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**Earmarks in the Federal  
Budget Process**

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Rob Porter  
Sam Walsh

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## **Introduction**

The lobbying scandals of recent months have focused public attention on the congressional practice of earmarking expenditures and have created political momentum for reforming the practice. 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 difference 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 some of the legislation now pending to reform those processes. 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>1</sup> Although themes of personal ownership and even swine-herding may resonate with contemporary observers of 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

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<sup>1</sup> Tim Weiner, *Sending Money to Home District: Earmarking and Congressional Pork Barrel*, N.Y. TIMES at A1 (July 13, 1994).

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>2</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>3</sup>

Although the practice of earmarking revenues is also the subject of an important policy debate,<sup>4</sup> this briefing paper focuses on earmarks in the appropriations process. 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>5</sup> More specific

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<sup>2</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>3</sup> GAO Fact Sheet, *Budget Issues: Earmarking in the Federal Government* 3-5 (1990).

<sup>4</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).

<sup>5</sup> WALTER KRAVITZ, *CONGRESSIONAL QUARTERLY’S AMERICAN CONGRESSIONAL DICTIONARY* 87 - 88 (3d ed. 2001).

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 “dedicating appropriations for a particular purpose,”<sup>6</sup> pending reform legislation in the Senate more narrowly defines an earmark as “a provision that specifies the identity of an entity to receive assistance and the amount of the assistance.”<sup>7</sup>

For many, however, a line-item expenditure need not be classified as an earmark simply because it includes specific spending instructions.<sup>8</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

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<sup>6</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).

<sup>7</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).

<sup>8</sup> See, e.g., Daniel Engber, *What’s an Earmark*, SLATE, April. 6, 2006, <http://slate.msn.com/id/2139454/>.

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>9</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 Congress directs for specific activities.<sup>10</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>11</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>12</sup> They also

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<sup>9</sup> Congressional Research Service, Memorandum, *Earmarks in Appropriations Acts: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005* (Jan. 26, 2006).

<sup>10</sup> *Id.*, at 3.

<sup>11</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*, UCLA L. REV. (forthcoming 2006).

<sup>12</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. at A6 (Feb. 21, 2006). Senator Richard Shelby, a member of the Senate Appropriations Committee and 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.

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>13</sup> Finally, the notion of a presidential earmark may also apply to spending programs that are perceived to arise out 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>14</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. 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>15</sup>

*d. Presence in Statutory Text*

While legislative language may explicitly designate any portion of a lump-sum amount for particular purposes,<sup>16</sup> instructions for targeted spending are more commonly found in Appropriations Committee reports accompanying appropriations bills<sup>17</sup> or in the

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<sup>13</sup> *Id.*

<sup>14</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>15</sup> WALTER KRAVITZ, CONGRESSIONAL QUARTERLY’S AMERICAN CONGRESSIONAL DICTIONARY 87 - 88, 181 (3d ed. 2001).

<sup>16</sup> See THE U.S. FEDERAL BUDGET PROCESS: AN OVERVIEW AND GLOSSARY OF TERMS 90 (G.I. Maltese ed., 1995).

<sup>17</sup> See Part II *infra*.

managers' joint explanatory statement accompanying final conference reports.<sup>18</sup>

Although both committee reports and manager's 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>19</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>20</sup> For others, however, 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>21</sup>

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<sup>18</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, <http://www.townhall.com/opinion/columns/robertnovak/2006/03/27/191332.html> (last visited Mar. 30, 2006).

<sup>19</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>20</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.).

<sup>21</sup> See, e.g., Sandy Streeter, *Earmarks and Limitations in Appropriations Bill*, Congressional Research Service, Report No. 98-518 (Dec. 7, 2004).

## II. Earmarks and the Budget Process

### a. Current Practice

Earmarked appropriations may enter the federal budget at three points in the congressional process: the authorizing committee,<sup>22</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>23</sup> For example, last year the House Appropriations Committee received almost 35,000 earmark requests,<sup>24</sup> and one appropriations bill alone generated over 25 funding requests per House member.<sup>25</sup> The 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>26</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>27</sup> a procedure that lacks the prerequisites of bicameralism and presentment. But despite the fact that the

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<sup>22</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), at [www.heritage.org/Research/Budget/wm548.cfm?renderforprint=1](http://www.heritage.org/Research/Budget/wm548.cfm?renderforprint=1).

