Note: The Case for Earmarks

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I. Introduction

Americans’ confidence in Congress has sunk to historical lows1 and it seems that dysfunction and ineptitude remain at an all-time high.2 But it is not just the public that is frustrated with Washington’s failures;3 it is members of the political elite themselves.4 While the dysfunction plaguing the Capitol can be attributed to any number of factors,5 it is the contention of this paper that one way to fix Washington is to end the ban on earmarks.6 The termination of

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1 See Rebecca Riffkin, Public Faith in Congress Falls Again, Hits Historic Low, GALLUP, June 19, 2014, http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx (finding that Americans’ current confidence in Congress is not only the lowest on record, but also the lowest recorded for any institution in 41 years; this is also the first time confidence in a major U.S. institution has been in the single digits); Confidence in Institutions, GALLUP, June 5-8, 2014, available at http://www.gallup.com/poll/1597/confidence-institutions.aspx (revealing that 7% of Americans say they have a great deal or quite a lot of confidence in Congress).

2 See e.g., Ezra Klein, 13 Reasons Why Washington is Failing, N.Y. TIMES, Oct. 7, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/07/the-13-reasons-washington-is-failing/. (“[Congress is] failing to craft policies that make the country better[,] [a]nd it’s failing to avoid disasters that make the country worse.”).

3 Few Seek Quick Cure for Nation’s Political Divisions, PEW RESEARCH CENTER, Dec. 11, 2014, available at http://www.people-press.org/2014/12/11/few-see-quick-cure-for-nations-political-divisions/ (finding that 70 percent of Americans say the failure of Republicans and Democrats to work together will hurt the country a lot; and more than 80 percent say it will hurt them personally).


5 See Warren, supra note 4 (showcasing that the dysfunction could be caused by the gerrymandering of hyper-partisan districts, the extinction of moderates and the rise of extremes, the never-ending election cycle, the influence of conflict media, or the demise of compromise, among others).

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earmarks in Congress, and their ultimate shift over to the executive branch, has contributed to the ineffectiveness of the legislature and its inability to write and pass meaningful solutions to the nation’s problems. Part II of this paper will seek to define earmarks, explain their importance to the political process, and illustrate their prolonged history culminating with their demise in 2011. Part III will then illustrate how the elimination of earmarks has led to a decline in policy-making in Congress by (1) examining the impact of the earmark ban on the appropriations process through an analysis of the Labor, Health and Human Services, Education, and Related Agencies (“Labor-H”) appropriations bill and (2) demonstrating that the newfound role of the executive only exacerbates Congress’ dysfunction through an assessment of the Department of Transportation’s (DOT) Transportation Investment Generating Economic Recovery (TIGER) discretionary grant program. Based on that analysis, Parts IV and V will recommend and conclude that reinstating earmarks may be just the thing to fix Washington.

II. Background

a. Defining Earmarks

There is no single definition of the term earmark accepted by all observers of the appropriations process, nor is there a standard earmark practice across all appropriations bills. in spending or reducing waste, fraud[,] and abuse, the ban has also had the unintended consequence of making Washington even more dysfunctional.”). See Thomas Edsall, The Value of Political Corruption, N.Y. Times, Aug. 5, 2014, http://www.nytimes.com/2014/08/06/opinion/thomas-edsall-the-value-of-political-corruption.html?_r=0 (stating that the earmark ban has done nothing to restore respect for Congress, rather, it has done just the opposite, “it has contributed to the legislative gridlock.”). Compare Guidance to Agencies on Definition of Earmarks, OFFICE OF MGMT. AND BUDGET, https://earmarks.omb.gov/earmarks-public/earmarks_definition.html (defining earmarks as specified funds for projects, activities, or institutions not requested by the executive, or add-ons to requested funds which Congress directs for specific activities) (last visited Apr. 3, 2014); and UNITED STATES SENATE COMMITTEE ON RULES AND ADMINISTRATION, RULE XLIV: CONGRESSIONALLY DIRECTED SPENDING AND RELATED ITEMS (“The term ‘new directed spending provision’ as used in this paragraph means any item that consists of a specific provision containing a specific level of funding for any specific account, specific program, specific project, or specific activity, when no specific funding was provided for such specific account, specific program, specific project, or specific activity in the measure originally committed to the conferees by either House.”); and CONG. RESEARCH SERV., EARMARKS IN APPROPRIATIONS ACTS: FY1994, FY1996, FY1998, FY2000, FY 2002, FY2004, FY2005 (2006) (stating that the Congressional Research Service uses a different definition of an earmark for each spending bill it analyzes) with Sean Kennedy, The Congressional Pig Book, Citizens Against Government Waste, http://cagw.org/reporting/pig-book (explaining that to qualify as an earmark a project must meet at least one of CAGW’s seven criteria: (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 funding; (6) not the subject of congressional hearings; or (7) serves only a local special interest). See also Miller, infra note 12, at 27 (“Pork is defined as spending on projects that are of low priority for
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Under the broadest definition, virtually every appropriation is earmarked; however, in practice earmarks are generally defined more narrowly as a sum of money that is directed to a specific project by a member, or a group of members, of Congress and is included in a bill or committee report.

