

Executive Summary Backgrounder

No. 1924
April 27, 2006



Published by The Heritage Foundation

A Primer on Lobbyists, Earmarks, and Congressional Reform

Ronald D. Utt, Ph.D.

Because of the regrettable actions of a few, Congress is now considering significant reforms that would curb the influence of lobbyists and discourage the use of wasteful earmarks. Among the Members of Congress with more notable lapses in fiscal responsibility that triggered the current quest for reform were Representative Don Young (R-AK), who showed a penchant for pork-barrel excess in the highway bill, and former Representative Randy Cunningham (R-CA), who has been convicted for accepting bribes in return for earmarks. Taken together, their actions helped to precipitate a national backlash against the growing influence of lobbyists on the federal budget.

This backlash has encouraged several Members of Congress to introduce legislation designed to discourage some of these practices. Of the 51 pieces of such legislation introduced by early April 2006, most would make only cosmetic changes in the earmarking process and would leave the lobbying community untouched.

Two notable exceptions are pieces of legislation introduced by Senator John McCain (R-AZ) that would require extensive reporting and transparency of the entire lobbying/earmark process and provide a remedy against some of the more wasteful earmarks included in appropriations bills. Enactment of these two bills, the Lobbying Transparency and Accounting Act of 2005 (S. 2128) and the Pork-Barrel Reduction Act (S. 2265), would deter some of the more outrageous lobbying and legislative practices related to earmarks.

Among their many provisions, these two bills would:

- Require lobbying firms, lobbyists, and their political action committees to disclose their campaign contributions to federal candidates and officeholders;
- Mandate both the disclosure of fundraisers hosted, co-hosted, or otherwise sponsored by these entities and the disclosure of contributions for other events involving legislative and executive branch officials;
- Allow Senators to oppose earmarks by raising a point of order, which, if sustained, would delete the earmark from the bill; and
- Require recipients of earmarked funding both to disclose the amount of money that they spent on registered lobbyists to obtain the earmark and to identify the lobbyists.

What Congress Should Do. While these bills are by far the best of the many bills introduced to date and could improve the integrity of the legislative process, they could be made tougher by including several additional provisions:

This paper, in its entirety, can be found at:
www.heritage.org/research/budget/bg1924.cfm

Produced by the Thomas A. Roe Institute
for Economic Policy Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
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- **Disclosure of family relationships.** With so many close family (and family-like) connections between registered lobbyists and Members of Congress and their staffs, the Pork-Barrel Reduction Act should also require registered lobbyists to disclose blood and marital relationships (including in-laws) with Members of Congress, senior congressional staff, and senior executive branch officials.
- **Disclosure of campaign contributions.** The Lobbying Transparency and Accounting Act should also require both the disclosure of any campaign contributions from the client or the client's staff to a Member of Congress and the disclosure of any contributions paid by a client or lobbyist to a Member's charitable affiliate. Combined with the other provisions in S. 2128, these changes would make it somewhat easier to connect earmarks to campaign contributions.
- **A reasonably precise definition of an earmark.** Any successful effort to limit Members' propensity to earmark spending and other federal privileges requires a reasonably precise definition of what is and what is not an earmark. A good definition would also help to

prevent the congressional abuses that transfer valuable public resources to other interests for reasons based solely on influence and privilege. Of the bills introduced so far, the Transparency and Accountability Act of 2006 (S. 2349), sponsored by Senator Trent Lott (R-MS), offers the most detailed definition of an earmark. Section 3 defines it as covering "budget authority, contract authority, loan authority, and other expenditures, and tax expenditures or other revenue items."

Conclusion. These bills would have their biggest impact in deterring some of the corrupt and wasteful practices that appear to be associated with a number of earmarks. By requiring extensive reporting and transparency and by making the link between earmarks and campaign contributions more obvious, they would enhance the integrity of the legislative process. While these provisions are not likely to slow the growth of earmarks, they should make the process more honest.

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Two seemingly unrelated events in 2005 promise to contribute to some of the most significant changes in federal budget practices since the enactment of the Budget Control and Impoundment Act in 1973.

First, the enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA-LU)¹ in late July revealed that there was a limit to the congressional waste that the American public was prepared to tolerate. With its more than 6,300 pork-barrel earmarks, the federal highway program and Representative Don Young's (R-AK) \$220 million for the infamous "bridge to nowhere" became objects of national ridicule. As the public demanded a remedy, many fiscally conservative Members intensified their efforts to curtail the embedded fiscal irresponsibility that has made pork-barrel spending increasingly commonplace.

Second, the indictment of former Representative Randy Cunningham (R-CA) for selling earmarks to defense contractors and the revelations of Jack Abramoff's unethical lobbying practices have added the taint of corruption to the earmarking process, which had once seemed merely irresponsible.

Egged on by the national media, the public responded with a degree of disgust that initially forced worried Members of Congress to take a number of steps to appear responsive to the public's concern. Among these early steps was a dramatic request from Senator Ted Stevens (R-AK) that the Senate delete funding for the two controversial

Talking Points

- Growing evidence that links earmarks to bribes from lobbyists and their clients has encouraged Congress to enact reforms.
- Many of the reform proposals would make only cosmetic changes and leave the worst of the problems in place.
- Much more transparency is needed, and stiffer reporting requirements should be imposed on lobbyists, their clients, and the Members of Congress and congressional staff that they contact.
- Even with meaningful reform, the number of earmarks will continue to increase, but the process will likely be more honest.
- The press deserves much of the credit for exposing the problems and instigating the formal criminal investigations that have revealed the shady nature of the earmarking process. If not for a free and inquisitive press, the comprehensive reform process now underway would never have happened.

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bridges in Alaska, though the governor decided to restore spending for them a month later.²

Despite the Senate's empty gesture, the public's concern was not satisfied. As evidence of more improprieties emerged, demands for a fundamental reform continued to escalate. In response, many in Congress have sought ways to clean up the process. As of mid-April 2006, 51 bills had been introduced in the House and Senate to regulate the relationship between Congress and its earmarks and lobbyists. President George W. Bush took the unprecedented step of addressing the issue in his State of the Union address:

I am pleased that Members of Congress are working on earmark reform—because the federal budget has too many special-interest projects. And we can tackle this problem together, if you pass the line item veto.³

Yet despite the broad public concern, presidential interest, and the introduction of dozens of legislative remedies, most in Congress remain skeptical about the need for any change in behavior. In a radio interview, Senate Minority Leader Harry Reid (D–NV) said, “There’s nothing basically wrong with the earmarks. They’ve been going on since we were a country.”⁴ In response to the President’s expression of concern, Senator Stevens retorted that “What needs fixing is to have the public understand what we do when we earmark bills.”⁵ During his recent primary challenge, Representative Tom DeLay (R–TX) emphasized “that he can bring home pork. His handouts claimed more than \$1 billion in federal dollars to Houston-area transportation projects, the port,

NASA, universities and law enforcement.” Of the transportation earmarks, Delay said, “Quite frankly...[we’re] using earmarks to force dollars into this region.”⁶

With their lucrative client contracts now at risk, the vast lobbying community is providing congressional skeptics and opponents of reform with vocal support and will certainly use its considerable skills, contacts, and resources to thwart any meaningful reform that would undermine its prosperity. John Engler, head of the National Association of Manufacturers and former Michigan governor, testified in a Senate hearing that “Additional rules and laws weren’t needed.” At the same hearing, Paul Miller, president of the American League of Lobbyists, echoed a theme that will be at the core of the anti-reform defense effort in the coming months: “[T]his is not a widespread scandal.... Our government is not corrupt, lobbyists are not bribing people, and members of Congress are not being bought for campaign contributions.... I don’t think we can say with certainty that the current system is broken.”⁷

Put on the defensive, many Members of Congress and the lobbyists have responded to the criticism with justifications for their actions and activities. Some have promised to consider changes and reforms, but not everyone has. The leadership and staff of the House Appropriations Committee went on the offensive in February 2006 by compiling a list of earmark requests submitted to the committee by Members who have co-sponsored the earmark control legislation introduced by Representative Jeff Flake (R–AZ). In turn, the committee staff leaked the list of 717 earmarks and who

1. Public Law 109–59.

2. See Ronald D. Utt, Ph.D., “Bait-and-Switch on Alaska Bridges Undermine Congress’s Credibility—Again,” Heritage Foundation *WebMemo* No. 951, December 22, 2005, at www.heritage.org/Research/Budget/wm951.cfm.