<sup>23</sup> See SCOTT A. FRISCH, *THE POLITICS OF PORK: A STUDY OF CONGRESSIONAL APPROPRIATION EARMARKS* 16 (1998).

<sup>24</sup> David Baumann, *Here To Stay*, NAT’L J. (Feb. 13, 2006), available at [www.govexec.com/dailyfed/0206/021306ol.htm](http://www.govexec.com/dailyfed/0206/021306ol.htm).

<sup>25</sup> Jonathan Weisman & Charles R Babcock, *K Street’s New Ways Spawn More Pork: As Barriers With Lawmakers Fall, ‘Earmarks’ Grow*, WASH. POST at A1 (Jan. 27, 2006).

<sup>26</sup> See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 212 (2000); FRISCH, *supra* note 23 at 17.

<sup>27</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).

administrative agencies are not legally required to pay for projects earmarked in committee reports, they uniformly do so to avoid being punished in the next year's appropriations process.<sup>28</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>29</sup> arguing that committee report language was “neither voted on by Congress nor presented to the President, [so they] are not law.”<sup>30</sup> Miller then announced that the federal agencies would not respond to committee report language.<sup>31</sup> Congress responded with threats of retaliation and Miller soon capitulated, sending a second letter to the agencies reversing his original request.<sup>32</sup> Since then, there is no record of the executive branch challenging the authority of appropriations subcommittees to earmark funds in committee reports.

#### *b. Proposed Reforms to the Earmarks Process*

Recent lobbying scandals have engendered a set of proposed reforms to the earmarks process. Most of those proposals aim to bring greater transparency to the process of burying earmarks in committee and conference reports without attribution to

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<sup>28</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>29</sup> 462 U.S. 919 (1983).

<sup>30</sup> JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* 37 (1996).

<sup>31</sup> *Id.*

<sup>32</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).

the responsible lawmaker or opportunity for consideration by the full body.<sup>33</sup> A proposal by Senators Lott and Feinstein focuses 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>34</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 earmarks passed by only one chamber did not.<sup>35</sup> It is presently unclear when the House will act on the Legislative Transparency and Accountability Act until next year or how the two chambers will reconcile their differences on the lobbying reform.<sup>36</sup>

In addition to the Lott-Feinstein proposal, a number of others measures were proposed in the Senate and may still be considered going forward. A proposal by Senator McCain focuses on the appropriations process. One piece of his proposal would focus 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

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<sup>33</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 [www.opencrs.com/document/RL\\_33295](http://www.opencrs.com/document/RL_33295).

<sup>34</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>. Along similar lines, a proposal by Senator Obama would open meetings of the conference committees and require seventy-two hours of notice for consideration of a conference report. S.2261, 109<sup>th</sup> Cong. (2006).

<sup>35</sup> S. 2349, 109<sup>th</sup> Cong. (2006).

<sup>36</sup> See Jeffrey H. Birnbaum, *Senate Passes Lobbying Bill*, WASH. POST, at A1 (March 30, 2006).

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>37</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>38</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 is a self-serving omission by Senator McCain, who is due to take over the Armed Services Committee in 2007.<sup>39</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 comes from the House Appropriations Committee, which has recently considered a proposal to limit the total number of earmarks each member of the House can request, thus allowing more time and consideration for each request by the

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<sup>37</sup> Pork Barrel Reduction Act, S. 2265, 109<sup>th</sup> Cong. (2006).

<sup>38</sup> See OMB Watch, *Lobby Reform Continues to Overlook Budget Process*, at [www.ombwatch.org/article/articleprint/3287/1/82](http://www.ombwatch.org/article/articleprint/3287/1/82).

<sup>39</sup> Jonathan Allen, *Power Struggle Over Pork*, THE HILL (Feb. 24, 2006).

subcommittees. At present, the Committee has not specified how many earmarks each member would be allowed to request under the proposal.<sup>40</sup>

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

Advocates of earmark reform, hoping to lend urgency to the problem, argue that the use of earmarks has grown dramatically over the past decade.<sup>41</sup> Responding to that important claim, this Part attempts to gather and to synthesize the available empirical data on earmarks and to assess their recent growth in terms of the number of earmarked projects and their size relative to overall outlays and gross domestic product. Although there are significant reasons to doubt the accuracy of the available data, this Part ventures five empirical conclusions about the use of earmarks in the past decade. They are, in decreasing order of certainty, that 1) the absolute number of earmarks in the budget has increased, 2) the dollar amount per earmark has dropped substantially, 3) the total value of earmarked expenditures has risen substantially in current dollars, 4) the total value of earmarks has risen as a percentage of federal outlays, 5) the total value of earmarks has risen as a percentage of gross domestic product.

