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# PULLED PORK: THE THREE PART ATTACK ON NON-STATUTORY EARMARKS

*Jason Heaser\**

## I. INTRODUCTION

Definitions of earmarks, sometimes referred to as appropriations with a zip code,<sup>1</sup> vary depending on the source.<sup>2</sup> These varying definitions, however, generally revolve around four factors: “specificity of the entity receiving funding, congressional origin, exemption from normal competitive requirements for agency funding, and presence in statutory text.”<sup>3</sup> While an earmark normally means any expenditure for a specific purpose that is placed into a larger spending bill or related conference report,<sup>4</sup> a salient feature of earmarks is that they involve funding directives in areas that would otherwise demand some sort of competitive bidding process.<sup>5</sup> Labeling a piece of legislation as pork implies that lapses have occurred in procedures set forth by executive agencies to review and consider the expenditure of funds.<sup>6</sup>

The term earmarking originates from the medieval practice of herdsman cutting a notch in the ear of a swine as a type of brand, marking the pig as part of his flock.<sup>7</sup> The more abrasive term “pork barreling” comes from the late nineteenth century and compares legislators’ action to hungry slaves crowding a barrel of salted pork during mealtimes.<sup>8</sup> While often used interchangeably, pork and earmarks are used to describe different types of specific appropriations.<sup>9</sup> In the federal budget context the term earmark is used two ways: to refer to an expenditure that is specified to be paid to a particular local project from the general fund, or to refer to the dedication of a discrete

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1. Rob Porter & Samuel Walsh, Earmarks in the Federal Budget Process (May 1, 2006) (unpublished paper, [http://www.law.harvard.edu/faculty/hjackson/Earmarks\\_16.pdf](http://www.law.harvard.edu/faculty/hjackson/Earmarks_16.pdf)).

2. The Congressional Reporting Service and Citizens Against Government Waste use two somewhat varying definitions of earmarks.

3. Porter & Walsh, *supra* note 1.

4. TOM FINNIGAN, CITIZENS AGAINST GOV’T WASTE, ALL ABOUT PORK: THE ABUSE OF EARMARKS AND THE NEEDED REFORMS (2006), <http://www.cagw.org/site/DocServer/PorkFinal.pdf>.

5. Porter & Walsh, *supra* note 1, at 6.

6. FINNIGAN, *supra* note 4.

7. Tim Weiner, *Sending Money to Home District: Earmarking and the Pork Barrel*, N.Y. TIMES, July 13, 1994, at A1.

8. FINNIGAN, *supra* note 4.

9. *Id.* at 4.

revenue.<sup>10</sup> This note will focus on the former of these two.

The bulk of this Note will focus on non-statutory earmarks, which do not appear in the text of the statute itself, but are instead placed in conference committee and manager reports. This Note will be divided into four sections: a general background of earmarks, recent congressional action concerning earmarks, recent executive action regarding non-statutory earmarks, and judicial decisions that impact the use of non-statutory earmarks.

## II. BACKGROUND AND HISTORY OF EARMARKING

Congress is granted the power to appropriate funds under Article I of the Constitution.<sup>11</sup> Appropriations bills passed through Congress grant federal agencies the authority to spend money from the Treasury.<sup>12</sup> While the appropriation bill is being drafted, Congress members may submit earmark requests to members of the appropriations committee who may then insert the earmarks into the bill.<sup>13</sup> It comes as no surprise then that a disproportionate number of earmarks go to appropriation committee members.<sup>14</sup>

Upon passage the bill is sent to a conference committee. The conference committee's role, which is formed by members of the House and Senate Appropriations Committees, is to hammer out a negotiated bill which can then be passed by both houses. As well as a compromise version of the bill the conference committee also authors a conference reports. These reports are generally thousands of pages long and are not formally presented to either house of Congress or the President.

The modern trend of earmarking legislation is moving away from earmarks within legislation and instead placing the earmarks in conference reports and committee recommendations. This is not a new trend by any means as most earmarks were placed in the statutory text until the Budget and Accounting Act of 1921,<sup>15</sup> after which the majority of earmarks were found in conference reports. A 2006 Congressional Service Report found over 95 percent of earmarks were contained in the conference or manager's reports.<sup>16</sup>

Funds which are not earmarked go to general grant programs to be doled out by state or federal agencies through competitive processes or formulae. Agency decisions, especially those which are targeted toward research, are also based on peer reviews. Peer review for funding is rooted in, "history, doctrine,

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10. Porter & Walsh, *supra* note 1, at 2-3.

11. U.S. CONST. art. I, § 8.

12. *Id.* at art. I, § 9.

13. In 2005 the House Appropriations Committee received almost 35,000 earmark requests. David Baumann, *Tempest in a Barrel*, NAT'L J., Feb. 11, 2006, at 60, available at <http://www.govexec.com/dailyfed/0206/021306ol.htm>.

14. FINNIGAN, *supra* note 4, at 13.

15. Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.) (creating the General Accounting Office, which was meant to monitor expenditures of the federal government).

