

Return of the Swamp: Earmarks Would Be a Costly Mistake

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KEY TAKEAWAYS

Members of Congress should focus on crafting legislation that benefits the American people, not on making deals at the expense of taxpayers.

Congress banned earmarks in 2011 because of corruption and wasteful spending, but some lawmakers are pushing for their return.

Congress should maintain the ban on earmarks and use the power of the purse appropriately.

For the past decade, Congress has imposed a ban on earmarks—special interest spending championed by certain Members of Congress. Long controversial, Congress finally banned them in 2011. Now, despite the problems inherent in earmarks, Congress is considering bringing widespread earmarking back.

The House and Senate rules have similar official definitions of “congressional earmarks,” which are also sometimes referred to as “congressionally directed spending items.” An earmark is defined as an expenditure that is:

- Requested by a Member of Congress or a Senator;
- Provided to an entity, state, locality, or congressional district; and

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- Awarded through a means other than through a statutory or administrative formula or competitive award process.¹

The practice of earmarking took off in the 1990s and accelerated in the early 2000s. Between 1994 and 2011, the number of earmarks each year increased by 282 percent to nearly 16,000 earmarks in a single year.² For many years, conservatives fought against earmarks and pointed out the problems with the practice. The late Senator Tom Coburn (R-OK), a leading opponent of earmarks during his time in Congress, described some of the major problems with earmarks: “I have witnessed earmarking up close and know it is inherently corrupt. Earmarks were abused as a form of currency to buy and sell the votes of politicians and to reward political supporters.”³

The American people strongly opposed earmarks and the corruption and waste they represented. In 2010, 79 percent of respondents to a CNN poll called earmarks “not acceptable,” including 71 percent of Democrats and 89 percent of Republicans.⁴

The Earmark Ban

In response to the public outcry against the corruption and controversy surrounding earmarks, Congress instituted a de facto ban on earmarks in fiscal year (FY) 2011. President Barack Obama even threatened to veto any spending bill with earmarks, stating that “because the American people deserve to know that special interests aren’t larding up legislation with pet projects, both parties in Congress should know this: If a bill comes to my desk with earmarks inside, I will veto it.”⁵

The earmark ban is not a feature of the official rules of the House of Representatives or the Senate. The rules in each chamber continue to provide a process for spending bills to include earmarks and related disclosure requirements. In practice, the ban has been enforced through party discipline and by congressional leadership and committees refusing to accept earmark requests for legislation.

The Senate Republican Conference Rules prohibit Republican Senators from requesting earmarks. The Senate Republican Conference Rules provides that “it is the policy of the Republican Conference that no Member shall request a congressionally directed spending item, limited tax benefit, or limited tariff benefit, as such items are used in Rule XLIV of the Standing Rules of the Senate.”⁶

In contrast, the rules of the House and Senate Democratic Caucuses do not feature similar restrictions on requesting earmarks.

The House Republicans used to feature a prohibition on its members requesting earmarks. However, on March 17, 2021, the House Republican Conference voted 102–84 to repeal the earmark ban that had been a feature of their Conference Rules for more than a decade.⁷ In its place a standing order was inserted regarding “Article I Funding Requests,” allowing Members to request earmarks “[i]n order to responsibly execute Congress’ Article I authority to control the power of the purse.”⁸

Some government watchdog groups have a more expansive definition of earmarks, or “pork,” than the formal definitions in the House and Senate rules and argue that earmark-like funding continues despite the ban, such as the \$65 million for Pacific coastal salmon recovery and \$16.7 million for the East–West Center that was appropriated in FY 2020.⁹

“Community Project Funding”: Earmarks Rebranded

Some Members of Congress now want to bring earmarks back. On February 26, 2021, House Appropriations Committee Chairwoman Rosa DeLauro (D–CT) announced that congressional Democrats were ending the earmark ban and would “accept Member requests for Community Project Funding in appropriations bills for the upcoming fiscal year.”¹⁰ Representative Peter Defazio (D–OR), Chairman of the House Transportation and Infrastructure Committee, also announced his intention to include earmarks in upcoming highway and infrastructure legislation.¹¹

While the name may be a rebranding attempt, “community project funding” is simply a reprise of the earmarks that were permitted before Congress banned them. In addition to the existing rules governing earmarks, some other conditions will be applied to the renewed earmark process.¹² While these are being described as “new reforms,” the guidelines do not actually represent new conditions or improvements in the earmark process.