#### *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

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<sup>40</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>41</sup> For example, in his recent testimony to the Senate Rules Committee, 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. <http://rules.senate.gov/hearings/2006/McCainTestimony.pdf>.

tallied the use of earmarks in the thirteen appropriations bills.<sup>42</sup> The CRS Memorandum contains two major limitations in its methodology. 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 Memorandum looked at committee reports only for two appropriations bills that are particularly well-known for using that device: Agriculture and Foreign Operations.<sup>43</sup> Thus, the CRS data admittedly omits from its count earmarks contained in the committee reports of the other eleven appropriations bills. A second, related methodological limitation of the CRS data is that it used different methods and different personnel for tallying earmarks across the thirteen appropriations bills.<sup>44</sup> The aim of the memorandum was to maintain consistency within each of the thirteen bills over time. Thus, to estimate the *aggregate* level of earmarks over time from the CRS data is a perilous step that the CRS itself does not attempt.

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>45</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

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<sup>42</sup> Congressional Research Service, Memorandum, *Earmarks in Appropriations Acts: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005* (Jan. 26, 2006). The report also contains data for FY 2004 and FY 2005 for the fourteenth appropriation bill, homeland security.

<sup>43</sup> *Id.* at 3 – 4.

<sup>44</sup> *Id.*

<sup>45</sup> See generally Citizens Against Government Waste website, at [www.cagw.org](http://www.cagw.org).

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>46</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 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>47</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

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<sup>46</sup> Citizens Against Government Waste, PIG BOOK 2, [www.cagw.org/site/PageServer?pagename=reports\\_pigbook2005](http://www.cagw.org/site/PageServer?pagename=reports_pigbook2005).

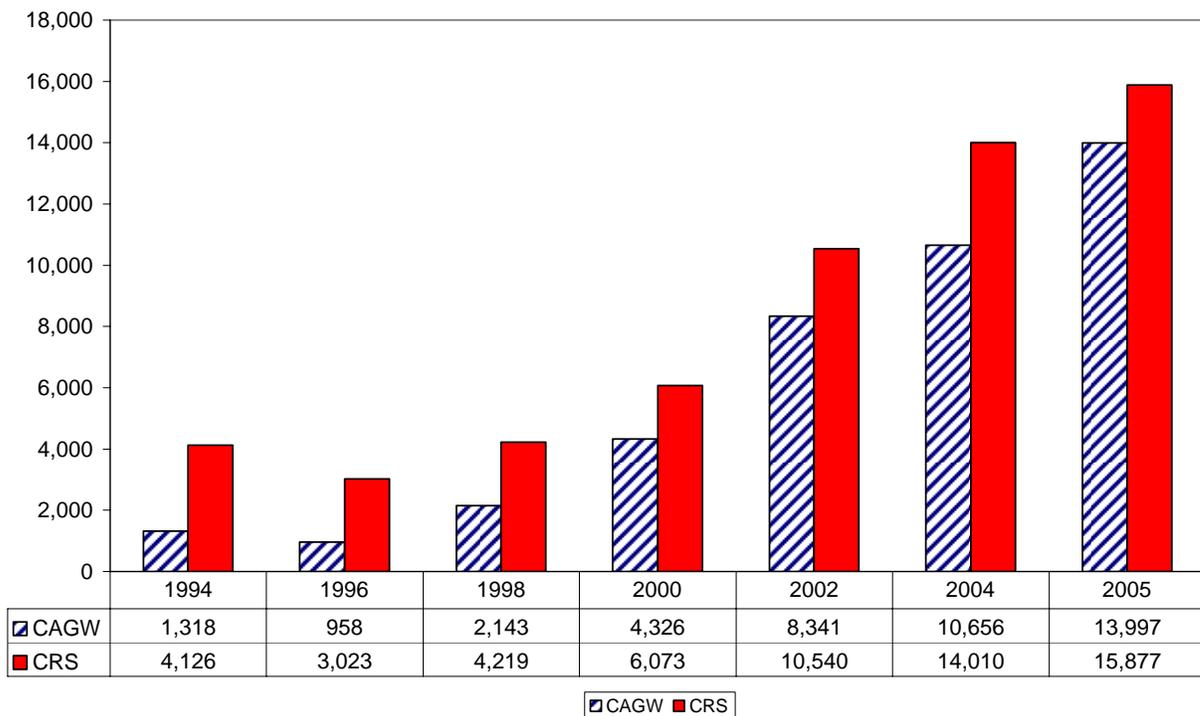
<sup>47</sup> When the President earmarks funds for a local purpose, the spending does not typically appear in any public budget document. See Calmes, *supra* note 12.