16. Robert Novak, *How to Erase Earmarks*, REAL CLEAR POLITICS, Mar. 27, 2006, [http://www.realclearpolitics.com/articles/2006/03/how\\_to\\_erase\\_earmarks.html](http://www.realclearpolitics.com/articles/2006/03/how_to_erase_earmarks.html).

and law, as well as in its practical effectiveness in promoting academic science.”<sup>17</sup> Evaluations from congressional committees, federal agencies, the General Accounting Office (GAO) and the Congressional Research Services (CRS) have found peer review to be generally fair and procedurally sound.<sup>18</sup>

Supporters of earmarks claim that Congress members are more in tune with the needs of their constituencies than agency bureaucrats. There are studies that suggest this may be true.<sup>19</sup> Some commentators argue differently, suggesting earmarks feed a congressional propensity to micromanage state and local affairs.<sup>20</sup> A report by the National Conference of State Legislators stated that, though earmarking may offer advantages in assuring funding for specific projects, it is more likely to hamper state budgetary designs and management.<sup>21</sup> This claim is supported by studies, which show large percentages of federal funds normally spent at the states’ discretion are earmarked toward specific projects.<sup>22</sup> In order to combat these problems, states have been forced to balance their attention between local leaders and Congress members in Washington D.C. The Colorado Department of Transportation (DOT) has set up a competitive process where they hear project requests from local leaders and then submit those requests to the Colorado congressional delegation.<sup>23</sup>

Some Congressional earmarks are passed even though they may be contrary to state and local needs.<sup>24</sup> In a 2005 appropriations bill Rep. John Salazar (D-Col.) secured a \$6.2 million earmark for a bridge in Glenwood Springs, Colorado.<sup>25</sup> The project has been dubbed a local “bridge to nowhere” because there is no connecting road on the other side of the river.<sup>26</sup> Further, the chairman of the Colorado committee that evaluates transportation projects lobbied against the earmark, stating that the project was unnecessary.<sup>27</sup> The original “bridge to nowhere” was an earmark project lead by Sen. Ted Stevens (R-Alaska) and Rep. Don Young (R-Alaska) which included \$223 million dollars to connect Ketchikan, population roughly 15,000, to Gravina Island, population

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17. JAMES SAVAGE, *FUNDING SCIENCE IN AMERICA: CONGRESS, UNIVERSITIES AND THE POLITICS OF THE ACADEMIC PORK BARREL* 5-6 (1999).

18. *Id.* at 37-39.

19. See Brian Freil, *Defending Pork*, NAT’L J., May 8, 2004, at 1406, available at <http://www.govexec.com/dailyfed/0504/051004nj1.htm>.

20. Ronald D. Utt, *How Congressional Earmarks and Pork-Barrel Spending Undermine State and Local Decisionmaking*, BACKGROUND (Heritage Found., Washington, D.C.), Apr. 2, 1999, at 2, 5, [http://www.heritage.org/Research/Budget/upload/18432\\_1.pdf](http://www.heritage.org/Research/Budget/upload/18432_1.pdf).

21. GOV’T ACCOUNTING OFFICE, FACT SHEET: BUDGET ISSUES, EARMARKING IN THE FED. GOV’T, at 10 (1995), available at <http://www.gao.gov/archive/1995/ai95216f.pdf>.

22. See PA. LEGIS. BUDGET AND FINANCE COMM., PERFORMANCE AUDIT: DEP’T OF TRANSP., PURSUANT TO ACT 1981-95, 187 (1996) (finding that over 25% of federal funds were earmarked).

23. Freil, *supra* note 19.

24. Utt, *supra* note 20 at 6-7.

25. Bob Cusack, *Bipartisanship a Likely Casualty of Earmark Reform*, THE HILL, Feb. 2, 2006, <http://thehill.com/leading-the-news/bipartisanship-a-likely-casualty-of-earmark-reform-2006-02-16.html>.

26. *Id.*

27. *Id.*

50.<sup>28</sup> Senator Stevens successfully defended the earmark against an amendment, which would have diverted the funds to help replace a bridge which was destroyed by Hurricane Katrina. When Rep. Young was asked about Alaskan constituents who supported diverting the funds as a gift from the Alaskan people he responded, "They can kiss my ear! That is the dumbest thing I've ever heard."<sup>29</sup>

Earmarking for local projects also has the threat of putting national programs in jeopardy. In 2006, the Energy and Water Development Appropriations Act earmarked \$36 million for seventeen energy related projects in Nevada.<sup>30</sup> However, this earmark steered funds away from established energy projects; such as the National Renewable Energy Laboratory in Golden, Colorado, which was forced to lay off eleven percent of its total staff.<sup>31</sup> The Surface Transportation and Uniform Relocation and Assistance Act of 1987<sup>32</sup> contained earmarks beneficial to twenty-one states. These benefits were secured at the cost of fifteen other states who received substantially less funds as a result.<sup>33</sup> On a more currently relevant scale, in 2004, the OMB warned that continued reduction and addition though earmarking would damage future military capabilities.<sup>34</sup>

Supporters portray earmarks as a coalition building tool and necessary in building a majority to pass critical legislation.<sup>35</sup> Earmarks help build coalitions because neither Congress members will likely vote down an entire bill because of an individual earmark, nor can the President veto a bill for a single earmark without vetoing the entire bill, therefore allowing earmark spending to cross party lines and build a bipartisan coalition.<sup>36</sup>

Whether blatant—as the case of Rep. Randy Cunningham (R-Calif.), who resigned from Congress and pled guilty to conspiring to take \$2.4 million in bribes from two defense contractors who had received earmarks through his legislative efforts<sup>37</sup>—or more clandestine—such as Rep. Alan Mollohan (D-W.Va.), who directed \$250 million to five newly created non-profits and then

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28. Shailagh Murray, *For a Senate Foe of Pork Barrel Spending, Two Bridges Too Far*, WASH. POST, Oct. 21, 2005, at A8.