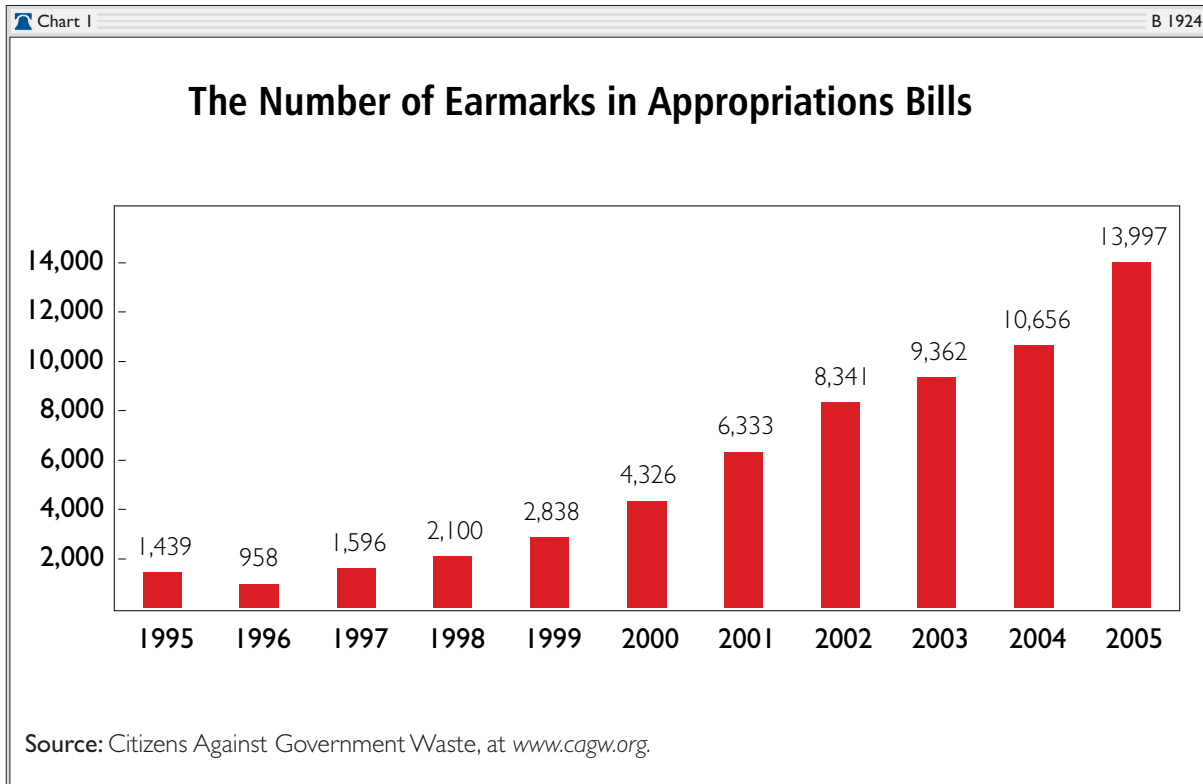
3. George W. Bush, “The State of the Union,” January 31, 2006, at www.whitehouse.gov/stateoftheunion/2006/index.html (March 26, 2006).

4. Robert Novak, “Looking to Fry Pork,” *The Washington Post*, January 30, 2006, p. A17.

5. Liz Ruskin, “Stevens: Earmarks Don’t Need Reforming,” *Anchorage Daily News*, February 2, 2006, p. B1.

6. Cox News Service, “Unrepentant DeLay Stresses Pork,” February 27, 2006.

7. Dana Milbank, “For Would-Be Lobbying Reformers, Money Habit Is Hard to Kick,” *The Washington Post*, January 26, 2006, p. A6, at www.washingtonpost.com/wp-dyn/content/article/2006/01/25/AR2006012502232.html (March 20, 2006).



requested them to select journalists in an effort to embarrass the bill's supporters.⁸

Earmark Corruption: Widespread or an Aberration?

As Congress and the lobbying community scramble to defend themselves against charges of questionable practices and illegal influence peddling, many note—quite correctly—that the vast majority of Members and lobbyists are scrupulously honest, abide by all the rules, and are doing nothing more than exercising their constitutional right to petition government on behalf of themselves or their clients. Nonetheless, a growing body of evidence suggests that illegal and questionable lobbying practices are not uncommon and that

incidents such as those involving Mr. Abramoff have likely been repeated in similar transactions between other lobbyists and Members.

A recent Congressional Research Service (CRS) analysis indicates the scope of such activities. The analysis found that the number of earmarks authorized by Congress in appropriations bills alone increased from 4,155 in 1994 to 15,887 in 2005—an increase of 282 percent.⁹ Using a slightly different methodology, Citizens Against Government Waste (CAGW) concluded that there were 1,439 earmarks in 1995, which grew to 13,997 in 2005, for an increase of 872 percent.¹⁰ By both the CRS and CAGW counts, earmarks in fiscal year (FY) 2006 fell by about 3,000, in large part as a result of the refusal of Senator Arlen

8. David Espo, "New House Leader Seeks to Rebuild Unity," CBS News, February 10, 2006, at www.cbsnews.com/stories/2006/02/10/ap/politics/mainD8FM6FTG0.shtml (March 20, 2006).

9. Press release, "McCain Statement on Earmark Reform Before Senate Rules Committee," Office of Senator John McCain, February 8, 2006, at mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=1656 (March 20, 2006).

10. Brian M. Riedl, "Federal Spending: By the Numbers," Heritage Foundation *WebMemo* No. 989, February 6, 2006, at www.heritage.org/Research/Budget/wm989.cfm.

Specter (R-PA) to allow any in the Labor-Health and Human Services bill.

Earmarking in federal highway reauthorization bills shows an even more dramatic longer-term trend. Notwithstanding Senator Reid's contention that "They've been going on since we were a country," the data in Table 1 and the data provided by the CRS and CAGW demonstrate that today's volume of earmarking is a relatively recent phenomenon.

In large part, this escalation in the number of earmarks reflects the growing number of lobbyists offering to obtain them for a fee. As the number of earmarks increases with each passing year, the business attracts more lobbyists who apply more pressure on Congress to spend more on pork-barrel spending.

For example, the annual appropriations bill for the civilian programs of the Army Corps of Engineers typically is the most earmarked bill produced by Congress. The Corps' \$5.3 billion annual budget for FY 2006 spawned a lucrative practice among lobbyists seeking a piece of the action for their paying clients. Among them is Marlowe & Co., which specializes in representing seaside resort communities seeking money from the Corps for "beach nourishment" projects. With the Corps' budget limited by annual appropriations, beach projects that promote tourism and enhance the value of vacation homes come at the expense of investment in flood control, including improved levees.

In a 2004 interview, firm owner Howard Marlowe bragged: "We know beaches." The article went on to note that the company earned more than \$700,000 in 2003 and estimated that it had won more than \$100 million in beach projects since entering the business.¹¹ Even more revealing is the Marlowe & Co. Web site, which provides prospective clients with its success stories. In its beach

Year of Bill	Earmarks
1982	10
1987	152
1991	538
1998	1,850
2005	6,371 *

nourishment practice, the firm lists 172 beach earmarks that it claims to have earned for its clients over the past several years.¹² Assuming that Mr. Marlowe is providing an accurate description of his company's successes, taxpayers deserve an explanation of how a for-profit firm is allowed to participate so intimately in the congressional budgeting and appropriations process.

Turning Pennies into Dollars. As the number of earmarks has escalated, there has been a similar increase in the number of lobbyists registered with the House and Senate, indicating their intentions to pursue clients' interests with the Appropriations Committees. According to a Knight-Ridder article on lobbying, 1,865 lobbyists were registered with Congress in 2000 to pursue appropriations issues,

11. Jim Snyder, "Marlowe & Co.: 'We Know Beaches' Howard Marlowe Is K Street's Man on the Waterfront," *The Hill*, July 6, 2004, at www.hillnews.com/business/070604_profile.aspx (March 20, 2006).

12. For the list, see Marlowe & Company, "Summary of the Federal Coastal Accomplishments of Marlowe & Company," revised June 2005, at [www.marloweco.com/files/MCo_coastal_accomplishments_\(2\).pdf](http://www.marloweco.com/files/MCo_coastal_accomplishments_(2).pdf) (March 20, 2006). Alternatively, the lobby reports posted on the Secretary of the Senate's Web site list the contracts registered for such purposes and include the City of Solana Beach, California, which paid the firm \$20,000 for "Beach restoration funding," and the "American Shore and Beach Preservation Association," which paid less than \$10,000 for similar services in general, including advocacy before the U.S. Office and Management and Budget "to ensure that shore protection is not a low budget priority."

but by 2004, the number is estimated to have increased to 3,523 lobbyists, an increase of 89 percent in four years.¹³ Even if Mr. Abramoff's activities were an aberration or a "not widespread" practice, 3,522 other lobbyists would still be registered to pursue earmarks for paying clients.

Adding to the pressure for earmark growth is lobbyists' increasingly common practice of aggressively marketing their services with unsolicited offers to prospective earmark buyers. This side of the business was exposed more than a year ago when officials in Culpeper County, Virginia, received an unsolicited offer of assistance to obtain a congressional earmark from Alcalde & Fay, a Washington-area lobbying firm. According to the public discussion of the offer at a subsequent meeting of the county's board of supervisors, a representative of the firm approached a county official with the offer to obtain an earmark of \$3.5 million to construct a community sports complex in the county.