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 Has Increased Substantially*

Both datasets show a substantial increase in the annual number of earmarks. From 1994 to 2005, 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.

**Number of Earmarks**



ii. *The Dollar Amount Per Earmark Has Dropped Substantially*

Both datasets also show a substantial *decrease* in the dollar amount of each earmark, even as measured in current dollars. 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. 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 now be 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>48</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.

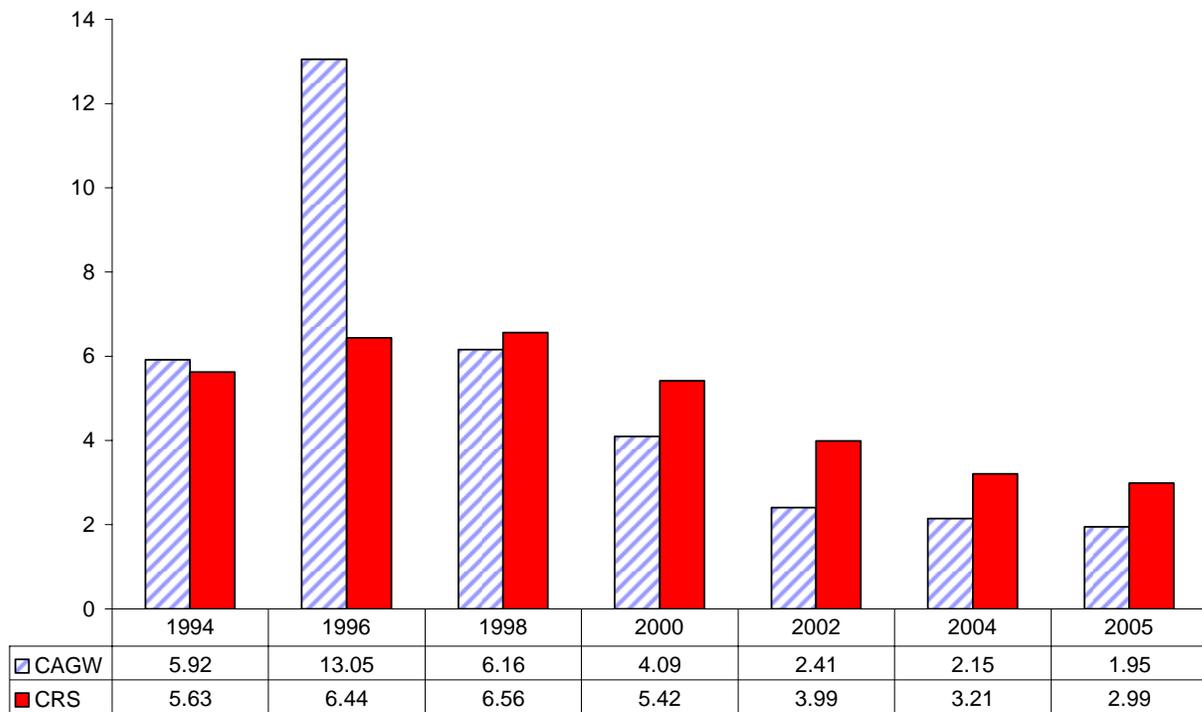
Finally, the political culture in Congress may have changed such that all Members now expect to receive some quantity of earmarks in order to assure their vote for an

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<sup>48</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.

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>49</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>50</sup> Such an explanation 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>51</sup>

**Avg. Dollars Per Earmark (\$ million)**



<sup>49</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).