29. *Id.*

30. H.R. REP NO. 109-275 (2006) (Conf. Rep.) available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_reports&docid=f:hr275.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr275.109.pdf).

31. Press Release, Citizens Against Government Waste, Senator Reid is December Porker of the Month, (Dec. 25, 2005), available at <http://www.cagw.org/site/News2?page=NewsArticle&id=9556>.

32. Pub. L. No. 100-17, 101 Stat. 132 (1987).

33. U.S. GEN. ACCOUNTING OFFICE, HIGHWAY DEMONSTRATION PROJECTS: IMPROVED SELECTION AND FUNDING CONTROLS ARE NEEDED, RCED-91-146, 7 (1991).

34. In the 2005 DoD Authorization Bill, Congress cut \$4.5 billion of DoD requests but inserted an additional \$8.9 billion in earmarks. Winslow Wheeler, *Don't Mind if I Do: Congress Says It's Going All Out for Troops. Here's \$8.9 Billion in Pork That Says It's Not*, WASH. POST, Aug. 22, 2004, at B1.

35. See DIANA EVANS, GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS (2004).

36. Jeffrey H. Birnbaum, *Earmark – It's \$\$\$, Not Body Art*, WASH. POST, Feb. 3, 2006 at A17.

37. Finlay Lewis, Jerry Kammer, and Joe Cantlupe, *Contractor Admits Bribing Cunningham*, THE SAN DIEGO UNION-TRIBUNE, Feb. 25, 2006, at A1.

recruited friends and former aides to run the organizations—the ability of earmarks to be used as a corruptive tool is seldom questioned.<sup>38</sup> Despite these obvious signs of abuse, few Congress members are willing to act against earmarking legislation. Congressman Jim Moran (D-Va.) declared at a fundraiser, “[w]hen I become chairman [of a House Appropriations subcommittee], I’m going to earmark the shit out of it.”<sup>39</sup>

Those that support earmarks argue that the process of using earmarks has been around since the days of Washington.<sup>40</sup> Critics on the other hand point to modern ubiquitous proliferation of earmarks as a new concept spawning mostly from the 1980’s.<sup>41</sup> Comparative studies have shown that the number of individual earmarks has increased dramatically, especially in the last ten years.<sup>42</sup>

Both the Executive and some members of the legislature have questioned the constitutional ability of Congress to specify in detail its appropriations bills since the early days of the Republic. When a measure was brought before Congress which would offer a bounty to New England, cod fisherman Rep. Hugh Williamson of the Second Congress argued against it, saying the effort to spend federal funds in a manner so localized was unconstitutional:

[T]o gratify one part of the Union by suppressing the other . . . destroy[s] this barrier, —and it is not a few fishermen that will enter, but all manner of persons; people of every trade and occupation may enter in at the breach, until they have eaten up the bread of our children.<sup>43</sup>

Thomas Jefferson himself argued against the localized appropriation of funds even to support the constitutionally required task of establishing a postal service.<sup>44</sup> Thomas Jefferson wrote James Madison, challenging his proposal for road improvements for the postal service and stating he viewed such individual appropriations:

[A] source of boundless patronage to the executive, jobbing to members of

38. Judi Rudoren, *Special Projects By Congressman Draw Complaints*, N.Y. TIMES, April 8, 2006 available at <http://www.nytimes.com/2006/04/08/washington/08earmarks.html> (Rep. Mollohan resigned his position as chair of the House Ethics Committee soon after news of these earmarks was released.).

39. Scott McCaggrey, *Moran: Democratic Majority Means More Money for 8<sup>th</sup> District*, SUN GAZETTE NEWSPAPERS, June 10, 2006 available at <http://sungazette.net/articles/2006/06/11/arlington/news/nws936e.txt>.

40. Janet Hool and Richard Simon, *Earmarking – A Win-Win for Lobbyists and Politicians*, LOS ANGELES TIMES, Jan. 29, 2006 available at <http://www.commondreams.org/headlines06/0129-06.htm>.

41. FINNIGAN, *supra* note 4.

42. BRIAN RIEDL, HERITAGE FOUNDATION, OMNIBUS EARMARKS OUT (2007), <http://www.heritage.org/research/budget/wm1757.cfm> (finding the number of earmarks as having increased from 958 in 1996 11338 in 2007.).

43. JOHN C. EASTMAN, THE CLAREMONT INSTITUTE, EATING UP THE BREAD OF OUR CHILDREN, (2006), <http://www.claremont.org/projects/jurisprudence/060206eastman.html>.