Although the county had planned to finance the complex with the proceeds of a county bond offering that the voters had already approved, the representative "expressed optimism that funds for the \$3.5 million sports complex could be tied to one or more federal appropriation bills."¹⁴ "The cost of hiring Alcalde and Fay would be \$5,000 per month, with an 18-month recommended contract."¹⁵ For a total fee of \$90,000 in return for a prospective federal grant of \$3.5 million, the lobbying firm was proposing to sell the county federal taxpayer money for just 2.6 cents on the dollar—something that was not really the firm's to sell. That the lobbyist believed he

could deliver on the transaction indicates that something is terribly wrong in today's Congress.

Members of Congress making pork-barrel spending promises to their constituents and delivering on them is one thing, but the buying and selling of earmarks by private speculators as if they were bushels of wheat on the open market is quite another.¹⁶ Apparently, all this wheeling and dealing is taking place without any involvement (at least not yet) by a Member of Congress. Since Article I, Section 9, Clause 7 of the Constitution reserves the power of appropriating money from the U.S. Treasury exclusively to Congress, how is it that these lobbyists have come by the same privilege, and who has allowed it to happen?

Representatives of Alcalde & Fay and Marlowe & Co. are just a few of the many registered lobbyists who attempt to provide clients with taxpayer-funded earmarks and other legislative favors in exchange for costly retainers. Exactly how these many firms make good on their client commitments remains something of a trade secret that neither the lobbyists nor the Members and staff of the Appropriations Committee are eager to reveal.

Nonetheless, those firms with a successful track record are not shy about reporting it. In a recent interview, David Carmen, president of the Carmen Group, a mid-size lobbying firm in Washington, D.C., revealed:

In 2004, the latest year available... [Carmen Group] collected \$11 million in fees and delivered \$1.2 billion in benefits—a ratio of less than 1 to 100. The payoff is large but fairly typical of modern-day lobbying.¹⁷

13. James Kuhnhenh, "Corruption Probes, Pork Projects on the Rise," *The Free Lance Star* (Fredericksburg, Virginia), December 4, 2005, p. A1.

14. Donnie Johnson, "Culpeper May Hire Sports-Complex Lobbyist," *The Free Lance Star*, November 4, 2004, at www.fredericksburg.com/News/FLS/2004/112004/11042004/1560642 (March 20, 2006). Before this incident, the county had planned to finance the complex with the proceeds of a county bond offering that the voters had already approved. The county has since chosen not to hire the firm or to seek the earmark.

15. Jeffrey H. Birnbaum, "Clients' Rewards Keep K Street Lobbyists Thriving," *The Washington Post*, February 14, 2006, p. A1, at www.washingtonpost.com/wp-dyn/content/article/2006/02/13/AR2006021302239_pf.html (April 4, 2006).

16. Of course, Alcalde & Fay is not the only firm engaged in the misdirection of federal resources through the pay-to-play process. The market for earmarks in appropriation bills has been growing rapidly and, given its abundant profitable opportunities, will likely continue its robust growth. See Ronald D. Utt, Ph.D., and Christopher B. Summers, "Can Congress Be Embarrassed into Ending Wasteful Pork-Barrel Spending?" Heritage Foundation *Backgrounder* No. 1527, March 15, 2002, at www.heritage.org/Research/Budget/BG1527.cfm.

Carmen's fee/reward ratio compares favorably to Alcalde & Fay's proposal to Culpeper County, which was more than double Carmen's implied rate. It also compares favorably to former Representative Cunningham's price list, in which earmarks of up to \$20 million were for sale for a nickel on the dollar. Perhaps reflecting volume discounts, his price for larger earmarks fell to half this rate.¹⁸

In defense of the lobbying practice, some contend that the lobbyists earn their fees because they are more adept at making an effective pitch to Members and staff on the importance of a project. Yet if that was all there was to it, why could the Culpeper County officials not simply visit with their Congressman when he or she was back in the district and make the request themselves? While many earmarks may in fact result from routine meetings between Members and constituents, the fact that so many petitioner/constituents pay tens of thousands of dollars for an alternative channel to the U.S. Treasury offers disturbing insight into the appropriations process and the extent to which parts of it have been outsourced to the K Street lobbyists in return for campaign contributions and other sorts of rewards and favors.

Delivering the Earmark. Who the lobbyists are and whom they represent is known from their congressional registrations, and the evidence of their success appears annually in the appropriations and varied authorization bills. However, little is known about the process by which the lobbyists secure these rewards from Congress for their paying clients. Recent investigations by some in Congress and in the U.S. Department of Justice are beginning to shed some light on the process.

One such instance was exposed by Senator McCain, who released copies of a September 2001

e-mail exchange between Jack Abramoff (JA) and his colleague Tony Rudy (TR) at a hearing before the Senate Committee on Indian Affairs in mid 2005. The afternoon exchange between the two lobbyists was in an e-mail entitled "Is This Viable?":

TR to JA: There are a few senate staffers I would like to help reward. Would the choctaws or couchetta donate like 10k to pay for a trip? Tony Rudy

JA to TR: A trip where?

TR to JA: There is a hunting and fishing resort 3 hours south of texas that smith's¹⁹ people expressed an interest in. Tony Rudy

JA to TR: I don't see how we can sell them on funding that.

TR to JA: Thank you trip for the approps we got. Tony Rudy²⁰

The bribery investigation into former Representative Cunningham has revealed additional information on how earmarks are placed into legislation. At the hearing held to accept a guilty plea from Mitchell Wade of MZM Inc.—the defense contractor accused of bribing Cunningham—Wade also pleaded guilty to making nearly \$80,000 in illegal campaign contributions to "Representatives A and B" in return for earmarks that would benefit MZM operations in their districts. According to news reports, Representative A succeeded in placing the earmark in a bill, while Representative B "made such a request for funding, but it was not granted."²¹

Given how little access the public and media have to the detailed process of lobbying and the rewards that are privately offered and received in response to legislative favors, there is no way of

17. Birnbaum, "Clients' Rewards Keep K Street Lobbyists Thriving." Emphasis in original.

18. Charles R. Babcock and Walter Pincus, "Bribery a la Carte," *The Washington Post*, February 26, 2006, p. B3.

19. There were two Senator Smiths in the U.S. Senate in September 2001, and there is no evidence to indicate that the proposed trip took place.

20. Jack Abramoff, "RE: Is This Viable?" e-mail to Tony Rudy, September 21, 2001, in hearings, *Oversight Hearing on In Re Tribal Lobbying Matters, et al.*, Committee on Indian Affairs, U.S. Senate, 109th Cong., 1st Sess., June 22, 2005, exhibits, part 1, pp. 71–72, at indian.senate.gov/exhibitspart1.pdf (April 4, 2006).

21. Charles R. Babcock, "Contractor Pleads Guilty to Corruption," *The Washington Post*, February 25, 2006, p. A1, at www.washingtonpost.com/wp-dyn/content/article/2006/02/24/AR2006022401737.html (March 20, 2006).

knowing how typical such reward arrangements are among Members and staff.

Recommendation #1: The House Committee on Standards of Official Conduct and the Senate Select Committee on Ethics should invite a cross section of registered lobbyists and current and former congressional staff to testify on all facets of the lobbyist/earmark process.

Some in Congress Propose Reforms

In response to the many revelations of misbehavior by Members of Congress, congressional staff, and registered lobbyists, the House and Senate leadership have promised to develop a package of reform proposals that would more closely regulate the conduct and contact between Congress and the lobbyists. On March 29, 2006, the Senate passed an amended version of the Transparency and Accountability Act of 2006 (S. 2349), sponsored by Senator Trent Lott (R-MS), which would ban gifts from lobbyists, require more extensive reporting by both Members and lobbyists, allow for points of order against earmarks that originate in conference, and provide a comprehensive definition of earmarks. The House has yet to produce a comprehensive bill, but an effort to do so is underway in the committees of jurisdiction.

For the most part, the delays in developing a comprehensive legislative response reflect strong disagreements among Members on key provisions and the extent to which they are willing to limit their discretion. While the leadership debated the proper course of action, many Members introduced their own proposals as pending legislation.

Lobbying Reform. Of the 51 bills introduced on earmarks/lobbying reform through early April 2006, the most notable is the Lobbying Transparency and Accountability Act of 2005 (S. 2128), introduced by Senator McCain. Among its many provisions, the bill would:

- Require lobbying firms, lobbyists, and their political action committees to disclose their campaign contributions to federal candidates and officeholders, their political action committees, and political party committees;

- Mandate both the disclosure of fundraisers hosted, co-hosted, or otherwise sponsored by these entities and the disclosure of contributions for other events involving legislative or executive branch officials;
- Require registrants to list as clients those entities that contribute \$10,000 or more to a coalition or an association;
- Lengthen the period during which senior members of the executive branch, Members of Congress, and senior congressional staff are restricted from lobbying;
- Require registrants under the Lobbying Disclosure Act to report gifts worth \$20 or more; and
- Require Members of Congress and congressional staff to pay the fair market value for travel on private planes and the cost of the highest-priced ticket in the arena for sports and entertainment tickets in skyboxes.

Introduced in mid-December 2005, Senator McCain's bill had only seven cosponsors as of early April 2006. The companion bill in the House (H.R. 4667) fared worse, gaining no cosponsors out of the 434 Representatives.