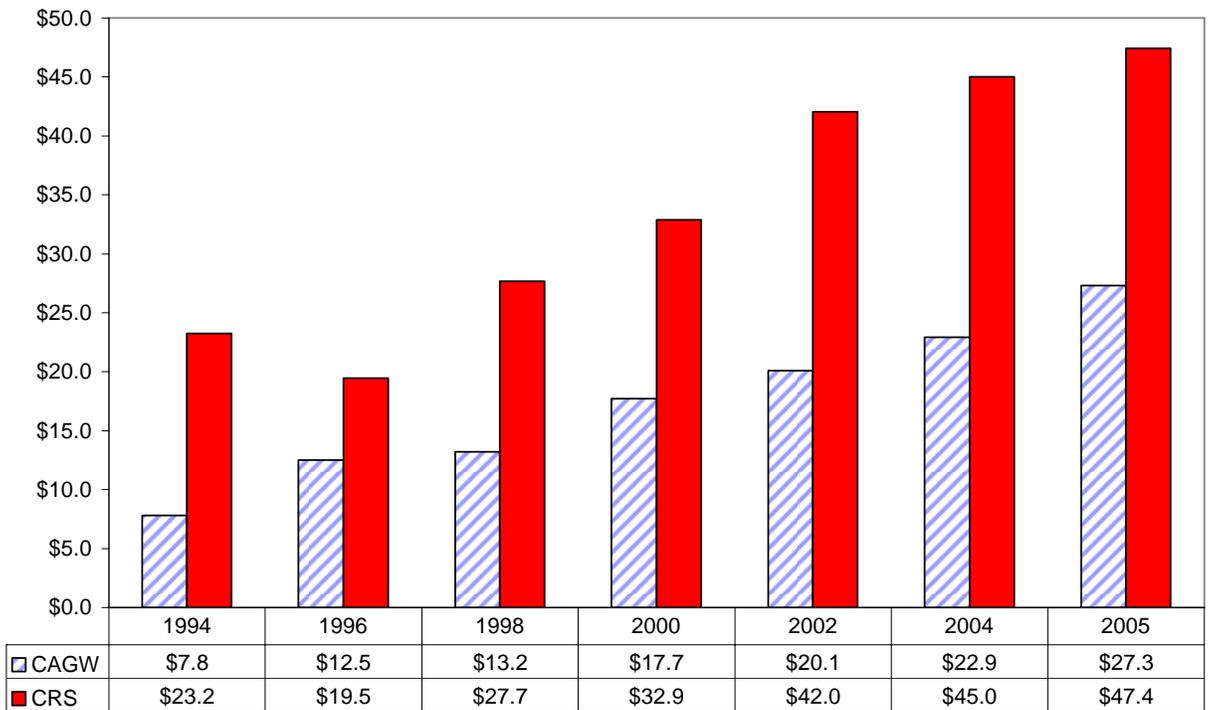
<sup>50</sup> See Steve Ellis, *The Explosion of Earmarks on Capitol Hill*, Taxpayers for Common Sense, <http://www.taxpayer.net/budget/earmarkspeechcato.htm>.

<sup>51</sup> *Id.*

iii. *The Size of Earmarks in Current Dollars Has Risen Substantially*

Both data sources show that the amount of spending devoted to earmarks has risen substantially in current dollars. According to the CRS, the value of earmarks has risen over the period by 104%, from \$23.2 billion in 1994 to \$47.4 billion in 2005. According to the CAGW *Pig Book*, the value of pork projects has risen 250% over the period from \$7.8 billion in 1994 to \$27.3 billion in 2005.