Regardless of which definition is used, the implications of earmarks are undoubtedly significant. Under Congress’ constitutional power of the purse authority, earmarks allow members to set broad or specific instructions on how and where federal funds may be spent, effectively providing each member of Congress with the ability to respond to the real needs of the constituents they serve. This allows members to allocate funding to projects in their hometowns, such as roads, bridges, museums, shelters, and job training programs. Moreover, recognizing the importance of a constituencies’ support to a member seeking reelection, earmarks can be used by party leaders as an incentive to convince recalcitrant legislators to support controversial legislation and join coalitions that they might otherwise scorn. If members are going to vote for things that may cause them political pain at home, compensating them with an earmark can ease that pain. Ultimately, this incentivized support helps create the majorities necessary for Congress to function.

the nation as a whole, but of high priority to the congressperson or senator who is ‘bringing home the bacon,’ helping ensure his or her reelection.”).


10 Id.

11 SCOTT A. FRISCH AND SEAN Q. KELLY, CHEESE FACTORIES ON THE MOON: WHY EARMARKS ARE GOOD FOR AMERICAN DEMOCRACY 11 (2011). See also Rob Porter & Sam Walsh, EARMARKS IN THE FEDERAL BUDGET PROCESS, 16 HARVARD LAW SCHOOL FEDERAL BUDGET POLICY SEMINAR 1, 4, May 1, 2006, available at http://www.law.harvard.edu/faculty/hjackson/Earmarks_16.pdf (finding that generally four factors are commonly used to identify earmarks: (1) specificity of the entity receiving funding, (2) congressional origin, (3) exemption from normal competitive requirements for agency funding, and (4) presence in statutory text).

12 U.S. CONST. art. I, § 9, cl. 7 (providing the legal framework for Congress’ authority to earmark through the power of the purse provision found in Article I, Section 9, Clause 7 of the Constitution which provides, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).


14 See e.g., Klein, supra note 2 (“It used to be that Boehner could ask a member to take a tough vote and, in return, help him or her get a bridge built back home. That bargaining chip is gone.”).

15 See Edsall, supra note 7 (“The House and Senate leadership and ranking committee members used earmarks to persuade their reluctant colleagues to vote for or against key bills; they used them as a tool to forge compromise and as a carrot to produce majorities.”); Greenberg, supra note 6 (“On Capitol Hill, party leaders must appeal to lawmakers’ interests as well as their principles to get the votes they need. The leaders must be able to offer incentives—such as earmarks—to win votes on difficult issues.”).
b. The Appropriations Process

How Congress actually appropriates earmarks is another matter. As codified in the Congressional Budget and Impoundment Control Act of 1974, the process should unfold in a very precise way—often referred to as “regular order.” The President initiates the process by presenting a budget request for the following fiscal year on or before the first Monday in February. The action then moves to Congress where the House and the Senate pass budget resolutions that contain spending allocations, known as 302(a)s, for each appropriation jurisdiction. The House and the Senate then will use a conference committee to iron out any cross-chamber differences. Following the passage of the budget resolution, appropriations committees formulate 302(b) sub-allocations for each subcommittee, which then produce their own appropriations bill.

Given that members of Congress represent either a district or a state, the appropriations process begins with an interest group or local entity informing a member about a given concern. Earmarks that respond to these local concerns are frequently inserted at the subcommittee level. While there is no standardized procedure for how earmark requests are handled at the subcommittee level, all earmarks that are to be included in the legislation are

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16 See generally Policy Basics: Introduction to the Federal Budget Process, CENTER ON BUDGET AND POLICY PRIORITIES 2, Sept. 10, 2014, available at http://www.cbpp.org/files/3-7-03bud.pdf [hereinafter Policy Basics] (explaining that programs that fall under the House and Senate Appropriations Committees are renewed annually to keep government agencies open and the programs operating. Programs that fall into this method of funding range from defense spending, to environmental protection, to education, to healthcare, to research, and transportation).