The absence of congressional support is especially disturbing given that the bill would mostly just require greater disclosure of certain activities and contributions and require Members to pay their own way (at full market value) on private planes and at entertainment events. The bill's only new limitation would be extending the prohibition on lobbying former colleagues from 12 months to 24 months after the official leaves government. Several of the provisions of Senator McCain's bill have been incorporated into the final version of S. 2349, but overall, the bill is not as tough as S. 2128.

Earmark Reform. Senator McCain has also introduced two other lobbying reform bills: The Obligation of Funds Transparency Act of 2005 (S. 1495)²² is intended to establish better control over the growth of congressional earmarks. The Pork-Barrel Reduction Act (S. 2265), which was introduced several weeks later, should be viewed as a

22. The House version is H.R. 1642, introduced by Representative Flake.

much-improved version of S. 1495. It would attempt to limit the incidence of earmarks by:

- Allowing Senators to oppose an earmark by raising a point of order, which requires 60 votes to overrule under Senate rules. If the point of order is sustained, the earmark would be dropped from the bill or its report.
- Requiring that conference reports be filed and available publicly for at least 48 hours before consideration on the Senate floor.
- Requiring the disclosure of earmarks, including the identity of the lawmaker seeking the earmark and a description of the earmark's "essential government purpose."
- Requiring recipients of earmark funding both to disclose the amount of money that they spent on registered lobbyists to obtain the earmark and to identify the lobbyists.
- Prohibiting federal agencies from spending money on items and earmarks that are included only in conference reports.
- Strengthening Senate rules against the inclusion in conference reports of matters not considered by either the House or the Senate.

With only nine cosponsors as of early April 2006, the provisions of the Pork-Barrel Reduction Act were more than most Senators were willing to accept. Nonetheless, the House should revisit many of these proposals as it develops its own package of reforms.

One weakness in S. 2265 is that it would apply only to earmarks in appropriations bills, not those in authorization bills. While appropriations bills have been the chief legislative vehicles for earmarks, authorization bills have also been used, and several have been loaded with costly earmarks. The most notorious pork-laden authorization bill is SAFETEA-LU, the recent highway bill. Signed into law in 2005, it contained more than 6,300 earmarks, compared to the 13,997 to 15,877 earmarks included in the 12 appropriations bills in 2005. If the Pork-Barrel Reduction Act were passed as is, Congress would likely shift more and more earmarks to authorization bills to preserve the earmarks and keep their origins and associated financial rewards confidential.

Although the Pork-Barrel Reduction Act has attracted more cosponsors than many of the other reform measures, the number was well short of the votes needed to pass it, especially since many Senators view the pursuit of earmarks as an essential and legitimate part of their duties. As a result, there is a profound lack of enthusiasm for any type of earmark reform but lots of interest in figuring out how to get even more. Indeed, in October 2005, 82 Senators voted for spending more than \$220 million on the infamous bridge to nowhere in a well-publicized, stand-alone vote after the project had become an object of national ridicule.

In response to the Pork-Barrel Reduction Act, the Senate Rules Committee produced the Transparency and Accountability Act of 2006 (S. 2349), which is more modest in scope, provides for less transparency, and includes fewer requirements and prohibitions. S. 2349 allows for points of order on a relatively small fraction of legislative earmarks, bans all gifts except for meals (which must be reported within 15 days), imposes limits on travel, and prohibits Senators from having "official" contact with a spouse or an immediate family member who is a registered lobbyist. While a weaker bill overall, it has some good points, notably a more robust definition of an earmark and limits on contact with family members acting as lobbyists. After extensive debate and numerous amendments, the Senate passed S. 2349 in late March 2006 by a wide margin.

Perhaps recognizing that their colleagues will not support any meaningful lobbying and earmark reform, Senators McCain and Tom Coburn (R-OK) have also announced that they intend to use what authority they have under existing Senate procedures to challenge each pork-barrel project. In a press release on January 26, 2006, the Senators announced: "We are committed to doing all we can to halt this egregious earmarking practice and plan to challenge future legislative earmarks that come to the Senate floor."²³

Pressure to Move Forward with Reforms

For much of 2005, many in Congress responded to the public's escalating concern over lobbyists, earmarks, and corrupt practices with the attitude

that these were one-day stories and individual aberrations that will soon be forgotten. Beyond some perfunctory sense of regret and an acknowledgement that they can probably do a little bit better, some Members and staff believe that nothing much needs to change and that the only priority that matters is the swift return to business as usual.²⁴ Campaign fundraisers with lobbyists remain on the schedule, including golf outings to Florida.

A week after the President urged earmark restraint in his State of the Union address, a staff member of the Senate Committee on Appropriations sent an e-mail notifying all Senate Republican offices that they had until April 5, 2006, to submit their earmark requests for the FY 2007 Labor and Health and Human Services bill. The staffer urged them to be “realistic,” noting that “You should not have 50 project priorities. Remember, these lists will be held confidential by the committee.”²⁵

Thanks to an enterprising media and Justice Department prosecutors, this state of blissful avoidance may not last much longer. Former Representative Cunningham and Jack Abramoff and his associates have all agreed to cooperate with prosecutors, and revelations to date suggest that many more will be implicated and that new mechanisms and channels for illicit influence peddling will be uncovered.

Added to this will be the evidence uncovered by the many more investigations now being conducted by the media. After all, a *San Diego Tribune* reporter was the one who asked why the new owner of Cunningham’s former home—a defense contractor benefiting from congressional earmarks—was selling it six months later for about half of the purchase price and why Cunningham was living rent-free on a yacht owned by the same contractor. This successful investigation has led to

dozens more, and several more Members of Congress have recently been linked to questionable legislative initiatives that closely coincide with campaign contributions and lobbyist influence.²⁶

Essential Provisions of Lobbying and Earmark Reform

With the prospect of ongoing revelations of corruption and influence peddling, Congress will be forced to address fundamental lobbying and earmark reform. The bills introduced by Senator McCain offer an excellent place to start, but these proposals should be strengthened.

Letting the Sun Shine: The Need for Greater Disclosure. Key to any meaningful reform is much greater transparency in the lobbying process. As former Supreme Court Justice Louis Brandeis observed, “Sunshine is the best disinfectant.”

Several of the bills designed to diminish the corrupt aspects of the process would require more reporting on lobbyist contributions to Members of Congress and other government officials, but while this would lead to important improvements, most of the proposals stop well short of the degree of disclosure necessary to clean up existing problems. For example, S. 2128 does not require any additional reporting by Members of Congress or congressional staff, nor does it require lobbyists to report anything more than contacts at which something of value transpires. It does not extend the reporting requirement to lobbyist’s clients, who are often the ones providing the campaign contributions and the other types of rewards and favors (although S. 2265 does cover clients).

The exemption of lobbyists’ clients is of particular importance because even though registered lobbyists are relatively modest contributors to candidates, evidence from several investigations of improprieties indicates that financial transactions

23. See press release, “Coburn and McCain Put Colleagues on Notice; Each Pork Project to Be Challenged on Floor,” Office of Senator Tom Coburn, January 26, 2006, at coburn.senate.gov/index.cfm?FuseAction=News.PressReleases&id=194 (March 20, 2006).

24. For example, see Representative Mike Simpson (R-ID), undated “Dear Colleague” letter, “The Other Side of Earmarking,” at www.townhall.com/docs/blogs/EarmarkingSimpson.pdf (April 4, 2006).

25. E-mail made available to author by Senate staff.

26. Babcock, “Contractor Pleads Guilty to Corruption.”

between Members of Congress and the clients of lobbyists are significantly more substantial. Indicative of the confusion stemming from the lack of transparency are the hairsplitting allegations between the two political parties about whether campaign contributions and other financial favors from Jack Abramoff's clients, as opposed to Abramoff himself, reflect an attempt by Abramoff and his associates to influence a Member's vote.²⁷

Similarly, officers of a company seeking legislation to require the Transportation Security Administration to buy its products contributed a total of \$122,000 to a well-placed Member's political action committee (PAC).²⁸ While some of these questionable contributions came from organized fundraising events and thus would have to be reported under the provisions of S. 2128, conducting these same financial transactions outside the scope of an organized or reportable event would be relatively easy, thus escaping the reporting requirement. Such a loophole would not exist if clients of lobbyists were also required to report campaign contributions regardless of the mechanism used to move money from one person to another.

New reform legislation should also require full disclosure by lobbyists of blood, marital, and other formal relationships between them and Members of Congress, senior congressional staff, and executive branch officials. At present, some restrictions apply to husbands and wives, but none address relationships between parents, siblings, or lobbyists serving as officers on a Member's campaign finance organization or political action committee.