**Total Value of Earmarks (\$ billion)**



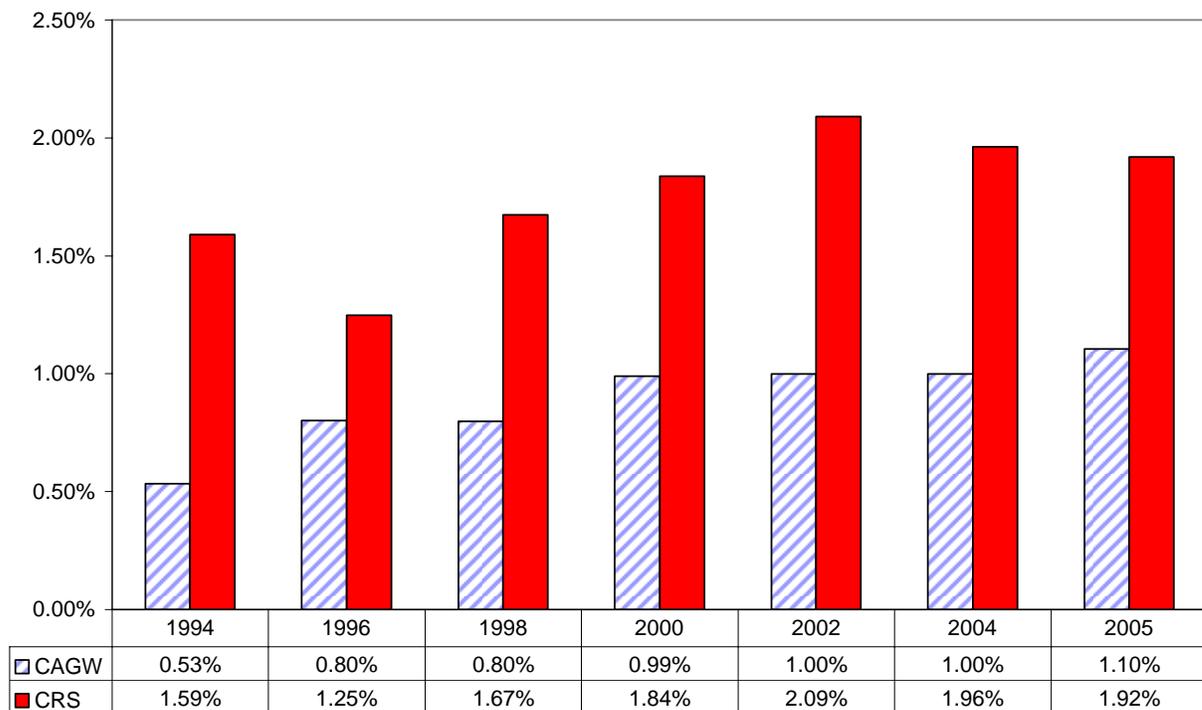
iv. *Earmarks Have Risen As a Percentage of Total Federal Outlays*<sup>52</sup>

Both datasets show earmarks rising as a percentage of total federal outlays. In the CRS data, earmarks rose 21%, from 1.59% of federal outlays in 1994 to 1.92% in 2005.

<sup>52</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/>.

However, the CRS show that earmarks grew as a percentage of outlays mostly in the late 1990s and have since drifted down from a high of 2.09% of federal outlays in 2000. The CAGW data also show earmarks doubling as a percentage of outlays, from 0.53% in 1994 to 1.10% in 2005. Again, however, the data show that, after 2000, earmarks leveled off as a percentage of outlays.

**Earmarks as a % of Total Federal Outlays**



v. *Earmarks Have Risen As a Percentage of GDP*<sup>53</sup>

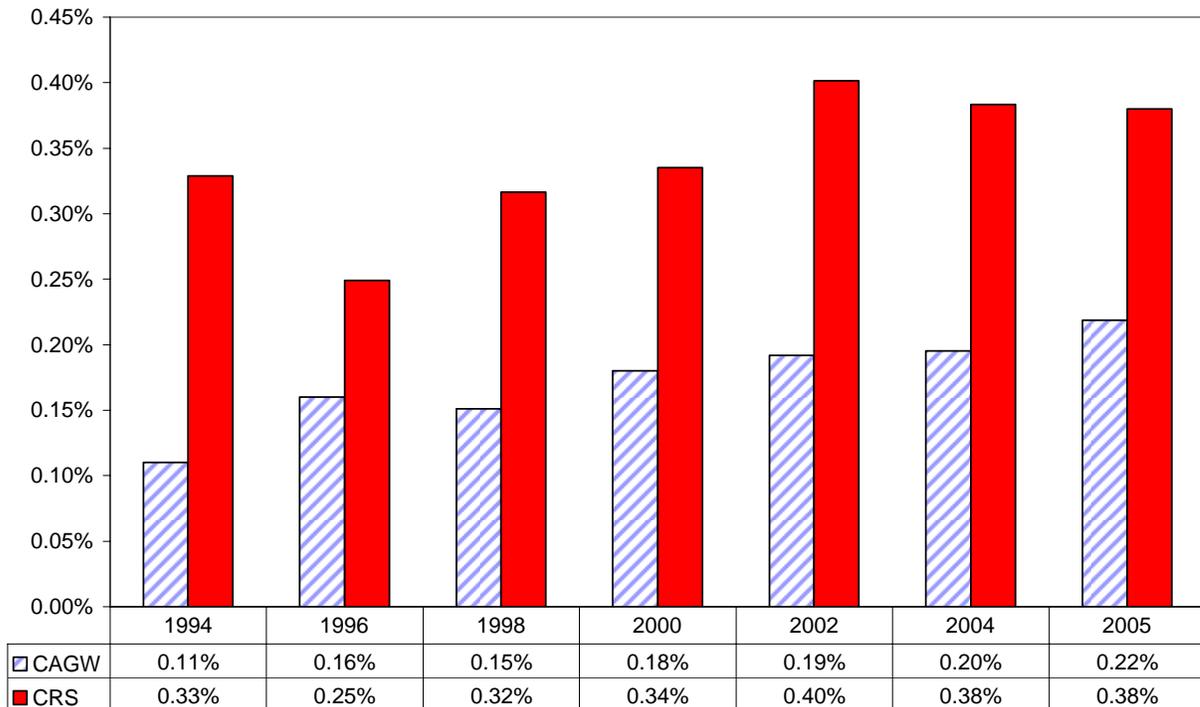
Both datasets also show the value of earmarks rising as a percentage of GDP.