44. U.S. Const. art. I, § 8.

Congress and their friends, and a bottomless abyss of public money . . . it will be a scene of eternal scramble among the members, who can get the most money wasted in their State; and they will always get most who are meanest.”<sup>45</sup>

Multiple Presidents and numerous founding fathers have agreed in Jefferson’s analysis of the dangers and constitutionality of earmarks. Alexander Hamilton did not believe Congressional powers extended to spending of a local or regional benefit.<sup>46</sup> James Monroe argued that federal money should be limited “to great national works only, since if it were unlimited it would be liable to abuse and might be productive of evil.”<sup>47</sup> Grover Cleveland vetoed numerous appropriation bills, stating his only reason, “I can find no warrant for such an appropriation in the Constitution.”<sup>48</sup> James Madison went so far as to veto a public works bill that specified it would be put toward roads and canals.<sup>49</sup> He took a strict interpretation of the congressional powers within Article I of the Constitution, stating that the Common Defense and General Welfare clauses did not grant Congress additional powers not otherwise enumerated.<sup>50</sup>

More recently, Ronald Reagan vetoed the Surface Transportation and Uniform Relocation Assistance Act of 1987 for its inclusion of earmarks, stating, “I haven’t seen this much lard since I handed out blue ribbons at the Iowa State Fair.” That bill only contained 121 earmarks.<sup>51</sup> In comparison the 2005 Labor/HHS Appropriations Act contained over 3000 earmarks totaling 1.69 billion dollars.<sup>52</sup>

### III. RECENT LEGISLATIVE ACTION

House Joint Resolution 20, The Revised Continuing Appropriations Resolution of 2007, includes the most direct action that Congress has taken in eliminating earmarks within committee reports.<sup>53</sup> The resolution itself is a continuing resolution of appropriations for fiscal year 2007 and other purposes. However it includes a provision which states, “[a]ny language specifying an earmark in a committee report or statement of managers accompanying an appropriation Act for fiscal year 2006, shall have no legal effect with respect to

45. Letter from Thomas Jefferson to James Madison (March 6, 1796) (on file with The Thomas Jefferson Papers, The Library of Congress).

46. EASTMAN, *supra* note 43.

47. Ken Silberstein, *The Great American Pork Barrel*, HARPER’S MAGAZINE, July 1, 2005.

48. WALTER E. WILLIAMS, GEORGE MASON UNIVERSITY, HOW DID WE GET HERE? (2004), [www.gmu.edu/departments/economics/wew/articles/fee/here.html](http://www.gmu.edu/departments/economics/wew/articles/fee/here.html).

49. Letter from James Madison to the U.S. House of Representatives, *Veto of federal public works bill*, available at [www.constitution.org/jm/18170303\\_veto.htm](http://www.constitution.org/jm/18170303_veto.htm).

50. *Id.*

51. U.S. DEP’T OF TRANSP. FEDERAL HIGHWAY ADMIN., PRESIDENT RONALD REAGAN AND THE SURFACE TRANSPORTATION AND UNIFORM RELOCATION ASSISTANCE ACT OF 1987, (2005), available at [www.fhwa.dot.gov/infrastructure/rw01e.htm](http://www.fhwa.dot.gov/infrastructure/rw01e.htm).

52. CITIZENS AGAINST GOVERNMENT WASTE, 2005 CONGRESSIONAL PIG BOOK, (2005), [http://www.cagw.org/site/DocServer/2005\\_Pig\\_Book.pdf](http://www.cagw.org/site/DocServer/2005_Pig_Book.pdf).

53. H.J. Res. 20, 110 Cong. (2007)

funds appropriated . . . ”<sup>54</sup>. This shows that Congress at least understands it has the power to eliminate non-statutory earmarks through its own legislation.

While many legislators rail against earmark corruption, legislation focused on the elimination of earmarks has been slow and has bore limited fruit. Even following the aforementioned scandals, Congress has passed only one piece of legislation that was meant to curb earmark use.<sup>55</sup> Both the House and Senate attempted to pass legislation in 2006 that would have made mandatory disclosure of all earmarks requested and received by list of the requesting Congress members.<sup>56</sup> Ultimately, the House and Senate could not reconcile their differences in the bills, and it would not be until the 110th Congress came to power that earmark legislation would be passed into law.<sup>57</sup> The first significant legislation passed by the 110th Congress was the Honest Leadership and Open Government Act of 2007.<sup>58</sup> The HLOG mandates all earmarks within the bill be listed along with the requesting member.<sup>59</sup>

Earmark reform continues to be a hot topic in both houses of Congress. Several members including Sen. John McCain (R.-Ariz.) and Karen McCaskill (D.-Mo.), have continued to push for stronger and more effective means of limiting earmark use. The use of earmarks also became an item of discussion for both presidential tickets in 2008.

#### IV. RECENT EXECUTIVE ACTION

Several administrations have objected that committee reports do not carry the force of law because they are not presented to both houses, nor are they presented to the President for approval.<sup>60</sup> During the Reagan Administration, OMB director James Miller wrote a letter to the federal agencies instructing them to ignore conference report earmarks. Miller argued that the conference report language was “neither voted on by Congress nor presented to the President, [so they] are not law.”<sup>61</sup> It should be noted that after Miller informed Congress in writing that the Reagan Administration would ignore earmarks as non-binding, several committee chairmen refused to deal with Director Miller. Thus, his ability to advocate for President’s policies was compromised.<sup>62</sup> Congress even responded with threats of retaliation, and

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54. *Id.* at § 112.

55. *See supra* notes 34–36 and accompanying text.

56. Legislative Transparency and Accountability Act of 2006, S.2349, 109th Cong. (2006); Lobbying Accountability and Transparency Act of 2006, H.4975 109th Cong. (2006).

57. Jeffrey Birnbaum, *House Votes to Disclose Earmarks*, WASH. POST, September 15, 2006, at A1. The House of Representatives was able to pass a rule change which mandated a list of earmarks and the requesting representative accompany each bill.