There will be a restriction on directing “community project funding” to for-profit entities, while state and local governments and “eligible non-profits” will be eligible for taxpayer funding. This same condition had already been put in place before the earmark ban.¹³ It is worth noting that merely funneling funding to governments or nonprofits does not rule out the potential for corruption, as the convictions of former Congressmen on charges of earmark-related corruption prove.¹⁴ Such a restriction may not even keep taxpayer funds from benefiting for-profit businesses, with lobbyists already speculating that “even limited earmarks for nonprofits could spur new public–private partnerships, with businesses queuing up to collaborate on future projects.”¹⁵

Under the community project funding proposal, each Member will be permitted to request up to 10 earmarks per year. The guidelines note that “only a handful may actually be funded,” which would allow the committees and congressional leadership to use earmarks as “political currency.”¹⁶ This could also further burden the House and Senate Appropriations Committees, which could be forced to investigate more than 5,000 earmark requests each year—assuming that they actually do the homework. Not to mention the rank-and-file Members of Congress who would be asked to vote on the numerous earmarks that would be included in the omnibus spending bills without the time or the resources to adequately vet the special interest funding being sent throughout the country.

Total earmark spending will be capped at no more than 1 percent of total discretionary spending. This is a similar level of earmark funding to the pre-ban era; in FY 2010, the last year before the ban was put in place, earmarks represented about 1.3 percent of total discretionary budget authority. One percent of the base discretionary appropriations for FY 2021 would have been about \$13 billion, meaning that if this earmark policy had been in place, the amount of earmarked spending would have been larger than the budget for the U.S. Department of Labor. The guidelines do not clarify if the 1 percent cap only applies to the base regular annual appropriations, or if it would also include emergencies, overseas contingency operation funding, and supplemental appropriations. Nor does it clarify if the earmarks would be distributed proportionally among bills, or if certain appropriations bills could have more or less earmarked spending.

Many Reasons to Oppose the Return of Earmarks

There are many reasons to oppose a return of earmarks, including:

- **Earmarks spawn corruption.** The earmarking process is inherently corrupt, with the prospect of millions of taxpayer dollars for special interests prompting unscrupulous behavior on the part of lawmakers, earmark recipients, and lobbyists.¹⁷ Several former Members of Congress have been convicted of crimes related to earmarking, and more have been implicated in unsavory schemes.¹⁸ One former Member of Congress even wrote out a “bribe menu” on congressional stationery showing how much different levels of earmarks would cost while he lived on a yacht owned by a defense contractor named after the Congressman.¹⁹ Lobbyists, such as Jack Abramoff and Paul Magliocchetti, have gone to prison for corruption charges related to earmarks.²⁰

- **Earmarks encourage wasteful spending.** While not every earmark is a “bridge to nowhere,” there are numerous examples of clear waste, such as the \$3 million in the 2009 defense bill for a golf program, \$188,000 for the Lobster Institute, and \$328,300 for a minor league baseball stadium in Montana.²¹ Even if earmarks only comprised a small percentage of the budget each year, they still amount to billions of precious taxpayer dollars directed to special interests instead of actual national needs, adding to the skyrocketing national debt and increasing the size and scope of the federal government beyond its proper roles.
- **There are better ways to exercise Article I power.** As The Heritage Foundation’s Justin Bogie has written, “while it is true that Congress has ceded some of its Article I power to the executive branch, it is not the result of the earmark ban.... When considering which reforms to pursue in order to regain more Article I power, Congress should think of the totality of the ways in which it has ceded this power.”²² There are many policies that would be more effective ways for Congress to properly exercise its Article I powers, such as requiring congressional approval for major regulations as proposed by the Regulations from the Executive in Need of Scrutiny (REINS) Act, subjecting federal receipts to the regular appropriations process, and taking the prohibition on funding unauthorized programs more seriously by eliminating unnecessary and wasteful programs.²³
- **Earmarks are “swampy.”** There is nothing more emblematic of the proverbial Washington, DC, swamp than earmarks.²⁴

Earmark Myths and Facts

There are several myths that proponents of earmarks often use to argue in favor of the practice.