19 See Policy Basics, supra note 16, at 5.

20 Id.

21 JESSICA TOLLESTRUP, CONG. RESEARCH SERVICE, R42388, CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 1-2 (2014) (clarifying that both House and Senate appropriations committees have twelve subcommittees, and each subcommittee has jurisdiction over one regular annual appropriations bill that provides funding for departments and agencies under the subcommittee’s jurisdiction); see also John Hudak, Lessons Learned from the Shutdown: Pork and Earmarks Help Break Gridlock, BROOKINGS INSTITUTE, Oct. 30, 2013, http://www.brookings.edu/blogs/fixed/posts/2013/10/29-shutdown-lessons-the-benefits-of-pork-hudak (explaining that earmarks determine how the pie is cut, not the size of the pie).

22 TOLLESTRUP, supra note 21, at 18.

23 See e.g., FRISCH, supra note 11, at 29-30 (detailing the request of educators to start a nursing program in response to the nurse shortage in California, and the request of local officials in Tchula, Mississippi for a police station and improvements to its water and sewer system); Martin Frost, The Power of the Purse: Earmarks I Have Known and Loved, POLITICO, Feb. 26, 2007, http://www.politico.com/news/stories/0207/2904.html (responding to a request of his local veterans organizations that a national veteran’s cemetery be constructed in northern Texas).
compiled in the first version of the subcommittee bill, the “Chairman’s Mark.” The Chairman’s Mark is considered first by the relevant subcommittee and, once approved, the full appropriations committee then puts it forward for consideration. Following committee consideration, the bill moves to the floor of each chamber for approval. Just because an earmark is included in the House or Senate bill does not mean that the earmarks are approved. After both the House and the Senate have passed their bills, any differences are resolved in conference. This often involves a discussion between the chambers about which earmarks will be in the final version of a bill. Once through the conference process, the compromise bill returns to each chamber for final passage. At each of these points, bills are accompanied by reports detailing expectations or directions to executive departments and agencies on the distribution of funding among various activities funded within an account. After the conference reports are passed, the President signs them into law before the beginning of the fiscal year on October 1.

Thus, earmarks may enter the federal budget at three points in the appropriations process: the appropriations subcommittee, the appropriations committee, or the conference committee. At each of these points, earmarks may appear in different portions of the legislation and its accompanying documents. Some are in statute, some are incorporated by reference, but the large majority of earmarks appear in committee or conference reports. Since these reports are not legally binding they can technically be ignored by the agencies. But what gives appropriations reports special status is not law, it is the fact that the next appropriations cycle is less than a year away. Thus, while some agency officials may risk ignoring the instructions included in committee reports, an agency that willfully violates report language risks congressional retribution.

For several years now, order has been anything but regular. Very few appropriations bills have passed before the beginning of the fiscal year; and more commonly, governmental

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24 Frisch, supra note 11, at 36.
25 See generally Tollestrup, supra note 21, at 5-8.
26 See id. at 8-10.
27 See id. at 13 n.52 (elucidating that reports accompany committee-reported legislation, which are included in conference reports); see also Miller, infra note 29, at 109 (“Although a bill may merely say that some agency has been appropriated X hundred million dollars for a general purpose, the committee report will direct the agency to spend so many million for this or that specific project.”).
28 Heniff, supra note 14, at 1.
30 See e.g., id. at 109-10 (recounting that James Miller, Reagan’s Director of the Office of Management and Budget (OMB), had written a report reminding agencies that congressional reports had no force of law. However, in response, members of Congress retaliated by fashioning appropriations language “designed to keep OMB from preventing or delaying the commitment of funds identified in committee reports.” Miller eventually capitulated, declaring, “this was an issue the next president would have to resolve.”).
31 See Rauch, supra note 17 (explaining that recently regular order has been replaced by regular chaos in that “games of chicken replaced mutual back-scratching”); Major Garrett, Why Isn’t the Crisis Vise Forcing Congress to Compromise?, National Journal, Oct. 15, 2013,
activities are funded through continuing resolutions\textsuperscript{32} or omnibus bills\textsuperscript{33} that are negotiated by party leaders and the President, thus circumventing the role of the appropriations committees and shifting that power to the executive branch agencies and departments.\textsuperscript{34}

c. The History of Earmarks and the Rise of the Ban

Based on the process by which earmarks are appropriated and the tendency of the media to provide disproportionate coverage to the most outrageous,\textsuperscript{35} perhaps it is no surprise that the term earmark has become a dirty word in Washington with lawmakers pledging not to use the special funding carve-outs.\textsuperscript{36} But earmarks have been in use for centuries, dating back to one of the earliest bills passed by the first Congress in 1789, the Lighthouses Act,\textsuperscript{37} and paving the way for some of the nation’s most meaningful legislation including the Civil Rights Act and the constitutional amendment banning slavery.\textsuperscript{38}