As the lobbying industry has grown in size and profitability and as the appearance of ethical propriety becomes less important in today's Washington, more and more wives and husbands, sons and daughters, and in-laws of Members of Congress and staff have become registered lobbyists. Moreover, as the traditional family structure gives way to alternative relationships among consenting adults, many of these otherwise close and intimate relationships are not subject to the same limits that would apply to a legally married husband and wife.²⁹

In 2003, a lengthy investigative report in the *Los Angeles Times* revealed an extensive network of lawmakers' sons who were registered lobbyists and were serving clients whose business and financial interests involved issues that came before their parents' congressional committees. Part 1 of the article named at least 17 Senators and 11 Representatives with family members who lobbied or worked as consultants on government relations. The article also quotes an attorney who worked as a consultant on government ethics for one of the political parties and who believed that at least 70 relatives of lawmakers lobbied at the federal or state level.³⁰

Part 2 focused on the relationship between one Senator and his four sons and his son-in-law, each of whom was then employed by one of two law firms with extensive lobbying practices targeted at state and federal officials.³¹ Following publication of this information, the Senator announced that his son and son-in-law (the only two of the five who were registered as federal lobbyists at the time) would not be allowed to visit his office on behalf of clients. Later that year, the son gave up his position as a Washing-

27. Derek Willis and Laura Stanton, Graphic, *The Washington Post*, December 12, 2005, at www.washingtonpost.com/wp-dyn/content/graphic/2005/12/12/GR2005121200286.html (April 4, 2006), and Deborah Howell, "The Firestorm Over My Column," *The Washington Post*, January 22, 2006, p. B9, at www.washingtonpost.com/wp-dyn/content/article/2006/01/21/AR2006012100907.html (March 20, 2006).

28. Scott Higham and Robert O'Harrow, Jr., "The Quest for Hometown Security," *The Washington Post*, December 25, 2005, p. A19, at www.washingtonpost.com/wp-dyn/content/article/2005/12/24/AR2005122400990.html (March 21, 2006), and Robert O'Harrow, Jr., and Scott Higham, "Post-9/11 Rush Mixed Politics with Security," *The Washington Post*, December 25, 2005, p. A1, at www.washingtonpost.com/wp-dyn/content/article/2005/12/24/AR2005122400372.html (March 21, 2006).

29. For example, see Eric Fetterman, "Love and Work: NJ's New Rule," *The New York Post*, December 14, 2005, p. 39.

30. Chuck Neubauer, Judy Pasternak, and Richard T. Cooper, "The Senator's Sons—A Washington Bouquet: Hire a Lawmaker's Kid," *The Los Angeles Times*, June 22, 2003, p. 1.

31. Chuck Neubauer and Richard T. Cooper, "The Senator's Sons," *The Los Angeles Times*, June 23, 2003, p. 1.

ton-based federal lobbyist and returned to Nevada to work for a developer.³²

While expressions of concern over potential conflicts of interest between Members of Congress and their family members and relatives who are registered as lobbyists have become more common in recent years, similar problems are emerging over such conflicts between congressional staff and their family members who lobby. In mid-February 2006, a Senator acknowledged allegations that clients of a lobbyist married to a member of his staff had received 13 earmarks totaling \$48.7 million. To the Senator's credit, he has asked the Ethics Committee to look into the allegations.³³

Recommendation #2: Lobbyist reporting requirements should be extended to blood and marital connections with Members of Congress and senior congressional staff.

The Pork-Barrel Reduction Act could be made more effective if the provision requiring publication of the client and the fee paid to lobbyists also included blood and marital relationships with Members of Congress, senior staff, and senior executive branch officials. The Lobbying Transparency and Accountability Act should also require the lobbyist's client and the client's staff to report any campaign contributions or contributions to a Member's charitable affiliate related to the pursuit of an earmark.

Developing a Workable Definition of an Earmark

One potential deficiency in most of the reform proposals before Congress is the absence of a clear definition of what constitutes an earmark. Without such a definition, many existing legislative abuses on behalf of lobbyists, their clients, and influential constituencies could escape scrutiny and control, and future Congresses could circumvent the new controls by devising earmark-like acts that fall outside the implied definition of an earmark.³⁴

To avoid these potential pitfalls, legislative reform proposals should include an expansive definition of earmarks that covers all existing practices used to provide some tangible benefit to some narrow constituency. That definition should also attempt to anticipate attempts by future Congresses to avoid the new controls.

As the following examples suggest, Congress is increasingly using the legislative process to provide other kinds of financial rewards—in addition to earmarks for location-specific projects—to influential constituents in their states and districts.

Earmarks for Location-Specific Projects. Although not formally expressed, the earmark reform proposals focus primarily on the type of earmark generally found in annual appropriation bills and in highway reauthorization bills, which are enacted once every six years. For the most part, these earmarks appear in neat lists that enumerate exact sums of money to be provided to tangible projects in specific locations. The infamous “bridge to nowhere” was one of the 6,371 location-specific earmarks in SAFETEA-LU, along with the High Knob Horse Trail in Virginia, the National Packard Museum in Ohio, the American Tobacco Trail in North Carolina, and the Sapelo Island Visitor Center in Georgia.

As this type of earmark has become more common, the practice has been extended to all federal programs. Project-specific earmarks are included in bills to fund the Federal Aviation Administration's Airport Improvement Program, the Federal Transit Administration's New Starts Program, the Community Development Block Grant Program at the Department of Housing and Urban Development, and virtually all spending by the civilian component of the U.S. Army Corps of Engineers.

Individually Tailored Earmarks. While tangible, location-specific projects are the most common type of earmark, Members of Congress are increasingly using the legislative process to provide

32. Associated Press, “Latest News in Brief from Southern Nevada,” *The Reno Gazette-Journal*, December 14, 2003.

33. Matt Kelley, “Senate Aide's Spouse Gets a Windfall,” *USA Today*, February 16, 2006, at www.usatoday.com/news/washington/2006-02-15-specter-earmarks_x.htm (March 21, 2006).

34. For example, see Representative Jim Kolbe (R-AZ), “Dear Colleague” letter, “How Do You Define an Earmark,” March 8, 2006.

other kinds of individually tailored financial rewards to influential constituents in their states and districts. A close reading of SAFETEA-LU reveals many more earmarks buried in the text beyond the 6,371 already identified. For example:

- Sections 1937 through 1963 mandate 24 project-specific earmarks, including some benefits for the Apollo Theater in Harlem and funding for a documentary about Alaska's infrastructure.
- Section 1925 requires spending \$2 million on a Community Enhancement Study conducted by "a national organization representing architects" with the stated goals of "Enhancement of community identity" and "Creation of a greater sense of community through public involvement."
- Section 5505 provides combined grants of \$160 million to 10 identified universities, including the University of Alaska.
- Section 5506 provides grants totaling \$188 million to another 32 universities specified in the bill.
- Section 5504 awards a grant to the National Association of Development organizations to establish the Center for Transportation Advancement and Regional Development.

The 844-page bill is peppered with hundreds more such special-interest provisions, yielding a total earmark count well in excess of the acknowledged 6,371.

Transfers of Federal Land to the Private Sector.

Past efforts to sell federal land to raise revenue for programs have almost always faced strident opposition and congressional rejection.³⁵ Opponents of land sales contend that the land will be degraded by development, mining, or other commercial uses. As a consequence, federal land holdings, now totaling more than 700 million acres, have actually

increased in recent years as new land is acquired to save it from commercial uses.³⁶

Despite nearly consistent opposition to land sale proposals that would benefit the general public, Congress sometimes votes to give valuable parcels away to politically influential developers or to local communities that in turn sell or transfer the land to for-profit developers.³⁷ Although federal spending remains unaffected by these transfers, the government loses valuable assets and the opportunity to raise more revenue for programs, tax relief, and deficit reduction.

Research Grants. Many long-time observers of congressional earmarking contend that the modern lobbyist/earmark market originated a few decades ago when innovative lobbyists discovered willing (and paying) clients among universities and Members of Congress happy to accommodate them with research grants and other types of spending tied to specific institutions of higher education. Although the federal government has long funded academic research, the traditional practice had been to identify high-priority areas of research and study that would benefit the nation at large, encourage qualified institutions to compete for the federal funding to perform the research, and award the contract based on merit. Through such competition, the federal government would be more likely to obtain the best results from the most qualified organization in a cost-effective manner.

However, because competition yields both winners and losers, Members of Congress have increasingly intervened to ensure that less qualified academic institutions in their states and districts receive a share of federal research dollars. Increasingly, they are absolving the grant recipients from the pesky requirement of actually performing research on specific topics of interest to the federal government. More recently, federal research grants

35. One example is President Bush's February 11, 2006, plan to sell select parcels of federal land and reinvest the proceeds in education, which provoked swift opposition.

36. Currently, 51.9 percent of all federal land holdings are in 13 Western states.

37. For a discussion of several such transfers, see Neubauer and Cooper, "The Senators' Sons," June 23, 2003, p. 1, and Susan Crabtree, "Miller Helped Free Land for a Business Partner," *The Hill*, March 30, 2006, at www.hillnews.com/thehill/export/TheHill/News/Frontpage/033006/news2.html (April 4, 2006).

are being provided directly to the trade and professional associations that lobby on behalf of the grant, as in Sections 1924 and 5504 of SAFETEA-LU.³⁸

As with the traditional earmarks, SAFETEA-LU offers numerous examples of such grants. For example:

- In addition to the earmarks in Sections 5504, 5505, and 5506, Section 5309 creates four new Centers for Surface Transportation Excellence, designating Virginia Tech and the Hubert H. Humphrey Institute for two of them and allowing the Department of Transportation to select the other two based on competition.
- Section 5508 funds grants to investigate the development and/or deployment of Intelligent Transportation Infrastructure in congested metropolitan areas and lists the 51 cities that are to receive the grants, including Richmond, Virginia, which is one of the least congested metropolitan areas in the country.

