Insight

Earmarks Are Back, Legislating Is Not

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Executive Summary

- Appropriations bills used to be vehicles for earmarks, or "pork," which were generally understood to be narrow spending requests that benefited Members' districts and States.
- A long-standing perquisite and tool for legislators, the practice was widely perceived to have been abused in the early and mid-2000s, leading to congressional corruption scandals.
- The 112th Congress instituted a moratorium on earmarking that held for a decade.
- The current Congress has reinstituted earmarking and Congress has embraced the practice with bicameral, bipartisan enthusiasm, with over 3,000 earmark requests in the House, and over 8,000 earmark requests in the Senate for fiscal year 2022.

Introduction

On October 2021, the 2022 fiscal year (FY) began, and the Budget Control Act (BCA) of 2011 expired. For the first time in a decade, Congress was free from statutory spending limits in the BCA that, though eroded over time, served to limit discretionary spending. In the absence of statutory spending limits, Congress would have to fall back on its regular budget process to set agencies' spending levels. Along with the revival of "regular" budgeting is the restoration of earmarking. Earmarking, or directing appropriations to specific entities or locations, was a regular and well-worn tradition in Washington for decades. But Congress's appetite for "pork" exploded in the early and mid-2000s, and scandal soon followed, marked perhaps most conspicuously with the convictions of former House appropriator Randy "Duke" Cunningham and lobbyist Jack Abramoff. Earmarking, long a target of "good government" groups, became a congressional taboo, culminating with an effective ban beginning with the 112th Congress. That ban is now just as dead and forgotten as the BCA. Today, the House majority posted details of a long-awaited FY2022 omnibus appropriations bill, and it would appear as though congressional earmarks never lost a step. While the totality of earmarks in the omnibus is unclear, Congress's enthusiasm for the practice is not. Bipartisan, bicameral majorities requested over 3,000 earmarks in the House, and over 8,000 earmarks in the Senate. Touted as a tool for incenting compromise and timely legislating, the renewed practice may merely allow Congress to return to pork-barrel politics, with no appreciable improvement in the budget process.

What Is an Earmark?

Historically, earmarks were not formally defined or regulated by anything other than the give and take of legislating. In general, earmarks are requests that funding provided in appropriations acts for agency accounts be "earmarked" for specific projects and/or locations, typically in Members' districts. Budget observers developed criteria to identify earmarks in appropriations acts and other legislation consistently over time. Some Members of Congress advertised or otherwise celebrated their ability to deliver federal funds for their districts, while other Members were less transparent. The system afforded Members this opacity. Yet as the practice grew in scope and scale

, congressional abuse and corruption widened apace. A public backlash to the practice, encouraged by some visible champions in Congress, followed. In 2007, the House of Representatives adopted formal rules for requesting and disclosing earmarks. The Bush Administration similarly promulgated a formal definition of earmarks and established a public database of earmarks it had identified. The Senate established its own formal definition and disclosure rules for earmarks in legislation enacted later that year.[1] Today, these rules remain in place and define an earmark as follows:

In the House:

"[T]he term 'congressional earmark' means a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process."

In the Senate:

"[T]he term 'congressionally directed spending item' means a provision or report language included primarily at the request of a Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process[.]"

While these definitions have minor distinctions, they are the formal definitions of earmarks for the purposes of congressional rules and disclosure. These definitions were rendered somewhat moot in late 2010, however, when the incoming Republican majority voted to ban earmarking in its conference rules. Senate Republicans adopted a similar practice, and Congress forswore earmarking for the subsequent decade. It is important to note that the earmark moratorium was not codified in House or Senate rules, or by statute, but rather in party rules and committee processes. Accordingly, lifting the functional ban on earmarks requires no change in either the House or Senate's rules or statute.

Earmarks in FY2022

The current congressional majority has revived the practice of earmarking, but, through committee guidance, formalized the process beyond the legacy earmark rules established in 2007. In 2021, the chairs of the House and Senate Appropriations Committees announced that the committees would be accepting requests for earmarks for FY2022 appropriations acts. Chair DeLauro and Chairman Leahy each issued similar new requirements for Members' requests. The new requirements in the House and Senate are similar, and require additional disclosures from legislators and the committees. The new rules also limit earmarks to "1 percent of discretionary spending," although how that will be policed is unclear.

While the earmark ban that prevailed in Congress for a decade was a significant initiative for the incoming House Republican majority in 2010, the restoration of earmarking has bipartisan appeal. According to the House Appropriations Committee database, 332 House Members requested 3,018 earmarks totaling $7.1 billion. In the Senate, 64 Senators requested 8,071 earmarks. The enthusiasm for the resumption of earmarking is clear in the explanatory statements accompanying the FY2022 omnibus spending bill currently before the Congress

presently defy easy tabulation. The earmark requests appended to the appropriations act for the Labor, Health and Human Services, Education Departments and related agencies, ran to 150 pages.

Are Earmarks a Problem?

It is important to understand what earmarks are, and what they are not. Of note, the earmarks in the FY2022 omnibus are included in the joint explanatory statement accompanying the legislation itself. The earmarks, as was largely true in the past, do not have the force of law. Rather, they form part of the legislative history and congressional intent behind the law itself. The earmarks are not appropriations themselves. Rather, they could be seen as clear congressional guidance for the disposition of funding provided in the appropriations acts. Congress is vested under the Constitution with the power of the purse – earmarking is an exercise of that discretion.

A review of the earmarks in the FY2022 omnibus would appear familiar to budget observers familiar with earmarks in years past. They are largely devoted to the major hospitals, universities, non-profits, and other major employers and institutions of civil society within Members' districts. A $675,000 Department of Labor grant to a literacy center in Pittsburgh from Sen. Bob Casey, and a $1 million Department of Labor grant to Mississippi State University from Sen. Hyde-Smith are classic examples of earmarks. Supporting documentation on the Senate Appropriations Committee website is a recent innovation.

The transparency of the Members' requests, including the public documentation of the recipients, are novel, however, and meaningfully improve the public's visibility into these requests. Improved visibility into earmarking could mitigate the risks of malfeasance and corruption that inspired the 2011 moratorium, but the abrupt and widespread abandonment of that consensus should concern budget observers as to Congress's appetite for parochial spending.

One argument that earmark supporters had made that has clearly not borne out is that earmarks encourage more timely appropriations. The fiscal year is nearly half way over, and Congress is less than 48 hours from another funding lapse. Congress clearly rediscovered earmarking but has failed to recommit to the budget process.

Conclusion

The 2011 earmark ban in Congress was a remarkable initiative. Congress was affirmatively ceding power to the executive branch. In the absence of earmarks, agencies would have more discretion to dispose of program funds where and how they saw fit. Essentially, Congress announced that it couldn't be trusted to weigh in on funding as it previously had, and the abuse and related scandals in the 2000s suggested it was right. Ten years later, Congress has reclaimed its prerogative, but with new restrictions and transparency measures. It is unclear if the new reforms will preclude the worst behaviors of the 2000s, but the magnitude and enthusiasm of requests for earmarks suggests Congress is willing to run the risk again.

[1] For more on the executive branch's approach to earmarks, see: https://crsreports.congress.gov/product/pdf/RL/RL34648/5; for more on the disclosure rules in the House and Senate, see https://crsreports.congress.gov/product/pdf/RS/RS22866 and https://crsreports.congress.gov/product/pdf/RS/RS22867, respectively.