Myth #1: Earmarks Are Important Article I Tools. A favorite argument of earmarkers is that the practice allows Congress to exercise its Article I “power of the purse.” They say that since Members of Congress have specialized knowledge of their district and state, congressionally directed spending is important to provide for their particular local needs.²⁵

Proponents of earmarks often make sure to cite the appropriations clause of the Constitution to justify their spending.²⁶ Unfortunately, they

neglect the rest of the Constitution, which establishes a limited government with only specified authorities.

Fact: The appropriations clause does not give Congress unlimited license to appropriate funds for any purpose; the other clauses of the Constitution make clear that the truth is quite the opposite.²⁷ The spending clause “permits the levying of taxes for two purposes only: to pay the debts of the United States, and to provide for the common defense and general welfare of the United States.”²⁸ Properly understanding the general welfare clause is vital: Spending is required to “be for the ‘general’ (that is, national) welfare and not for purely local or regional benefit.”²⁹ The phrase “general welfare” is a contrast to spending that would provide a particular, parochial, narrow, or limited benefit.

The spending and general welfare clauses are followed by an enumeration of specific powers. The federal government has no legitimate power to spend for purposes beyond what the enumerated powers specify. As Madison described in Federalist 45, “The powers delegated by the proposed Constitution to the federal government are few and defined.”³⁰ The Tenth Amendment further makes the point even clearer about the limited powers of the federal government provided by the Constitution and reinforces the principle of federalism.³¹

The very point of earmarks is contrary to the limited Article I powers of the Constitution. Few earmarks could seriously be described as carrying out a specific enumerated power and rarely (if ever) has a sponsor described his earmark as such. Providing funds from the federal Treasury for the particular benefit of an entity, state or local government, or other organization at the request of a Member of Congress is decidedly opposed to the furtherance of the “general welfare.” The argument that the specialized knowledge of a Member of Congress is required in order to narrowly tailor federal funding to fit the particular needs of a local community is itself a denial that the proposed funding even pretends to be for the general, national welfare. It is also a rejection of federalism. The notion that earmarks could be a tool for Congress to exercise its legitimate Article I powers is a complete myth.

Myth #2: Earmarks Are Key to Regular-order Legislating. The theory behind this myth is that earmarks can help to grease the wheels of the legislative process by enticing Members of Congress to vote for legislation that they might not otherwise support.³²

Fact: The fact that proponents of earmarks think this is a good thing speaks volumes. The goal of the congressional budget process should be to carry out the necessary functions of government, not “to hand out money

to everyone involved.”³³ As Eric Boehm of *Reason* has written, “if a piece of legislation can’t get enough support without bribing backbenchers with piles of taxpayer cash, you have to consider the possibility that the bill doesn’t deserve to pass.”³⁴

There have been high-profile examples of the logrolling power of earmarks. However, the evidence does not support the idea that earmarks helped the normal appropriations process to function via regular order in any systemic way. The last time each of the annual appropriations bills was signed into law individually and on time was for FY 1995.³⁵ Congress has been forced to enact multiple continuing resolutions to prevent a government shutdown due to appropriations bills not being passed on time in every year since FY 1997.

During the years when earmarking was at its peak, Congress passed an average of 5.75 continuing resolutions each fiscal year, providing funding between the enactments of the regular appropriations bills. In the decade after the earmark ban, an average of four continuing resolutions each year have been enacted. In the 15 years before earmarks became especially prevalent, an average of 3.33 continuing resolutions were needed.³⁶ As one analysis concluded, “The mid-2000s peak earmark period did not coincide with a dramatically more productive or efficient Congress.”³⁷

Myth #3: Earmarks Do Not Waste Money or Drive Up Spending.