However, of all the results, this one appears most sensitive to which dataset is used. In

<sup>53</sup> GDP data came from the Bureau of Economic Analysis. See Bureau of Economic Analysis website, at <http://www.bea.gov/bea/dn/home/gdp.htm>.

the CRS data, the growth of earmarks as a percentage of GDP was small and not clearly indicative of an upward trend. Earmarks drifted upwards as a percentage of GDP during the late 1990s, and appear to have leveled off since 2002. Overall, in the CRS data, earmarks have increased as a percentage of GDP by 16% over the period from 1994 to 2005: from 0.33% of GDP to 0.38%. By contrast, the CAGW data more firmly shows pork projects rising as a percentage of GDP, rising 98% over the period from 0.11% to 0.22% of GDP.

### Earmarks as a % of GDP



#### *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>54</sup> This result is consistent with anecdotal evidence for the importance of committee membership on legislators’ ability to procure earmarks.<sup>55</sup> More surprisingly, when measuring the effect of seniority on earmarks, Frisch found a positive coefficient but not one that was statistically significant.<sup>56</sup> Frisch also found a statistically significant negative relationship between the average income in the districts and the number of earmarks received,<sup>57</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>58</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

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<sup>54</sup> FRISCH, *supra* note 23, at 86.

<sup>55</sup> See ROY T. MEYERS, STRATEGIC BUDGETING 154 - 55 (1994). 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>56</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 23, at 90.

<sup>57</sup> *Id.* at 86.

<sup>58</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 23, at 86.

on the issue wasteful spending.<sup>59</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 were measurably larger. The authors claim that this result supported the blame avoidance hypothesis 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>60</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>61</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>62</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>63</sup> Because committee chairs and individual sponsors often incorporate only earmarked funding from lawmakers

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<sup>59</sup> See Steven J. Balla et al, *Partisanship, Blame Avoidance, and the Distribution of Legislative Pork*, 46 AM. J. POL. SCI. 515 (2002).

<sup>60</sup> *Id.* at 523 – 24.

<sup>61</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>62</sup> See *id.* at Table 5.

<sup>63</sup> See Edwin Feulner & Alison Fraser, *A Line in the Sand for Fiscally Responsible Lawmakers*, Heritage Foundation WebMemo #874 (Oct. 6, 2005) at [http://www.heritage.org/Research/Budget/wm874.cfm#\\_ftnref2](http://www.heritage.org/Research/Budget/wm874.cfm#_ftnref2).

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 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>64</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>65</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>66</sup> Indeed, critics charge that allowing lawmakers individually to allocate federal grants invites corruption. Congressional e-mail messages recently made public reveal that, for certain appropriations bills, each supporting lawmaker is given a personal fund – 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

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<sup>64</sup> Knight, *supra* note 49.

<sup>65</sup> Brian M. Riedl, "How Pork Corrupts Congress," Heritage Foundation Commentary (Jan. 25, 2006), at <http://www.heritage.org/Press/Commentary/ed012506a.cfm>.

