be in play in a Congress without earmarks – lawmakers would surely seek some alternative mechanism to ensure local appropriations. Nevertheless, it remains true that “a spending bill with projects spread around the country is easier to pass than one without them.”<sup>125</sup>

*ii Earmarks are relatively cheap*

Beyond this important political function, supporters also contend that earmarks are relatively inexpensive in terms of the budget as a whole. For example, the 2004 House

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<sup>121</sup> GAO *supra* note 121, at 7.

<sup>122</sup> Feulner & Fraser, *supra* note 101.

<sup>123</sup> See DIANA EVANS, GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS (2004) (defending pork barrel spending as an effective means to secure passage of general interest legislation including tax reform, highway bills, NAFTA, and an array of appropriations bills).

<sup>124</sup> Michael Barone, *The Case for Pork*, BaroneBlog (Jan. 27, 2006), <http://www.usnews.com/blogs/barone/2006/01/27/?track=rss> (last visited Mar. 1, 2008).

<sup>125</sup> ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 215 (2000).

transportation bill contained some 8,000 earmarks worth \$10 billion and was depicted as emblematic of out-of-control pork spending. Nonetheless, the earmarks in the bill accounted for just 1.2 percent of the \$822 billion appropriations measure.<sup>126</sup> Although scholars like Allen Schick concede that to argue earmarking is relatively inexpensive “is not to justify the practice or to claim that all the money is spent well,”<sup>127</sup> it is simply not the case that pork represents a primary factor in the growth in size of the federal budget. Moreover, some analysts have claimed that earmarks might result in a net *decrease* in spending because “they can buy support for government-shrinking bills, too.”<sup>128</sup>

ii. *States and their representatives have figured out how to use earmarks effectively*

In response to critics who argue that Congressional earmarks undermine state decision-making and local priorities, some supporters seek to demonstrate that states have in fact successfully instituted processes for identifying and pursuing projects that would benefit from earmarked money. In an article drawing from interviews with multiple state officials, Brian Friel suggests that as earmarks have increasingly become an additional funding stream, many states have developed an annual process for coordinating earmark requests – a process that often involves thorough vetting on a regional and local level as well as extensive planning for anticipated projects.<sup>129</sup> Additionally, he highlights several appropriations subcommittees and the House Transportation and Infrastructure

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<sup>126</sup> Brian Friel, *Pork Defenders Praise Earmarks*, NAT'L J. (May 10, 2004), available at <http://www.govexec.com/dailyfed/0504/051004nj1.htm>; see also *supra* Part IIIb.

<sup>127</sup> SCHICK, *supra* note 31 at 215.

<sup>128</sup> Javers, *supra* note 107 (further noting that “[t]he Clinton administration spread pork around liberally to secure congressional votes for the North American Free Trade Agreement, and most fiscal conservatives are glad it did. If earmarks have more often been used to grease the skids for statist legislation, it is not because of the nature of earmarks themselves; it's because of the overall orientation of Washington, D.C., over the last century.”).

<sup>129</sup> Friel, *supra* note 127. For example, Friel describes how local officials explain to the Transportation Commission of Colorado why their projects need special funding, after which the commission decides what projects to include in a list submitted to the Colorado congressional delegation, whose members generally seek to secure only earmarks from the list.

Committee which now require members of Congress to fill out extensive questionnaires justifying projects, in an attempt to ensure that earmarked projects are worthwhile expenditures.<sup>130</sup> Although based exclusively on anecdotal evidence drawn from a few exemplary states and congressional committees, Friel's discussion suggests that past data indicating a severe mismatch between earmarked appropriations and local needs may no longer reflect the current situation.

By contrast, the argument continues, it is hardly clear that *federal* agencies have a firm handle on local priorities. For example, a 1998 review of the Department of Transportation process for selecting discretionary projects found that the Department's rationale for its decisions "was neither explained nor documented," and that nearly 60 percent of projects the Federal Highway Administration picked for funding were not actually ranked as the highest priority through the agency's merit-based processes.<sup>131</sup> As House Appropriations Committee Chairman Bill Young wrote to then-OMB Director Mitch Daniels, "all wisdom on the allocation of federal funding does not reside in the Executive branch. Members know the needs of their districts better than civil servants working in Washington, D.C."<sup>132</sup>

*iv. Earmarks are easy for the public to find and thus to hold politicians accountable*

There is also an argument to be made that greater legislative specificity and control over federal spending produces greater democratic accountability. Legislative earmarks are relatively simple to find in spending bills and companion committee reports. Since earmarks are easily traced, the media and others can use them to demonstrate wasteful

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Ronald D. Utt & Christopher B. Summers, *Can Congress Be Embarrassed Into Ending Wasteful Pork-Barrel Spending?*, Heritage Foundation Background (March 15, 2002), at <http://www.heritage.org/Research/Budget/BG1527.cfm>.

spending and to embarrass decision makers.<sup>133</sup> On the other hand, very few earmarks create this kind of attention and many members of Congress have learned to bear substantial criticism because of a belief that their constituents expect them to seek earmarked funds.<sup>134</sup> But at the very least, congressional earmarks appear fairly transparent in comparison to some executive branch funding decisions. While the president's public budget contains many explicit line item requests, the details of what many consider “executive earmarking” are sent to a limited audience days or weeks after the formal budget request. These influential agency “justifications” for programmatic funding levels are largely hidden from all but the pertinent appropriations subcommittees.<sup>135</sup>

## **Conclusion**

This Briefing Paper has sought to inform new scholarship on the subject of congressional earmarks. Part I explored the prevailing definitions of the term ‘earmark.’ Part II outlined the processes through which earmarked expenditures arrive in the federal budget and then described of the legislation now pending to reform those processes. Part III aggregated and synthesized the available empirical data on the volume of earmarks in the federal budget, concluding with some trepidation that the use of earmarks has increased. Part IV catalogued the normative arguments against and in favor of current practice.

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<sup>133</sup> A recent example is the so-called Alaskan “Bridge to Nowhere” associated with Senator Ted Stevens. Another notorious incident involved a 1991 proposed earmark for the purchase of a Gulfstream executive jet for the Speaker of the House and other leadership members. The inevitable labeling of the proposal as “Air Foley” proved fatal for the purchase of such an aircraft. *See* MEYERS, *supra* note 23, at 155.

<sup>134</sup> *See* Paul Starobin, *Bringing It Home*, NAT’L J., June 26, 1993, at 1642 – 45.

<sup>135</sup> *See* Calmes, *supra* note 15.

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