\textsubscript{32} See TOLLESTRUP, supra note 21, at 14-15 (defining continuing resolution as a joint resolution used to maintain temporary funding for agencies and programs until the regular bills are enacted).
\textsubscript{33} See id. at 14 (defining omnibus bills as a combination of several appropriations bills into a single legislative vehicle prior to enactment).
\textsubscript{36} See What Is An Earmark?, WASH. POST, Feb. 6, 2012, http://www.washingtonpost.com/investigations/what-is-an-earmark/2012/01/27/glQAK6HGvQ_story.html (stating that the term earmark conjures up abuses where projects benefited few, such as the “Bridge to Nowhere” in Alaska).
\textsubscript{38} See e.g., Julian Zelizer, Is There Anything Wrong With a Little Pork Barrel Spending?, CNN, May 12, 2014, http://www.cnn.com/2014/05/12/opinion/zelizer-the-case-for-earmarks/
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However, earmarks grew dramatically in number and dollar amount between 1993 and 2006. In 1993, there were 892 earmarks worth $2.6 billion; in 1998, there were nearly 2,000 earmarks worth $10.6 billion; and by 2005, there were nearly 14,000 earmarks costing $27.3 billion. In 2006, earmark spending peaked at $67 billion. Based on those statistics, perhaps it is no surprise that Congress started to reform the earmarking process in 2007. When the Democrats took back the majority in the 2006 midterm elections they suspended all earmarks until a reformed and transparent process could be put in place. This ultimately resulted in new House and Senate rules requiring robust earmark disclosures. In 2008, the total dollar amount earmarked for non-project-based accounts was reduced by 43% below 2006 levels; and in

(explaining that President Johnson needed as many votes as possible to overcome the southern filibuster in the Senate against the Civil Rights Act of 1964, and one of the ways in which Johnson won over a key vote was to let Arizona Democrat Carl Hayden know that the administration would support a Central Arizona Water Project that his constituents desperately wanted. In exchange, Senator Hayden agreed to vote for cloture); Douglas Farrar, On Congress: Is Pork the Way to Fix Government, Jan. 16, 2013, http://www.aspeninstitute.org/about/blog/congress-pork-way-fix-government (finding that President Lincoln “doled out federal largesse” for votes to support the Constitutional amendment banning slavery); see also Neyfakh, supra note 13 (stating that President Clinton won over a group of congressmen reluctant to go along with his controversial NAFTA bill by helping them secure earmarks for which they could then claim credit in their home districts).

40 Id.; see also Porter & Walsh, supra note 11, at 15 (noting that data from the Congressional Research Service shows a substantial increase of 285% in the annual number of earmarks from 1994 to 2005).
42 See FRISCH, supra note 11, at 132 (acknowledging that even many who strongly support the power of Congress to earmark money believed that earmarks became too plentiful and “out of control” during the period from 1994 to 2006).
43 See CHARLES KONIGSBERG, AMERICA’S PRIORITIES: HOW THE U.S. GOVERNMENT RAISES AND SPENDS $3,000,000,000,000 (TRILLION) PER YEAR 68 (2007) (explaining the House rule, which required disclosure of earmark sponsors, justification for earmarks, and written certification that earmarks will not benefit their House sponsor; and the Senate rule, which prohibited consideration of legislation unless the committee chair or majority leader certified that all earmarks in legislative or report language have been identified by sponsor, and have been publicly available on the Internet for 48 hours. Senators were also required to provide to the committee with the name and location of the earmark beneficiary and a certification that they have no financial interest in the earmark).
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2009 and 2010, the reforms continued, resulting in a 50% reduction below 2006 levels. The following year, in 2011, Congress eradicated earmarks entirely.

It is the contention of this paper that the decision to ban earmarks was detrimental to the functionality of Congress. Given the current political climate, in which the ideologies on the left and right continue to drift farther apart, a unifying force is needed to provide an incentive for members of Congress to make difficult decisions and cast difficult votes. The opposition would argue that earmarks are corrupting and opaque, that they symbolize all that is wrong with American politics. But what those who disparage earmarks forget is that earmarks also gave congressional leadership something with which to trade.