Earmark proponents often claim that earmarks are not fiscally irresponsible. As one advocate has said, “earmarks did not represent a significant percentage of Federal spending. As an overall percentage of spending from recent Federal budgets, earmarks typically represented approximately 1–2 percent of the discretionary budget and less than 1 percent of the overall budget.... [E]armarks were not meant to increase spending, only prioritize it.”³⁸

Fact: Especially in an era where there is no cap on spending, the prospect of earmarks creates an incentive to push the total spending level higher to allow more earmarked funds to flow from the Treasury. When Members attempt to slip their pet projects into bills, the price of the bill goes up.³⁹ Furthermore, when federal funds are wasted on low-priority earmarked projects, important governmental priorities still require funding as well, pushing the total spending level higher. It is no coincidence that legislation that includes earmarks tends to be massive and costly.

Even the Department of Transportation’s Inspector General has taken issue with earmarks, reporting that “many earmarked projects considered by the agencies as low priority are being funded over higher priority, non-earmarked projects,” and that “some earmarks are providing funds for projects that would otherwise be ineligible,” because they “did not meet statutory program criteria.”⁴⁰

Earmarks also function as a “gateway drug” for Members of Congress to a costly addiction to spending.⁴¹ The practice of earmarking can numb Members to the dangers of overspending, allowing them to grow accustomed to the idea of spending vast sums of other peoples’ dollars.⁴² Earmarks reinforce the false notion that the federal government should provide for the “particular” instead of the “general” welfare and expand into areas well beyond the enumerated powers. Instead of focusing on the true priorities of the nation, it becomes tempting for Members to seek out the “quick high” of gaining political support by directing taxpayer money to special interests.

Even if earmarks only comprise a small percentage of the budget each year, they still amount to billions of dollars added to the national debt, which will need to be recouped by future tax revenues.

Recommendations for Congress

Keeping the earmark ban in place is not a silver bullet for fiscal responsibility. But repealing the ban would be a big step in the wrong direction. Instead of bringing earmarks back, Congress should:

Use the Power of the Purse Appropriately. The Constitution provides for a limited federal government that only has the authority to carry out enumerated powers to provide for the common defense and general welfare of the country. Unfortunately, the federal government has grown well beyond its proper constitutional boundaries and the federal budget is growing unsustainably. When the federal government grows beyond its constitutional bounds, and spends and taxes too much, it stifles prosperity, infringes on liberty, and makes it more difficult to live the American dream.⁴³

Congress should properly exercise its power of the purse by winding down programs that are not in accordance with the proper constitutional powers of the government or are otherwise low priorities. This includes respecting the principle of federalism by allowing issues more appropriately handled at the state and local level to be done so. Congress should implement reforms that slow down the growth of mandatory spending programs, such as those recommended in The Heritage Foundation’s “Blueprint for Balance.”⁴⁴

Strengthen the Earmark Ban. Congress should strengthen the earmark ban and make it permanent. An improvement would be to amend the rules of the House and the Senate to make it out of order to consider legislation containing an earmark. In the House, the Rules Committee should be prohibited from reporting a special rule for considering legislation that waives the earmark ban.

Not Include Earmarks in Any Bill. Even if earmarks are permitted under the rules, that does not mean that Congress should include earmarks in legislation. Leadership in the House and Senate should make clear that no legislation shall be scheduled for consideration if it includes an earmark. Members should not feel pressured—or free—to request earmarks simply because they can.

Conclusion

Earmarks encourage wasteful spending and spawn corruption, contributing to the swamp of Washington, DC. Special interest earmarks are not a viable tool for properly exercising Article I powers or for ensuring regular-order legislating. Congress should reject any proposals to lift the earmark ban. Instead of returning to earmarks, Congress should use the power of the purse appropriately, strengthen the earmark ban, and refuse to include earmarks in any legislation.

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