As more and more research earmarks are added to a fixed total of research funds, spending on high-priority, merit-based research must be reduced to accommodate the academic pork. In a review of the 2005 energy and water appropriations bill, an official with the American Association for the Advancement of Science calculated that:

[E]armarks in energy research and development hit \$266 million in the current fiscal year, “more than double the previous record from last year.” Among the earmarked money is \$495,000 for a pilot project in North Dakota to make hydrogen from wind power, \$1.5 million for wind turbines in Alaska, and \$500,000 for the expansion of ethanol fuel pumps in several states.³⁹

Product and Service Purchase Requirements.

Another common mechanism used by some Members of Congress to transfer federal budget resources to influential constituents is to require a federal agency to purchase a product or service from companies owned by the constituent regardless of the government’s need for the product or product’s performance compared with competing products. Examples of this practice include the following:

- A provision was included in the FY 2006 Transportation Appropriations bill to give Amtrak an additional \$8.3 million to compensate for the cost and inconvenience of hauling certain freight cars, used to transport perishable fruits and vegetables, that are owned and operated by a particular company. The company is located in the district of the Congressman who added the provision to the law and who has received substantial campaign contributions from the company’s owner.⁴⁰ After the press confronted him with documents concerning his relationship with the company and its lobbyists, the Congressman announced that he would work to rescind the \$8.3 million appropriation.
- In 2000, Congress required the Federal Aviation Administration (FAA) to buy and install airport baggage screening machines made by a specific company. The FAA had previously been reluctant to buy and install the company’s machines because the Department of Transportation Inspector General concluded that the machine’s performance was substandard in detecting weapons and bombs.⁴¹ The new law required the FAA to buy one of this company’s machines for every machine that it purchased from a competitor.

38. Earmarks have become such a common practice for universities that at least one (George Mason University in Virginia) offers an academic course to teach “how you can influence the legislative process at every stage in order to be the beneficiary of an earmark,” how to counter “public criticism of pork,” and “where to find earmarks.”

39. Matthew L. Wald, “In Energy Work, One Hand Giveth and the Other Taketh,” *The New York Times*, February 3, 2006, p. A17.

40. Matthew L. Wald and Glen Justice, “Congressman Adds More Vegetables to Amtrak’s Load,” *The New York Times*, December 11, 2005, Section 1, p. 48.

41. Stephanie Mencimer, “Tom Daschle’s Hillary Problem,” *The Washington Monthly*, January–February 2002, pp. 30–31, at www.washingtonmonthly.com/features/2001/0201.mencimer.html (March 21, 2006), and “L-3 Reliability Questioned in Boston Bag Screening System,” *Airport Security Report*, Vol. 10 (November 19, 2003).

- In 2004, the Homeland Security Appropriations Committee included a similar requirement in legislation, which strongly encouraged the Transportation Security Administration to buy baggage screening equipment made by a company that had just developed a new product. However, rather than explicitly identifying the company and its product, the bill's language required spending \$30 million on explosives-detection devices "that are currently being tested, certified, and piloted."⁴²
- Although much of the earmarking takes place in the discretionary programs subject to the appropriations process, earmarking also occurs in the federal entitlement programs—for example, when Members of Congress require Medicaid to offer eligible beneficiaries a certain product in response to lobbying and political support by influential constituents. Ironically, one such costly measure was included in the 2005 budget-cutting bill to pare \$38.8 billion from future federal spending. The Congressional Budget Office estimates that the provision will add \$125 million to the federal budget over the next five years and possibly even more to state budgets in shared Medicaid costs. California contends that the provision will cost the state \$50 million per year.⁴³

Federal Loans and Loan Guarantee Earmarks.

In addition to the more common practice of earmarking federal spending, Congress is earmarking direct loans and loan guarantees to private entities through many of the federal credit programs. The Energy Policy Act of 2005 (an authorization bill) contains a number of direct loans, loan guarantees, tax credits, and grants for the construction of energy production plants in certain specific locations, including an integrated coal/renewable energy system in the "Upper Great Plains" (Section

411); a clean coal technology plant near Healy, Alaska (Section 412); a coal gasification plant in a Western state at "an altitude greater than 4,000 feet above sea level" (Section 413); and new research facilities to derive fuels from Illinois Basin coal at Southern Illinois University, the University of Kentucky, and Purdue University.⁴⁴

Legislation That Directly Profits Members and Their Families. For the most part, much of the Capitol Hill–K Street market for earmarks appears to revolve around the exchange of campaign contributions for legislative and budgetary favors, with no apparent personal financial benefit to a Member. However, there are exceptions to this practice, many of which are not prohibited under congressional rules or traditions. For example, Members of Congress are not required by either rule or tradition to recuse themselves from involvement in legislation that would provide direct financial benefits to themselves or their relatives.

While the more typical connection would be between legislation and the value of a Member's investment portfolio, in some cases, the connection is even more direct. For example, between 1995 and 2002, nine Members of Congress received a total of \$2,177,491 in federal farm subsidies. In 2002, they received a total of \$243,605,⁴⁵ and these and other Members of Congress voted to extend the federal price supports for another five years at substantially more generous levels.

Relatives also often benefit from a Member's legislative actions. A few months after the highway bill was enacted, it was revealed that close relatives of two of the three members of Alaska's congressional delegation owned land on the islands that would be served by the two controversial bridges funded by earmarks in the highway bill. The land's value is expected to increase as a result of the better access to the mainland.⁴⁶

42. O'Harrow and Higham, "Post-9/11 Rush Mixed Politics with Security."

43. Jonathan Weisman, "Drugmakers Win Exemption in House Budget-Cutting Bill," *The Washington Post*, November 30, 2005, p. A8, at www.washingtonpost.com/wp-dyn/content/article/2005/11/29/AR2005112901650.html (March 21, 2006).

44. The Energy Policy Act of 2005, Public Law 109–58.

45. Brian M. Riedl, "Another Year at the Federal Trough: Farm Subsidies for the Rich, Famous, and Elected Jumped Again in 2002," Heritage Foundation *Backgrounder* No. 1763, May 24, 2004, p. 6, at www.heritage.org/Research/Budget/bg1763.cfm.

More troubling cases of personal gain stem from the use of legislation for corrupt purposes subject to criminal charges and punishment. Former Representative Cunningham pleaded guilty to accepting bribes in return for earmarking federal funds to a specific government contractor. Likewise, a congressional aide to another Member pleaded guilty to charges of bribery in January 2006.⁴⁷

Private Communication from Congress to a Department or Agency. In some cases, an earmark may be “authorized” without ever appearing in the legislation, the accompanying conference report, or any other public document. Instead, as agency and department officials privately acknowledge, once the legislation is enacted and signed into law, the chairman of the relevant committee writes a letter to the secretary of the relevant department strongly suggesting that a portion of the funds provided in the recent legislation be spent on a series of projects that are described in the letter. Although such letter requests have no force of law, department heads know that it is in their interest to accommodate requests from the congressional committees that control their budgets.

Miscellaneous Types of Earmarks. Other types of earmarks and self-dealing do not fit into any of the above categories but nonetheless involve using the legislative process to provide location-specific federal benefits to a particular constituent or narrow constituency. For example, Section 4408 of SAFETEA-LU includes the following statement:

Notwithstanding any law, regulation, or grant assurance, but subject to the requirements of this section, the United States shall release all restrictions, conditions and limitations on the use, encumbrance, conveyance, or closure of the Rialto Municipal Airport, in Rialto, California, to the extent such restrictions, conditions and limitations are enforceable by the United States.

In other words, Section 4408 absolves Rialto from paying back the \$14 million that it received from the FAA to improve and expand the airport, \$9 million of which was used to acquire the land for the expansion.

Instead of expanding the airport, Rialto decided to shut it down and sell the land acquired with federal money to a private developer.⁴⁸ Because this was an improper use of the federal grant, the FAA demanded its return, but Section 4408 overruled the agency. Instead, Rialto can sell the land for development, keep 55 percent of the proceeds for itself, and reinvest the remaining 45 percent in a nearby airport. How an aviation provision ended up in legislation related solely to surface transportation is a puzzle that merits further investigation and explanation. Whatever the ultimate findings, this represents a new and deeply troubling type of earmark in which recipients of federal grants can be legislatively absolved of the federal penalties for misuse of federal funds.