III. The Case for Earmarks

a. The Appropriations Process & Labor-H Appropriations

The earmark ban contributes to congressional dysfunction in many ways, but perhaps its most apparent influence is seen through the appropriations process. In fact, the progression of the earmark’s demise coincided with an undeniable slowdown in Congress’ ability to appropriate funds by regular order. Prior to the enactment of the ban, Congress was capable of undergoing the appropriations process, start-to-finish, without having to rely on an omnibus bill or continuing resolutions to appropriate funds. The value of considering these bills individually is

45 See id. (stating that new reforms would require members to post information about their earmark requests on their websites at the time the request is made explaining the purpose of the earmark and why it is a valuable use of taxpayer funds; and would make earmark disclosure tables publicly available the same day as the House or Senate subcommittee).
46 Earmarks and Earmarking: Frequently Asked Questions, Taxpayers for Common Sense, Mar. 10, 2010, http://www.taxpayer.net/library/article/earmarks-and-earmarking-frequently-asked-questions (last updated Aug. 21, 2013) (announcing that while the House refused to approve requests for earmarks that were directed to for-profit entities, the Senate declined to follow suit).
47 See Pelosi Press Release, supra note 36.
49 See generally notes 13-15 and accompanying text.
50 See e.g., Erin Kelly, Some Want Earmarks Back to Help Congress, USA TODAY, Oct. 29, 2013, http://www.usatoday.com/story/news/politics/2013/10/29/congress-earmarks-legislation-spending/3295509/ (“It used to be that Boehner could ask a member to take a tough vote and, in return, help him or her get a bridge built back home,” but now he is struggling to control his divided GOP caucus because “[he’s] got no grease”).
51 See Greeley, supra note 34 (stating that since the earmark ban took effect, the appropriations process has “melted down.”).
52 See id. (finding that there is now less incentive for a politician to serve on an appropriations subcommittee because there is nothing to hand out. As a result, the committees attract more partisans and fewer pragmatists—to its detriment).
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that it gives members the opportunity to exercise some oversight of government programs and to monitor how federal departments spend money. Since 2007, however, bills of this nature rarely make it out of committee, much less to the chamber floor, conference, or enactment. For example, consider the success of the appropriations process for fiscal year 2006 (the fiscal year before the first earmark reforms were put in place) as demonstrated in Table 1 compared to fiscal year 2014 (the most recent fiscal year since the earmark ban took effect) as demonstrated in Table 2 in the case of the Labor-H appropriations bill.

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The evolution of the Labor-H appropriations bill in the above charts provides for a perfect example of how the earmark ban has contributed to congressional dysfunction. The Labor-H appropriations bill allocates funding to the Department of Labor, the Department of Health and Human Services, the Department of Education, and the National Institutes of Health, inoffe (describing one instance in 2009 where the Senate “performed the rare action of considering many appropriations bills individually rather than irresponsibly lumping them all into one large bill to consider at the end of the year.”).

54 Id.
55 Id.
56 See generally Appropriations Legislation for Fiscal Year 2006, LIBRARY OF CONGRESS, available at http://thomas.loc.gov/home/approp/app06.html (demonstrating regular order; all subcommittees had an appropriations bill enacted).
57 See generally Appropriations Legislation for Fiscal Year 2014, LIBRARY OF CONGRESS, available at http://thomas.loc.gov/home/approp/app14.html (demonstrating regular disorder; no subcommittees had an appropriations bill enacted, instead Congress was forced to rely on omnibus legislating).
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among other federal agencies. These agencies cover traditionally left-leaning issue areas, such as enhancing education, improving job-training efforts and facilities, advancing scientific research, and safeguarding public health. In fiscal year 2006, Congress was operating in regular order. The Labor-H appropriations bill was passed out of subcommittee, committee, and off of the floor in both chambers. The bill went to conference, back to each respective chamber, and ultimately was signed into law.

However, after the earmark ban took full effect, Congress’ appropriation of funds became disordered with only the Senate appropriations committee considering a Labor-H appropriations bill. This stagnation has remained constant; for the second consecutive year, Republicans who control the committee in the House have refused to bring a bill before the subcommittee for a vote, the only appropriations bill to have that distinction. As chairman of the House appropriations Labor-H subcommittee, Congressman Tom Cole, stated, without earmarks, “you’re removing all incentive for people to vote for things that are tough.” This statement is emblematic of the actions of his subcommittee, which has not considered passing a stand-alone Labor-H appropriations bill since the earmark ban took effect. In fact, in fiscal year 2014, the Democrats attempted to draft a Labor-H appropriations bill to demonstrate the need for funding of critical services such as medical research, public health, and K-12 education, believing that these programs have been languishing from neglect. Yet despite these efforts, Republicans chose not to put forth a bill, instead factoring Labor-H appropriations into the omnibus bill. Within the omnibus bill, Republicans halted new funding, ultimately appropriating $100 million below the fiscal year 2013 level. Thus, a bill that had garnered support from both Democrats and Republicans at the subcommittee and committee level in 2006, such that it allowed the appropriations process to run its course, today would not even be considered by the subcommittee.