58. Pub.L. No. 110-81, 121 Stat. 735 (2007).

59. *Id.* at Title II.

60. John F. Cooney, *Signing Statements: A Practical Analysis of the ABA Task Force Report*, 59 ADMIN. L. REV. 647, 663 (2007).

61. JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* 37 (1996).

62. Cooney, *supra* note 60, at 663–64.

Miller soon capitulated sending another letter reversing his earlier instructions.<sup>63</sup> This shows that in practice, the White House may be compelled to treat the earmarks as binding for fear of retribution by the Appropriations Subcommittees and Congress as a whole.<sup>64</sup>

President George W. Bush first indicated an intention to ignore conference report language when he inserted a signing statement in H.R. 2863, which stated that the Administration would construe the bill in a manner consistent with the bicameral passage and presentment requirements of the Constitution.<sup>65</sup> On January 29, 2008, President Bush issued Executive Order 13,457 (the Order), "Protecting American Taxpayers from Government Spending on Wasteful Earmarks."<sup>66</sup> The Order states the government must ensure the proper use of taxpayer funds that are appropriated for government functions. In order to achieve this, the number and cost of earmarks must be reduced.<sup>67</sup> The Order further commands executive agencies not to "commit, obligate, or expend" funds on the bases of earmarks that originate from a non-statutory source except when required by law or when the agency has independently determined the merit of the expenditure.<sup>68</sup>

The Order takes a comprehensive definition of earmarks:

[T]he term "earmark" means funds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.<sup>69</sup>

The Order also identifies four duties of agency heads relating to earmarks. First, the agency head must take all necessary steps to implement the order as a bar to non-statutory earmarks. This duty entails ensuring all agency allocations are based on statutory text and not on committee reports or explanatory language.<sup>70</sup> Agency heads must also ensure all allocation decisions are based on, "authorized, transparent, statutory criteria and merit-based decision making," in accordance with OMB Memorandum M-07-10 to the extent consistent with applicable law.<sup>71</sup> OMB Memorandum M-07-10<sup>72</sup> was issued on

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63. KORN, *supra* note 61.

64. Cooney, *supra* note 60.

65. Press Release on the White House, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 47 Weekly Comp. Pres. Doc. 1918, (Jan. 292008), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

66. Exec. Order No. 13,457, 73 Fed. Reg. 6417 (2008).

67. *Id.* at § 1.

68. *Id.*

69. *Id.* at § 3(b).

70. Exec. Order No. 13,457, 73 Fed. Reg. 6417 § 2(a)(i) (2008).

71. *Id.* at § 2(a)(ii).

February 15, 2007 and explains the impact of the moratorium of earmarks under H.J.Res. 20.<sup>73</sup> Apropos to this note is the section indicating all agency heads must use statutory guidance in their decisions regarding allocations which stem from the fiscal year 2006 appropriation bills affected by section 112 of H.J.Res. 20.<sup>74</sup>

The second duty relayed by the Order is the agency may not factor into consideration of funding communication, which is purely oral. Further, the agency must make public, via the internet, all written requests for earmark expenditures from Congressional members or staff.<sup>75</sup>

The third duty instructs the agency heads to follow implementation procedures as further provided by the Director of the Office of Management and Budget.<sup>76</sup> The fourth duty allows the Director of the OMB to demand information from agency heads regarding compliance with the order.<sup>77</sup>

The impact of the Order will be stifled somewhat by the last provision, which states, "[t]his order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person."<sup>78</sup> Similar language in Executive Orders 12,291 and 12,866 has been interpreted to indicate the lack of any private cause of action against an agency.<sup>79</sup> Therefore, any private litigant would have to seek a cause following the *Bonneville Power* theory of administration action under the APA.<sup>80</sup>

Some discussion of Executive powers in regard to legislative interpretation is necessary to refute the possible argument that Executive Order 13,457 is an unconstitutional extension of the President's power. The President's power to issue executive orders stems both from constitutional authority, as granted under Article II, and express or implied statutory authority. If these Orders are issued under a valid claim of authority, they may have the force and effect of law, which would force courts to take judicial notice of their existence.<sup>81</sup>

Under a *Steel Seizure Case* analysis the Order appears to fall within the third category, as it is directly ordering agencies to ignore the implied will of Congress as shown through their legislative history.<sup>82</sup> The Order may still be a

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72. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-07-10, PROVIDING GUIDANCE TO DEPARTMENTS AND AGENCIES ABOUT OBLIGATING FY 2007 FUNDS UNDER A FULL-YEAR CONTINUING RESOLUTION (CR) WITH NO CONGRESSIONAL EARMARKS (2007), available at <http://management.energy.gov/February15GuidanceMemorandum.pdf>.

73. See, *supra* note 53 and accompanying text.

74. OMB, *supra* note 72.

75. Exec. Order 13,457, 73 Fed. Reg. 6417, § 2(b) (Jan. 29, 2008).

76. *Id.* at § 2(c).

77. *Id.* at § 2(d).

78. *Id.* at § 3(c).

79. *Associated Fisheries of Maine, Inc. v. Daley*, 954 F.Supp. 383, 390 (D.Me. 1997).

80. *Infra* note 123.

81. See *Armstrong v. United States*, 80 U.S. 154 (1871); see also *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967).

82. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J.,

valid Executive action because the courts, as will be shown in the following section, have made it clear that the power to enforce language in committee reports lies firmly and solely with the Executive.<sup>83</sup>

Further, Presidential restriction of agency rulemaking has become a widely used and accepted mechanism by which a President can exert determinative authority over agencies' actions.<sup>84</sup> President Reagan's Executive Order 12,291 established a centralized review procedure and required all new agency regulations to include a cost-benefit analysis.<sup>85</sup> This broadening of Presidential power over agency decision-making was met with controversy.<sup>86</sup> The Supreme Court did not offer a decision on 12,291 and lower courts refused to reach the constitutional issues<sup>87</sup> prior to its revocation by President Clinton.<sup>88</sup> Similarly, no court has thus far ruled on the similar language in Executive Order 12,866. However, courts have upheld compliance with the order without deciding on the constitutional question.<sup>89</sup>

The Executive cannot, however, refuse to spend money in the face of a, "clear statutory intent and directive to do so."<sup>90</sup> It seems clear that language within the congressional committee reports falls outside of "clear statutory intent and directive" and, therefore, the Executive may legally ignore such earmarks. This does not mean agencies may freely ignore clearly expressed legislative intent applicable to appropriations. Such actions are taken at the peril of strained relations with Congress. However, the agencies' practical duty to abide by the expressed intent of Congress falls short of a statutory requirement which would give rise to legal action, should there be a failure to carry out that duty.<sup>91</sup>

Surviving a constitutional challenge, Congress still has many options in dealing with the implications of the Order. Working within the new framework, the most obvious is to include all earmarks in the text of the statute.

concurring). Justice Jackson's three category analysis has generally been recognized as the most persuasive breakdown of Executive Power. The first category included Executive actions taken under express or implied congressional authority. The second category included Executive actions taken without congressional direction on the matter. The third category includes executive actions which run contrary to the expressed or implied will of Congress. Under this last category the Executive action is only valid if the exclusive power to act rests with the Executive.

83. See *infra* Part III.

84. CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, EARMARKS EXECUTIVE ORDER: LEGAL ISSUES 7 (2008).

85. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (revoked by Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)).

86. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4-6 (1995).

87. See *American Ass'n of Retired Persons v. Equal Employment Opportunity Comm'n*, 823 F.2d 600, 603 (D.C.Cir. 1987); see also *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (D.C.Cir. 1986).

88. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). While 12,866 explicitly revoked 12,291 it retained the high degree of Presidential review of agency decisions including review by the Office of Information and Regulatory Affairs and cost benefit analyses.

89. See *Cronin v. Browner*, 90 F.Supp.2d 364 (S.D.N.Y. 2000).

90. *Nat'l Council of Cmty. Mental Health Ctrs., Inc. v. Weinberger*, 361 F.Supp. 897 (D.C. 1973).

91. *LTV Aerospace Corp.*, 55 Comp. Gen. 308, 325 (1975).

This would make appropriations bills even more bulky and cumulative.<sup>92</sup> Congress could also include language within the statute which gives the committee report force of law; such as, “[a]ppropriation instructions in joint explanatory statement House Report No. 110-XXX shall be effective as if enacted into law.”<sup>93</sup> A third option would be to expressly anchor the committee report earmark to language within the legislation.<sup>94</sup> This approach has precedent in the Revised Continuing Appropriations Resolutions of 2007 which provided: “[t]he Office of National Drug Control Policy shall expend funds for ‘Counterdrug Technology Center’ . . . in accordance with the joint explanatory statement of the committee of conference.”<sup>95</sup> This type of direct and unambiguous language would appear to confer legally binding status to the congressional report. The Supreme Court has held that, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>96</sup>

Congress may decide that instead of working within the parameters set by the Order, they will fight the President on its implementation. As stated previously, the greatest battles will most likely be fought in the political arena. This will force agency heads to choose between following the letter of the Order and possibly aggravating committee chairs, and ignoring the order to appease the individuals who annually decide the agency’s budget.

Legally, Congress has the option of revoking the Order through legislation. This action has precedent in the National Institutes of Health Revitalization Act of 1993, which stated Executive Order 12,806 “shall not have any legal effect.”<sup>97</sup> Another more controversial option for Congress would be to deny funds to the Office of Management and Budget to enforce the Order.<sup>98</sup>

Regardless of Congress’ response, it appears as if President Bush has set the force of the Executive against the enforcement of non-statutory earmarks. If the Order is followed literally, it will virtually end non-statutory earmarks and lead to the transparency of the earmarking process as well as the appropriations process on whole.

## V. JUDICIAL DECISIONS

The courts had not until fairly recently weighed in on the legality of earmarks. Their decisions have found that there is no force of law in non-

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92. H.R. 2764, 110th Cong. (2007). The Consolidated Appropriations Act of 2008 was over 3400 pages long, and over 300 earmarked projects were not in the text.

93. CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, EARMARKS EXECUTIVE ORDER: LEGAL ISSUES 10 (2008).

94. *Id.*

95. Revised Continuing Appropriations Resolutions of 2007, Pub.L. No. 110-5, chap. 10, § 21057(b), 121 Stat. 8, 55 (2007).

96. *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

97. National Institute of Health Revitalization Act of 1993, Pub. L. No.103-43, § 121(c), 107 Stat. 133 (1993).

98. CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, EARMARKS EXECUTIVE ORDER: LEGAL ISSUES 10 (2008).

statutory earmarks that do not have an anchor within the text of the legislation. A more recent case even finds that agency decisions must be judicially reversed where the agency decision depends on non-statutory earmark language as a basis for its decision.