<sup>66</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).

sentiment that the practice of earmarking essentially results in “tax dollars being auctioned for campaign donations.”<sup>67</sup>

*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 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>68</sup> Similar earmarks for funding in areas ranging from higher education<sup>69</sup> to national security<sup>70</sup> circumvents traditional merit-based formulas and competitive processes designed to allocate resources to the worthiest projects as judged by career professionals in the federal agencies.

*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>71</sup> Many federal domestic discretionary programs distribute funding, with few limits imposed by the agency,

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<sup>67</sup> Riedl, *supra* note 65.

<sup>68</sup> See Genevieve J. Knezo, *Research and Development: Priority Setting and Consolidation in Science Budgeting*, CRS Issue Brief for Congress IB94009 (Oct. 13, 2000). In some circumstances, earmarks establish new centers or institutions, implying long-term federal support.

<sup>69</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 ROY T. MEYERS, *STRATEGIC BUDGETING* 153 (1994).

<sup>70</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>71</sup> See Edwards, *supra* note 66.

according to general legislative guidelines, formulas, and provisions used to determine eligibility, the proper use of funds, and state and local allocations.<sup>72</sup> While some commentators suggest that elected officials often reduce agency discretion only when agencies have abused the flexibility they were initially given,<sup>73</sup> others concede that the degree of discretion granted to agencies is largely determined by the tactical actions of spending advocates.<sup>74</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>75</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 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

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<sup>72</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).

<sup>73</sup> See IRENE RUBIN, *THE POLITICS OF PUBLIC BUDGETING* 234 – 52 (1993).

<sup>74</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*, *Congressional Quarterly Weekly Report* (Sept. 22, 1990).

<sup>75</sup> See UTT, *supra* note 72. 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.*

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>76</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>77</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 twenty-one states to receive substantially fewer highway funds than they would have received under the traditional formula.<sup>78</sup> As a result, critics charge that while many

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<sup>76</sup> *Performance Audit: Department of Transportation, Pursuant to Act 1981-95*, Pennsylvania Legislative Budget and Finance Committee 187 (June 1996).

<sup>77</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).

<sup>78</sup> GAO *supra* note 77, at 7.

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>79</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>80</sup> In this view, “it’s unrealistic to think you can have an effective representative democracy without pork.”<sup>81</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>82</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 transportation bill contained some 8,000 earmarks worth \$10 billion and was depicted as

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<sup>79</sup> Feulner & Fraser, *supra* note 63.

<sup>80</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>81</sup> Michael Barone, *The Case for Pork*, BaroneBlog (Jan. 27, 2006) at [http://www.usnews.com/usnews/opinion/baroneblog/archives/060127/the\\_case\\_for\\_po.htm?track=rss](http://www.usnews.com/usnews/opinion/baroneblog/archives/060127/the_case_for_po.htm?track=rss).

<sup>82</sup> ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 215 (2000).

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>83</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>84</sup> it is simply not the case that pork represents a primary factor in the growth in size of the federal budget.

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>85</sup> Additionally, he highlights several appropriations subcommittees and the House Transportation and Infrastructure 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>86</sup> Although based exclusively on anecdotal evidence drawn from a few exemplary states and congressional committees, Friel’s discussion suggests that past data

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<sup>83</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 Part IIIb *supra*.

<sup>84</sup> SCHICK, *supra* note 26 at 215.

<sup>85</sup> Friel, *supra* note 83. 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.

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

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>87</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>88</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 spending and to embarrass decision makers.<sup>89</sup> On the other hand, very few earmarks create this kind of attention and many members of Congress have learned to bear

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<sup>87</sup> *Id.*

<sup>88</sup> Ronald D. Utt & Christopher B. Summers, *Can Congress Be Embarrassed Into Ending Wasteful Pork-Barrel Spending?*, Heritage Foundation Backgrounder (March 15, 2002), at <http://www.heritage.org/Research/Budget/BG1527.cfm>.

<sup>89</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 ROY T. MEYERS, *STRATEGIC BUDGETING* 155 (1994).

substantial criticism because of a belief that their constituents expect them to seek earmarked funds.<sup>90</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>91</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>90</sup> See Paul Starobin, *Bringing It Home*, NAT'L J., June 26, 1993, at 1642 – 45.

<sup>91</sup> See Calmes, *supra* note 12.

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