61 See Greeley, supra note 34.
62 See DeLauro, supra note 56.
63 Id.
65 Id.
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Congress is now at a point where gridlock is the status quo, particularly as it pertains to the appropriations process. In the past, targeted appropriations for local interests enabled major legislative action because when a number of members have skin in the game, they will make sure a spending bill gets passed.66 Yet now, instead of cooperating with other members to ensure passage of appropriations bills on time, for weeks and months after the start of each fiscal year much of the government is left operating on a continuing resolution.67 The inability of Congress to perform these acts and give appropriations bills adequate consideration exemplifies the need for earmarks.68 Prior to the earmark ban taking effect, appropriations bills were regularly enacted in their respective jurisdictions; today, funding is appropriated through omnibus bills or continuing resolutions. This is because, while members may be willing to fund a bill necessary to evade a government shutdown, members no longer have a viable reason to take hard votes that may upset some constituents.69 Without that incentive, the notion of horse-trading that for so many years has been required to reach compromise is lost.70

b. The Executive Power & TIGER Grants

Due to the havoc the earmark ban has wrought on the appropriations process, Congress has effectively ceded its constitutional authority to the unelected bureaucrats housed within the executive branch.71 Congress’ constitutional power of the purse acts as an important check on the power of the executive agencies because unlike agency officials, members of Congress are subject to electoral accountability.72 Without the guidance of committee reports or bill text

67 Id.
70 See Dana Bash, The Death of Horse-Trading on the Hill, CNN, Dec. 12, 2014, http://www.cnn.com/2014/12/12/politics/horsetrading/ (explaining that another reason there is less horse-trading is that there are not as many horses to trade because while earmarks used to be the most valuable currency on Capitol Hill, with the enactment of the ban it makes it hard for party leaders to force compromise by giving reluctant lawmakers some buy in).
72 See Farrar, supra note 38, at 14-15 (explaining that accountability to constituents functions as the best safeguard against both executive and congressional profligacy).
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providing suggestions to executive offices, this has effectively removed the ability for members of Congress to be responsive to their constituents. Moreover, this means that the administrative offices themselves are using their own discretion to distribute grants—and not always to those areas most in need.73

Though the original intent of earmark reforms was to curb federal spending, lessen corruptive practices, and increase transparency, today lawmakers haggle with executive branch officials for funds through the processes of letter-marking and phone-marking.74 These processes involve members of Congress writing letters or making phone calls to officials at executive agencies in order to secure funding for a given project in their district or state.75 This ensures that members of Congress no longer have to engage with each other about problems within their constituencies. Instead, members must rely on undisclosed letters and phone calls to the executive branch and hope that they are persuasive enough. This is a perversion of the constitutional power of the purse, but more than that, it is emblematic of the dysfunction in Washington. It is no wonder that American citizens think that Congress cannot accomplish anything—because they are not, they are tacitly accepting this shift in power, and they are supporting it by playing into the system.

Implicit in the arguments of many earmark critics is the assumption that the unelected bureaucrats in the executive branch can be trusted to make better decisions about how to spend federal funds.76 Yet the executive branch is not an apolitical arm of the government. Presidents and political appointees, like members of Congress, are ambitious politicians concerned with reelection and the election or appointment of their successors and supporters; and they have allegiances and alliances to particular states and districts.77 Having supporters of the executive

73 See FRISCH, supra note 11, at 80-84 (finding that program administrators can steer contracts toward particular vendors just as readily as members of Congress can).
75 See Greeley, supra note 34.
76 See FRISCH, supra note 11, at 76.
77 See Scott Lilly, End Pet Projects: Earmarks are a Presidential Problem, Too, CENTER FOR AMERICAN PROGRESS, Jan. 28, 2008https://www.americanprogress.org/issues/open-government/news/2008/01/28/3888/end-pet-projects-earmarks-are-a-presidential-problem-too/ (“Presidents use earmarks as much as members of Congress ‘to reward political supporters, campaign contributors and sometimes members of Congress’ for votes on a presidential priority.”); see e.g., id. at 81 (providing an example in the two extremely costly presidential appropriations’ requests for Mesa Verde National Park in 2009. It is unlikely that objective measures of need were the driving motivation to fund these construction projects. The park ranked 107 out of 391 in number of visitors, and the number of visitors appeared to be in decline.
branch direct federal spending allows them to ensure that funding is allocated to states of their party or swing states critical to their reelection.\textsuperscript{78}