While the previous examples of earmarks were designed to reward certain constituencies, in late 2005, Representative Tom Davis (R-VA) floated the idea of a novel type of “anti-pork” earmark when he threatened to use his legislative clout to punish several of his constituents financially. At the time, Fairfax County, Virginia, where Representative Davis lives, was in the process of approving a large, high-density, mixed-use real estate development near his neighborhood of single-family detached houses. Although most of the land to be developed was privately owned, a small 3.7 acre slice was owned by the Washington Metropolitan Area Transit Authority (Metro), the regional public transit authority, which receives federal subsidies.

Metro planned to sell that parcel to the developer to allow for a seamless connection between the new development and the Metrorail station, but nearby resident Representative Davis opposed the devel-

46. John Fund, “Don Young’s Way,” *Opinion Journal*, February 7, 2006.

47. Shailagh Murray and Allan Lengel, “The Legal Woes of Rep. Jefferson,” *The Washington Post*, February 16, 2006, p. A1, at www.washingtonpost.com/wp-dyn/content/article/2006/02/15/AR2006021502752.html (March 21, 2006).

48. Crabtree, “Miller Helped Free Land for a Business Partner.” See also John R. Wilke, “Appropriations, Local Ties, and Now a Probe of a Legislator: West Virginia Rep. Mollohan Has Real-Estate Holdings That Also Bring Scrutiny: Growth of Budget ‘Earmarks,’” *The Wall Street Journal*, April 7, 2006, p. A1.

opment and the congestion it might cause, and he threatened to use his congressional clout to enact legislation forbidding the sale if Metro tried to sell the land.⁴⁹ After public criticism of his threat, Davis decided that a taxpayer-funded incentive might work better than a threat and introduced H.R. 3496, which would prohibit Metro from selling the land but soften the blow by offering Metro an additional federal subsidy of \$1.5 billion (provided that all of the jurisdictions served by Metro enact additional taxes dedicated to the transit system.)⁵⁰ If enacted, H.R. 3496 could become one of the most expensive earmarks in U.S. history.

Finally, there is an earmark category best described as the “stealth earmark” in which the language of the authorizing bill is vague enough to obscure its purpose or value. For example, SAFETEA-LU includes designations such as:

- \$100 million for “CREATE” (what and where is it?);
- \$1.6 million for “Lewis and Clark Expressway” (is this for repairs, expansion, or flower plantings?);
- \$400,000 for Jeanette Truck Route (for what purpose?); and
- \$880,000 to “Provide pedestrian and water access to Convention Center from surrounding neighborhoods” (where is this convention center?).

Other language may be deliberately misleading: Earmark number 4584, for example, provides \$2.5 million for “Improvements for West 125th Street in West Harlem,” which is the street on which the Apollo Theater is located. Since Section 1963 also contains opaque language regarding some additional federal benefit to Harlem’s Apollo Theater, the use of “for” instead of “to” in the earmark description may be telling.

While most of the earmark language is reasonably clear and precise, vague descriptions are not uncommon. To the extent that any enacted reforms allow for points of order against wasteful earmarks,

future descriptions will likely be made even more vague and misleading. To discourage such practices, reform legislation should require clarity as well as transparency.

Legislative Remedies to Curb Earmarks

As the previous discussion indicates, Congress has devised a number of legislative mechanisms to provide financial benefits to influential individuals, relatives, businesses, universities, trade and professional associations, and communities. In addition to the typical earmark involving the spending of money on a tangible project in a particular community, other forms of congressional earmarking involve mandatory product purchases by government agencies, transfers of federal land to private developers, research grants to universities, and forgiveness of debt to the U.S. government. While many more kinds of legislative mechanisms probably can be devised to transfer financial rewards from government to private interests, the examples provided above were drawn largely from SAFETEA-LU, which was an authorization bill.

SAFETEA-LU is a fitting target for an investigation of earmark abuse, not just because it took the process to its historic extreme by designating a record number of earmarks—more than 7,000—but also because not one of those earmarks would be subject to any of the exposure, transparency, or control provisions that would be established by the Pork-Barrel Reduction Act. This is because S. 2265 would apply only to appropriations bills, not to authorization bills.

Under current practices, this is not a serious deficiency because the vast majority of earmarks—between 13,000 and 16,000 in 2005—are in the appropriations bills. With the exception of the highway bill, most authorization bills have not been used as vehicles for significant numbers earmarks, and highway bills are enacted only once every six years.

49. Lisa Rein, “Lawmaker Steps in on Va. Growth,” *The Washington Post*, April 21, 2005, p. B1, at www.washingtonpost.com/wp-dyn/articles/A6031-2005Apr20.html (March 21, 2006).

50. Lindsey Layton, “Bill Offers Metro \$1.5 Billion with Greater Oversight, Dedicated Funding,” *The Washington Post*, July 28, 2005, p. A1, at www.washingtonpost.com/wp-dyn/content/article/2005/07/27/AR2005072702437_pf.html (March 21, 2006).

Nonetheless, if appropriations bills are subjected to greater scrutiny and spending controls, Members of Congress will quite probably begin to use authorization bills as earmark vehicles. The recently enacted energy bill is a good example of this likely outcome. Because the controls in S. 2265 would apply only to “unauthorized” earmarks in appropriations bills, adding an earmark to both appropriations and authorization bills would shield it from points of order and all of the important transparency provisions.

Distinguishing Between Good and Bad Earmarks

Excluding authorization bills from control and transparency may appear to be a significant deficiency in S. 2265, but this exclusion may recognize that the earmarking process in some federal programs is not only acceptable, but also essential. What follows is an attempt to delineate between programs in which earmarks are a source of abuse and programs in which they may be essential for effective operation.

Earmarks on Formula Programs Based on State and Local Discretion. To date, much of the concern over earmarks has been focused on the several discretionary programs in which federal money is allocated to states and communities according to a formula that attempts to measure need. In turn, the states and communities allocate those funds to their priorities, subject to the program’s rules and restrictions. For example:

- The highway program uses a formula that considers miles of roads, number of licensed cars, vehicle miles driven, and other quantitative factors to determine how much money (expressed as a share of the total spent nationwide) each state receives from the highway trust fund. States are then free to spend this money on their own transportation priorities, subject to a series of rules and guidelines.
- The Department of Housing and Urban Development’s Community Development Block Grant program operates in a similar manner,

using a formula to determine need within a community. It assumes that the cities and counties receiving the money are capable of adequately identifying their own priorities.

Over time, however, Congress has been reducing the states’ discretion by creating more categorical programs (SAFETEA-LU created about 30 new ones) and by carving out more and more earmarks from the money that states would otherwise have to spend on their own priorities. By earmarking these otherwise discretionary funds, Members of Congress (urged on by influential constituents and hired lobbyists) are taking the position that they and their staffs—not the state and local governments—know what is best for the communities in their states and districts.

Speaker of the House Dennis Hastert (R-IL) spoke in support of this view when he asked rhetorically: “Who knows best where to put a bridge or a highway or a red light in their district?”⁵¹ Many of his colleagues and their staffs share his view, which reflects poorly on the quality of the Illinois Department of Transportation and on how they see their duties as members of the legislature of the world’s greatest democracy. Either way, this new attitude reflects both a growing propensity of Congress and its staff to micromanage policy to the minutest degree and a significant centralization of power in Washington.

Earmarks and Entitlements. While earmarking can be detrimental to the efficacy of discretionary formula grant programs, the issue is less clear-cut in other federal programs. In entitlements in which federal statutes define benefit levels and eligibility, Congress must influence all facets of a program and become involved in the details by exercising its oversight authority.

In a health care program like Medicare, for example, congressional micromanagement of pricing decisions, eligibility, benefit levels, and broad issues of treatment is unavoidable. Because Medicare sometimes lags in approving treatments and procedures already widely approved by private insurance plans, it may be appropriate on policy grounds to push Medicare into covering them as

51. Novak, “Looking to Fry Pork.”

well. However, it would be inappropriate for Members of Congress to decide which company's drugs and devices can be used in approved treatments and which ones cannot.

Many of the federal food assistance programs are under pressure to include the products of influential agriculture groups. Food processors and growers use their influence to obtain the eligibility and use of their products in the school lunch program; the Women, Infants, and Children Program; and military commissaries.⁵²

Centralized Discretionary Spending. The most problematic are discretionary spending programs in which project earmarking is essential to their value because of their objectives and modes of operation, such as in national defense and the civilian component of the Army Corps of Engineers. In operating these programs, Members of Congress (and the President) are well within the responsible execution of their duties to insist that the annual authorizations and appropriations for these programs be very specific on a project-by-project basis.

Tasked with a number of responsibilities that include flood control and river navigation, the Army Corps of Engineers each year submits to Congress its budget request (currently in the \$5 billion range), which details what it intends to do with the money. In theory, the Corps applies a comprehensive cost-benefit analysis to all of the projects under consideration and selects those with the highest comparative benefits. In this way, its fixed budget yields the maximum benefit to the nation, in comparison to a program that uses a formula to allocate money to the states or communities as an entitlement. Because the risk of flooding is higher in some areas than in others and river navigation improvements are limited to navigable rivers, Corps spending tends to be concentrated in a relatively small number of places to ensure maximum benefits.