The Court of Federal Claims ruled on the force of non-statutory earmarks in *Blackhawk Heating & Plumbing Co., Inc. v. United States*.<sup>99</sup> The case involved a contract action where a contractor was refused his agreed-upon settlement payment because of language in the conference report and statute that removed settlement authority from the Administrator of Veterans' Affairs. The Court noted that several congress members expressed their disfavor for the settlement deal and, after being rebuked by the VA Administrator, placed an amendment within a conference report which stripped the Administrator of his ability to contract in settlement for amounts greater than one million dollars.<sup>100</sup> The Court found the amounts earmarked for individual items are not binding unless those items and their amounts are carried into the language of the appropriations bill itself.<sup>101</sup> The Court's discussion of appropriation earmarks is dicta though, for before the case was heard the Senators had placed restrictive language within the Statute, thus making the case moot.<sup>102</sup>

The D.C. Circuit Court in *International Union v. Donovan* agreed with the lack of force of non-statutory earmarks.<sup>103</sup> In an opinion written by current Supreme Court Justice Antonin Scalia, the Court upheld the Secretary of Labor's discretion to withhold funding to training programs not specifically mentioned in statutory text.<sup>104</sup> The Court cited the authority of the General Accounting Office and its consistent interpretation that lump-sum appropriations created no requirement that the agency use the money for one project over another.<sup>105</sup> Then-Judge Scalia went on to state: "[a] lump sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."<sup>106</sup> The Court also found that the only way Congress could mandate any type of spending is through the enactment of legislation.<sup>107</sup> The Court did concede that as a political matter the agency's relationship with Congress might demand that certain budget justifications be followed.<sup>108</sup> In refusing to overturn the decision, the Court found that it did not have jurisdiction to review the Secretary's allocation where the action is committed to agency discretion by law.<sup>109</sup> Agency action is committed to agency discretion where

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99. *Blackhawk Heating & Plumbing Co., Inc. v. United States*, 622 F.2d 539 (Ct. Cl. 1980).

100. *Id.* at 544.

101. *Id.* at 547.

102. *Id.* at 553.

103. *Int'l Union v. Donovan*, 746 F.2d 855 (D.C. Cir. 1984).

104. *Id.* at 861.

105. *Id.*

106. *Id.*

107. *Id.* at 860-861.

108. *Id.* at 862.

109. *Int'l Union*, 746 F.2d at 863 (quoting 5 U.S.C. § 701(a)(2) (1982)).

statutes are drawn in such broad terms that there is no law to apply.<sup>110</sup>

The Supreme Court holds a similar view as to the lack of any binding authority for conference report language.<sup>111</sup> In *Lincoln v. Vigil*, the Director of Indian Services cut a program for handicapped Indian children in the Southwest. Congress was aware of the program but never allocated funds directly for it.<sup>112</sup> The Court's opinion affirmed that the allocation of funds from a lump sum appropriation is such an action to be regarded as committed to agency discretion and therefore outside the scrutiny of judicial review.<sup>113</sup> Justice Souter went further, however, and discussed the discretion which agencies enjoy with regard to lump-sum appropriations:

[A] fundamental principle of appropriations law that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should, or are expected to be spent do not establish any legal requirements on' the agency.<sup>114</sup>

Further discussion revolved around the need for agency discretion at the very point of a lump-sum appropriation, in order to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.<sup>115</sup> Justice Souter does, however, recognize that ignoring congressional expectations may have grave political consequences.<sup>116</sup>

The Court in *Lincoln* liberally quoted a 1975 decision by the head of the General Accounting Office, the Comptroller General.<sup>117</sup> The Comptroller's decision clarified the distinction between the legally binding effect of conditions or restrictions Congress placed in the text of the statute and the nonbinding specifying of conditions or restrictions Congress placed in non-statutory language.<sup>118</sup> The decision also warned of the distinction between using legislative history to understand statutory language and "resorting to that history for writing into law that which is not there."<sup>119</sup> The Comptroller General decision also noticed the dangers of earmarks in general:

To establish as a matter of law specific restrictions covering the detailed and complete basis upon which appropriated funds are understood to be

110. *Id.* (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

111. *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993).

112. *Id.* at 183.

113. *Id.* (citing 5 U.S.C. § 701(a)(2)).

114. *Id.* at 192 (quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975)).

115. *Id.*

116. *Id.* at 193.

117. *LTV Aerospace Corp.*, 55 Comp. Gen. 307 (1975). In 2004 the General Accounting Office changed its name to the Government Accountability Office.

118. *Id.* at 325.

119. *Id.*

provided would, as a practical matter, severely limit the capability of agencies to accommodate changing conditions.<sup>120</sup>

A year later the Supreme Court entrenched its position regarding committee report language. In *Shannon v. United States* the Court focused on the fact that the requested action was based upon language which was not specifically anchored to language within the statute itself stating, “courts have no authority to enforce a principal gleaned solely from legislative history that has no statutory reference point.”<sup>121</sup> Recently, the Supreme Court again warned of the dangers inherent in reviewing congressional report language as binding. In *Exxon Mobil Corp. v. Allapattah Servs., Inc.* the Court cautioned:

[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.<sup>122</sup>

The preceding decisions involve plaintiffs who desired an agency to do something, and attempted to use conference reports as a basis to force that agency into action. The decisions confirm the language in a conference report does not carry the force of law; however, they give no indication of the possible ramifications that would result an agency treating said instructions as law.