For example, since the 2009 stimulus, DOT has overseen the TIGER discretionary grant program. The TIGER program provides DOT with the opportunity to invest in road, rail, transit, and port projects that promise to achieve critical national objectives.\textsuperscript{79} The intent of those grants is to repair the nation’s most critical pieces of infrastructure, and logic dictates that almost all of these grants should be awarded to distressed areas.\textsuperscript{80} However, in the first year of the TIGER grant program, the Administration sent only 60\% of the TIGER grants to regions most in need of assistance,\textsuperscript{81} and while half of the funding was distributed to states with lower than average unemployment rates, there were still distressed states that received no TIGER grants at all.\textsuperscript{82} Additionally, of those awarded grants, during the first two years of the program Democrats received 80\% of funding despite controlling only 58\% of congressional seats, and the following year they received 69\% of the funding while controlling only 47\% of congressional seats.\textsuperscript{83}

Moreover, in the most recent round of TIGER grant applications, the Government Accountability Office found that DOT deviated from established procedures and recognized internal control practices, in that it did not document key decisions made during the application evaluation and selection processes, such as how DOT came to (a) accept and review applications

\begin{verbatim}
It is more likely that Ken Salazar, a former Democratic senator from Colorado, who was selected by President Obama to be Secretary of the Interior, motivated this elevated request for a Colorado park).
\textsuperscript{78} See Andy Sullivan, Exclusive: Spending – Why Red States Shoulder the Deepest Cuts Under Obama, Reuters, Jan. 28, 2015, http://www.reuters.com/article/2015/01/28/us-usa-politics-spending-idUSKBN0L10F120150128 (“Discretionary grant funding to red states like Mississippi fell by 40 percent to $15 billion between fiscal 2009 and fiscal 2013 . . . . Purple states like Ohio and North Carolina saw a smaller drop of 27 percent, to $19.8 billion, and blue states saw a yet-smaller drop of 22.5 percent, to $27.6 billion.”). He goes on to explain that this approach is not unique to Obama. Under presidents Clinton and W. Bush, purple states got about 7.3 percent more grants and 5.7 percent more grant dollars than states that were firmly in one camp).
\textsuperscript{79} DEPARTMENT OF TRANSPORTATION, http://www.dot.gov/tiger/about.
\textsuperscript{82} See e.g., Mica, supra note 80 (explaining that the unelected bureaucrats in the DOT determined that Florida, with the 7th highest unemployment rate, would receive no TIGER grant funding at all. “Despite 115 project applications from a state with an 11.8 percent joblessness rate, DOT bureaucrats concluded that no help was necessary from a program to benefit one of the nation’s most economically embattled areas.”).
\textsuperscript{83} Baruch Feigenbaum, Evaluating and Improving TIGER Grants, 99 REASON FOUNDATION POLICY BRIEF 10 (Apr. 2012) (stating that there are no definitive factors other than politics to explain these statistics: “Even a Democratic president, Democratic state assemblies, Democratic governors and Democratic local officials should not tip the funding balance this much.”).
\end{verbatim}
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received after the published deadline; and (b) advance projects with lower technical ratings instead of more highly-rated projects; and (c) change the technical ratings of lower-rated projects selected for funding to the highest technical rating category. The absence of such documentation and the lack of public information can give rise to challenges to the integrity of the evaluation process and the rationale for the decisions made.

The TIGER grant program accurately depicts the issues surrounding the shift in earmarking authority to the executive branch; and it showcases that many funding decisions are not, nor should they be, merely technical decisions. There is, and should be, a political component that enters into the calculus, but by having the executive play this role, while it allows the President to show voters how he is making a difference in their communities, the same cannot be said for Congress.

IV. Recommendations

It is time for the earmarking process to return to its rightful place in the legislative branch. Earmarks have admittedly been abused, and no one advocates for a return to 2005-style earmarking, but the current system of executive earmarks is too opaque to continue. Decisions are made behind closed doors in the White House, the executive office buildings in Washington, and in federal offices across the country outside of the view of the public. The two largest concerns surrounding earmarks were a lack of transparency and the appearance (and occasional presence) of corruption. Therefore, in lieu of the current system, the earmark ban should be lifted pending legislatively mandated transparency and ethics requirements.

With respect to the transparency requirement, the return to earmarks should bring with it reforms much like those enacted prior to the ban. Under such a requirement, members of Congress once again would be permitted to earmark federal spending for projects in their home

84 U.S. Gov’t Accountability Office, GAO-14-766, Surface Transportation: Actions Needed to Improve Documentation of Key Decisions in the TIGER Discretionary Grant Program 5 (May 2014) (finding that, for applicants who had experienced technical issues, DOT decided to accept applications for an additional thirty days without notifying the public of its decision. Ultimately, DOT accepted 146 late-arriving TIGER applications without validating that they had experienced technical issues).

85 Id. (explaining that DOT did not document its rationale for not advancing 22 highly recommended projects, while advancing 22 highly recommended projects, while advancing 43 recommended or acceptable projects for funding consideration).