In practice, however, Congress and lobbyists often interfere with this allocation process and use

the project-by-project nature of the programs to include projects of low social or economic priority but high political benefit. For example, in recent years, Congress has allocated much more money to high-cost, low-benefit navigation programs in Louisiana at the expense of the state's levee repair and flood control programs.⁵³

The annual Department of Defense (DOD) budget is also subject to considerable earmarking as the DOD makes its case to Congress for the next year's budget. As with the Corps and its diverse goals, the DOD budget begins with the goal of protecting the nation, which involves identifying threats and proposing a detailed spending request to meet those threats. In doing this, the DOD proposes broad allocations of spending among the uniformed services, detailing manpower needs, where the personnel will be stationed, the requested additions to its weapons inventory, and investments in new weapons and weapons technology. Of necessity, the proposed defense budget is quite specific on where and how the funds will be spent on a project-by-project basis.

As in the Corps budget, the project-based nature of the DOD budget allows for plenty of opportunities for traditional pork-barrel earmarking. Because most weapons are produced by a single company or a consortium of several companies, individual businesses stand to benefit substantially from the necessary earmarking and thus have a compelling interest in shaping the budget decisions. As a result, weapons, services, and products that the DOD does not want are often forced on it, and military bases of little value but high expense are kept open well beyond their useful life.

Defense-related research has also been subject to a growing incidence of earmarking, as the criminal case against former Representative Cunningham illustrates. Among the charges against Cunningham is accepting bribes in return for using defense appropriations bills to provide research grants to influential companies represented by Washington lobbyists.⁵⁴

52. For the current list of preferred commodities available for the various federal food and nutrition programs, see U.S. Department of Agriculture, "Commodity Food Network" Web site, at www.commodityfoods.usda.gov (March 21, 2006).

53. Ronald D. Utt, Ph.D., "The Army Corps of Engineers: Reallocating Its Spending to Offset Reconstruction Costs in New Orleans," Heritage Foundation *Background* No. 1892, November 4, 2005, at www.heritage.org/Research/Budget/bg1892.cfm.

Several other government departments have similar operational and program structures that require some allocation of spending to specific projects and locations.

- The Veterans Administration builds, renovates, and expands its hospitals located throughout the country.
- The Departments of the Interior and Agriculture allocate a portion of their funds to specific projects and improvements at various sites managed by the National Park Service, the Bureau of Land Management, and the National Forest Service.
- The National Aeronautics and Space Administration spends a substantial portion of its budget at a few sites in Texas, Alabama, and Florida and depends on a handful of companies to build its rockets and satellites.

Nonetheless, some in Congress have abused this need for project specificity to direct taxpayer dollars to influential constituents that might otherwise not be qualified to participate in the programs.

Adjusting to the Differences. As the above discussion demonstrates, the process of earmarking the federal budget does not always lead to frivolous waste but is sometimes essential to effective budgeting and agency accountability. Any effort to reform the budget process to diminish wasteful earmarks must devise a mechanism that allows for an orderly process that can distinguish between good and bad earmarks.

To some extent, S. 2265 achieves this in three ways.

First, it would exempt authorization bills from coverage, excluding many of the project-based spending proposals from review. This is particularly important for the Defense Department, which relies on the authorization bill to establish priorities among projects, weapons, bases, and other operational factors—a necessity that many Members of Congress regrettably abuse.

Second, with earmarks subject to a point of order rather than a prohibition, Congress would be inclined to focus only on those that seemed wasteful.

Third, inasmuch as many earmark-like spending plans are proposed by the agencies, there would be no formal lobbying activity to be exposed, thereby suggesting some greater measure of legitimacy. Nonetheless, enactment of S. 2265 would force Congress to stop shirking its responsibility to make tough choices.

Recommendation #3: Any successful effort to limit Congress's propensity to earmark spending and other federal privileges requires a reasonably precise definition of what is and what is not an earmark.

A reasonably comprehensive definition is also needed to control congressional abuses that allow the transfer of valuable public resources to other interests for reasons based solely on influence and privilege. Members of Congress have used a number of legislative mechanisms to benefit special interests at the expense of the general public, and all of these costly and questionable mechanisms should be discouraged.

Of the bills introduced so far, S. 2349 offers the most detailed definition of an earmark. Section 3 defines it as covering “budget authority, contract authority, loan authority, and other expenditures, and tax expenditures or other revenue items.”

There are as yet no easy answers to these important questions of scope and definition. To close this gap in knowledge, Congress should investigate this issue of definition and applicability through public hearings and in consultation with its key support institutions: the Congressional Research Service, the Government Accountability Office, and the Congressional Budget Office.

Conclusion

As is apparent from a review of the earmark and lobbying reform legislation introduced by Senators McCain and Coburn and Representative Flake,

54. Of note, one lobbyist associated with the Cunningham case is being sued by another client because the resultant earmark was smaller than promised. See Charles R. Babcock, “Earmarks Became Contractor's Business,” *The Washington Post*, February 21, 2006, p. A3, at www.washingtonpost.com/wp-dyn/content/article/2006/02/20/AR2006022001154.html (March 21, 2006).

much of the hoped-for improvement would rely on more detailed reporting and greater transparency than exists at present. While that would certainly lead to some beneficial results and deter some of the more questionable practices and projects, it is not apparent that reform proposals that rely largely on better reporting would make much of a dent in the legislative malpractice that they are designed to discourage and end.

In commenting on new federal laws requiring more detailed reporting by publicly traded corporations, Professor Todd Henderson of the University of Chicago Law School observed:

Ever since Brandeis turned the neat phrase “sunlight is the best disinfectant; electric light the best policeman” in praise of transparency, it has been virtually accepted wisdom in legal and policy making circles. But the efficiency and efficacy of “sunlight” is not always so obvious.⁵⁵

Representative Flake expressed a similar sentiment when he wrote to Speaker Hastert of his concern about a proposal from then-Acting Majority Leader Roy Blunt (R-MO) to reform the earmark process by having Members of Congress attach their names to earmark requests: “Anyone who thinks that members are averse to claiming credit for securing earmarks hasn’t been reading his own press releases.”⁵⁶

Both Representative Flake and Professor Henderson have raised an important concern that needs to be addressed in any reform proposal that depends largely on transparency and reporting to curb fiscally irresponsible behavior. Much of the sensational reporting in the media since August 2005, when SAFETEA-LU became law, has depended on facts and acts openly available in legislation, legislative reports, lobbyist Web sites and registration forms, federal election law disclosure

reports, open invitations to fund raising events (including pay-to-play Florida golf outings), and congressional press releases. These are just a few of the public venues in which the information is not just available, but often flaunted.

As noted earlier, lobbyist Howard Marlowe lists on his Web site details of every beach nourishment earmark that he has obtained for clients, and publicly available documents filed with the Clerk of the House and the Secretary of the Senate would reveal which clients paid him for those services. Congressional press releases would reveal who facilitated the transfers of money from the taxpayers to the clients.

The Carmen Group puts all of this information together to show the great service that it provides clients by calculating and promoting the dollar amount of earmarks that it has obtained compared to client fees paid. With regard to the most notorious earmark of all—the bridge to nowhere—Alaska’s congressional delegation defended it aggressively and sometimes flamboyantly to ensure its survival. Believing that the problem was not with the infamous earmark but with the American public’s misperception of it, Alaska’s governor announced plans to fund a nationwide publicity effort to set the record straight and restore the state’s tarnished reputation.

Under the circumstances and relying on the super majority required in points of order to strike an earmark, it seems likely that the vast majority of earmarks will survive this modest procedural gantlet. Absent a stronger deterrent, the increasingly popular process of earmarking is likely to grow at an accelerating rate.

Where the provisions of some of the bills could have their biggest impact is in deterring some of the corrupt practices that appear to be associated with some earmarks. By requiring extensive reporting and transparency and by making the links between

55. Todd Henderson, “Is Sunlight Always the Best Disinfectant?” *The Faculty Blog*, October 8, 2005, at uchicagolaw.typepad.com/faculty/2005/10/is_sunlight_the.html (March 21, 2006).

56. Press release, “Congressman Flake Sends Letter to Speaker Hastert Outlining Standards for Earmark Reform,” Office of Representative Jeff Flake, January 23, 2006, at www.house.gov/apps/list/press/az06_flake/060123 earmarkreform.html (March 21, 2006). See news release, “Blunt’s Southwest Missouri Highway Priorities Traveling to President’s Desk,” Office of Representative Jeff Flake, July 29, 2005, at www.blunt.house.gov/Read.aspx?ID=458 (March 21, 2006).

earmarks and campaign contributions more obvious, these bills would enhance the integrity of the process. While these provisions are unlikely to slow down the growth of earmarks, they should make the process more honest.

As is apparent from the Cunningham incident and the information referenced in many of this report's footnotes, the press deserves much of the credit for exposing the problems and instigating the formal criminal investigations that have revealed the shady nature of this process. In turn, these exposés

have led to helpful legislative proposals and the prospect of greater integrity in the future.

If not for a free and inquisitive press, the comprehensive reform process now underway would never have happened. With more reporters being assigned the earmark beat and with more transparency forced on Congress, some of the worst practices should disappear.

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