The Ninth Circuit in *Northwest Environmental Defense Center v. Bonneville Power Administration* answers that very question.<sup>123</sup> The Bonneville Power Administration (“BPA”), a federal agency within the Department of Energy, sells power from power plants in the northwest.<sup>124</sup> One of the BPA’s obligations is to oversee and fund the Fish Passage Center (“FPC”), which was created to gather data and inform the public of fish passage problems along the Columbia River.<sup>125</sup> In response to language in two 2005 congressional committee reports, the BPA transferred the functions of the FPC to Battelle Pacific Northwest Laboratory and Pacific States Marine Fisheries Commission.<sup>126</sup>

The Northwest Environmental Defense Center sought relief under the Administrative Procedure Act. The APA states a court must set aside an agency’s action if the action was “arbitrary, capricious, an abuse of discretion,

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120. *Id.*

121. 512 U.S. 573, 583 (1994) (quoting *Int’l Brotherhood of Electrical Workers v. National Labor Relations Board*, 814 F.2d 697, 712 (D.C.Cir. 1987)).

122. 545 U.S. 546, 568 (2005).

123. 477 F.3d 668 (9th Cir. 2007).

124. *Id.* at 672.

125. *Id.*

126. *Id.*

or otherwise not in accordance with the law.”<sup>127</sup> The related conference committee report included the following language: “The Bonneville Power and Administration may make no new obligations in support of the Fish Passage Center . . . to ensure an orderly transfer of the Fish Passage Center functions . . . within 120 days of enactment of this legislation.”<sup>128</sup> However the statutory language of the 2006 Appropriations Act, to which the reports were attached, made no mention of the FPC.<sup>129</sup>

The court interpreted BPA Vice President Gregory Delwiche’s adherence to the committee report language to imply BPA treated the committee report language as placing a legal obligation on BPA to transfer the functions of the FPC.<sup>130</sup> Using Supreme Court precedents the court found such legal obligation contrary to existing law:

The case law of the Supreme Court and our court establishes that legislative history, un-tethered to text in an enacted statute, has no compulsive legal effect. It was thus contrary to law for BPA to conclude, from committee report language alone, that it was bound to transfer the functions of the FPC.<sup>131</sup>

The court also found constitutional grounds for finding BPA’s action contrary to law.<sup>132</sup> Article I, as interpreted by the court, demands that legally binding legislation be subject to bicameralism and presentment.<sup>133</sup> The court indicated altering the legal duties of agencies falls under the actions which require legally binding legislation.<sup>134</sup> Allowing Congress to create law through non-statutory language would make an “end run around” the Constitution.<sup>135</sup>

The court also found BPA’s adherence to non-statutory language violated the principle of separation of powers set forth in the Constitution because non-statutory text does not follow the constitutionally mandated safeguards of legislation.<sup>136</sup> Delwiche stated in court, “I did not think that, as an Executive Branch agency, accountable to Congress, BPA could ignore this unambiguous Congressional direction.”<sup>137</sup> The court found allowing an agency that acted subservient to Congress in accordance with the conference reports, “undermines the distribution of authority in our federal government in which every exercise of political power is checked and balanced.”<sup>138</sup>

*Bonneville Power*, as it stands, seems to create a cause of action where a

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127. 5 U.S.C. § 706(2)(A) (2006).

128. *Bonneville Power*, 477 F.3d at 681 (citing H.R.Rep. No. 109-275, at 174 (2004)).

129. *Id.* at 681.

130. *Id.* at 682.

131. *Id.*

132. *Id.* at 684.

133. *Id.* (interpreting U.S. Const. art. I §, 7).

134. *Bonneville Power*, 477 F.3d at 684 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

135. *Id.*

136. *Id.*

137. *Id.* at 682.

138. *Id.* at 685.

private party which has suffered harm through an agency's action in adherence to a non-statutory earmark may, under the APA, seek injunctive relief so long as it can prove the agency adhered to the non-statutory earmark as if it were law and without sufficient merit based study. The decisions by all levels of federal courts make it clear that earmarks outside the statutory text are not to be given the force of law unless they are directly tied to statutory language. The Ninth Circuit seems prepared to go further in overturning agency decisions based on non-statutory earmarks.

## VI. CONCLUSION

Whether earmarks have been part of the American legislative process since its inception, or are merely a phenomenon of the last generation, their ability to corrupt shows more clearly than any ability to cross party lines. Numerous members of both houses of Congress have been indicted for scandals involving the earmarking of funds in exchange for political contributions or favors.

It is unfortunate that Congress has not made stronger efforts to curb earmark abuse. However, it is encouraging that the ubiquitous use of non-statutory earmarks seems to be coming to a close. If future administrations adhere to Executive Order 13,457, agencies will continue to be forced to allocate money along a merit-based system. Also, if the *Bonneville Power* decision stands as good law, agencies will have a legal explanation against possible political backlash for their setting aside of non-statutory earmarks, and more importantly, citizens will have a cause of action to stop agencies from blindly adhering to non-statutory earmarks. With judicial support from any political backlash the executive agencies may be able to ignore non-statutory earmarks, restore competitive processes for the funding of federal projects, and ensure that they receive the most money those that are most worthy.