86 Id. at 6 (discovering that after DOT finalized the TIGER grant selections, it changed the technical ratings of 19 lower-rated funded projects to highly recommended without adequate documentation).

87 See Sullivan, supra note 78 (finding that as Obama ran for re-election in 2012, administration officials traveled to battleground states to announce good news: $45 million for a manufacturing research center in Ohio; $8.2 million for a tech incubator in Gainesville, Florida; $18 million to extend a rail system in Charlotte, North Carolina).

88 See supra notes 39-41 and accompanying text.

89 See Frisch, supra note 11, at 76.


91 See notes 42-47 and accompanying text.
district or state, so long as their name is publicly attached to that particular spending, and it is published in a publicly accessible forum.\textsuperscript{92} Doing so would increase transparency, reduce the number of earmark requests, promote accountability, and allow for increased public scrutiny.\textsuperscript{93} Ultimately, the goal is for a member to willingly stand up publicly and tout the projects to which they have secured federal funding. For many these disclosure requirements should not be a tall order because most members of Congress do not hide their earmarking behavior, they trumpet it.\textsuperscript{94} In order to facilitate such transparency, Congress should also create a new database of all congressional earmarks. Even after Congress enacted reforms in 2006, information about lawmakers’ earmark requests was scattered across hundreds of websites in a variety of formats with differing levels of detail.\textsuperscript{95} Thus, Congress should create a unified, searchable, sortable and downloadable database on a publicly accessible website to provide the public with the necessary degree of transparency.\textsuperscript{96}

In the same vein, blanket certifications and empty promises from members that they stand to reap no financial reward from a given appropriation should be supplanted by an ethical disclosure requirement. In response to growing concerns about the corruptive nature of earmarks, such a requirement would oblige members to disclose any nearby property holdings or the involvement of family members or campaign contributors in the entity receiving federal funds by a written statement.\textsuperscript{97} Although this does not serve as a complete safeguard, the Ethics Committees should also be prepared to thoroughly investigate and punish members for corrupt earmarking practices if warranted. The best solution is not to ban earmarks but rather to oversee them more carefully, make them completely transparent, and severely punish those who violate the ethical requirements.

V. Conclusion

Today the system by which the government makes decisions on resource allocation is broken, and perhaps that is no surprise as there is no incentive for individual members of Congress to support a spending plan when there is nothing they can show their constituents. The best way to return the congressional appropriations process to regular order is to ensure that appropriations are coming to the floor in both houses and that the constitutional power of the purse is restored in Congress, doing so would increase transparency and accountability. “Done right, earmarks have given legislators the opportunity to direct federal money to worthy projects

\textsuperscript{92}Frost & Davis, \textit{supra} note 66.

\textsuperscript{93}See generally FRISCH, \textit{supra} note 11.

\textsuperscript{94}See \textit{id.} at 151 (explaining that members of Congress, when they have something that affects their district or state in a positive way as a result of an earmark, they will send out a press release about it).

\textsuperscript{95}See Earmark Reform, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, 2012, available at http://www.citizensforethics.org/policy/entry/earmark-reform (stating that while the data is technically available, it is virtually impossible to “collect, understand and analyze all of the earmark information.”).

\textsuperscript{96}Id.

that benefit people in their districts [and states].”

Though there are critics who harp on the few earmarks that have led to wasteful spending, such spending proposals should be defeated, but they should be defeated based on their substance—not simply because they are earmarks. Ultimately, the biggest difficulty faced in returning to an earmark-able era, is that Congress itself, in all of its current dysfunction, would have to agree to bring them back.

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98 President Barack Obama, Remarks on Earmark Reform (Mar. 11, 2009); see e.g., Peg McGlitch, Don’t Ban Earmarks, Fix Them, U.S. NEWS, Feb. 9, 2012, http://www.usnews.com/opinion/blogs/peg-mcglinch/2012/02/09/dont-ban-earmarks-fix-them (“For every cringe-worthy earmark . . . . [There are] [e]armarks [that] have funded hundreds of job training programs, paved roads that reduced traffic, supported the police officers protecting our streets, underwritten research on diseases, revitalized blighted neighborhoods, developed technologies to improve national defense, built libraries and schools, and given children new opportunities to learn.”).

99 See supra note 35; FRISCH, supra note 11, at 148 (quoting President Obama, “Projects have been inserted at the 11th hour without review, and sometimes without merit, in order to satisfy political or persona agendas of a given legislator rather than the public interest.”). See generally David S. Fallis, et al., Congressional Earmarks Sometimes Used to Fund Projects Near Lawmakers’ Properties, WASH. POST, Feb. 6, 2012, http://www.washingtonpost.com/investigations/2012/01/12/gIQA97HGvQ_story.html.

100 See Inhofe, supra note 53.