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EARMARKS: ARE THEY CONSTITUTIONAL?

by

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With the change in control of Congress, 2007 was to have been the year of earmark reform. Earmarks attached to appropriations bills have come to account for billions of dollars in annual spending, and there is a general consensus that earmarks are seriously out of control. Among the “first hundred hours” reforms adopted by House and Senate Democrats were Resolutions to provide transparency by identifying the sponsor(s) of each earmark. H.RES. 6, and S. 1, 109th Congress, 2007.

Transparency is good, but it doesn’t appear to have slowed the deluge of special interest, earmarked appropriations. On December 27, 2007, President Bush signed the 2008 consolidated appropriations bill, HR 2764, while lamenting:

I am disappointed in the way the Congress compiled this legislation, including abandoning the goal I set out early this year to reduce the number and cost of earmarks by half. Instead the Congress dropped into the bill nearly 9,800 earmarks that total more than \$10 billion. These projects were not funded through a merit-based process and provide a vehicle for wasteful government spending.

<http://www.whitehouse.gov/news/releases/2007/12/20071226-1.html>.

In their “reform” resolutions, the House defined “earmark,” and the Senate defined “congressional directed spending” with virtually identical features as: “a provision or report language included primarily at the request of a Member... or Senator providing ... spending authority ... targeted to a specific State, locality or Congressional District, other than through a statutory or administrative formula-driven or competitive award process.”¹

Thus an earmark (or a “congressionally directed expenditure”) is an expenditure made primarily at the request of a single member of Congress directed to a specific contract or grant which is authorized by neither statute nor formula nor implemented by competitive bidding. Earmarks represent extra-statutory funding, which is effectuated through the patronage and largess of individual members of Congress. The authorization of these earmarks is outside the matrix of national priorities which Congress has otherwise established by statute and formula. In dispensing his or her earmarks, each member of Congress becomes a charitable benefactor for specific projects or persons, which typically reciprocate by providing support for the member’s political incumbency by organizing either voting support or campaign contributions. Because earmarks serve the political

¹See H.RES. 6, at Sec. 404(a)(9)(d) and S;1 amending Senate Rule XLIV, 109th Congress contain virtually identical definitions.

interests of individual members of Congress, they are unlikely to be abandoned by act of Congress.

While members of Congress have a duty to look out for the interests of those whom they represent, the explosion of earmarks is a relatively recent phenomenon. In his online biography of Gerald Cassidy, “Citizen K Street, How Lobbying Became Washington’s Biggest Business,” *Washington Post* Associate Editor Robert Kaiser concludes that in the mid-70s Cassidy and his original partner “helped invent the idea of lobbying for earmarked appropriations – an idea that . . . fed a system of interdependence between lobbyists and Congress that thrives today.” <http://blog.washingtonpost.com/citizen-k-street/chapters/conclusion/index.html> at 2. This LEGAL BACKGROUNDER examines the constitutional implications of this relatively new phenomenon.

Earmarks come in many shapes and sizes. Citizens Against Government Waste found 2,274 earmarks worth \$1 billion in the 2008 “compromise” Labor-Health and Human Services appropriation bill, including \$1.5 million for the AFL-CIO Working for America Institute and \$2.2 million for the AFL-CIO Appalachian Council.² Two years ago the most visible earmark was for Alaska’s \$315 million, Gravina Island Bridge, dubbed the “Bridge to Nowhere.”³ Earmarks, which are reportedly allocated on a 60%/40% basis between the majority and minority parties, <http://thehill.com/leading-the-news/2007-12-03.html>, tripled during the 12 years of Republican control of the Congress. W. POST, Dec. 10, 2007 at A11; W. POST, Nov. 22, 2007 at B01.

Last year’s poster child of earmarks was \$1 million directed to a Woodstock Festival Museum by the two Senators from New York. After this earmark was disparaged during a televised presidential campaign debate, it was briefly dropped from the Senate-passed appropriation, only to be added back in conference. This \$1 million federal gift will go to a museum which has received most of its \$100 million cost from a foundation established by a generous donor, who has presumably already claimed federal and state tax deductions worth close to 50 cents on the dollar for his gifts. While this earmark was in play, the museum’s benefactor, his wife and two of their children contributed \$20,000 to the Senatorial campaign committee led by one of the Senate sponsors and \$9,200 to the presidential campaign of the other. Joel Achenbach, *A Museum on Woodstock, With a Haircut*, W. POST, Oct. 27, 2007 at A1. See also, Jim Hightower, *Love American Style*, THE TEXAS OBSERVER, Nov. 1, 2007 at 18.

If Congress is incapable of stanching the flood of earmarks, another place to look for a limit is the Constitution. An examination of current earmarking practices suggests that they not only go beyond the broad appropriations discretion authorized by the Constitution, but also impermissibly intrude on the executive power and veto power of the President.

Article I, Section 8, authorizes the levying of taxes and the expenditure of funds by the Congress. It provides that, “The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States. . . .” The extent of this power to tax and spend was discussed by James Madison and Alexander Hamilton in the *Federalist Papers*, with Madison taking the position that it was limited to taxes and appropriations for activities which were specifically listed in the Constitution as federal responsibilities. In Madison’s view expenditures for other activities were the responsibility of the States. *FEDERALIST PAPERS*, (Rossiter ed., Mentor 1961), No. 41, at 255 *et seq.*

Hamilton believed that the constitutional power to tax and spend was to be more broadly interpreted in conjunction with the subsequent clause authorizing funds to be raised and expended pursuant to “all Laws . . . necessary and proper for carrying into Execution the foregoing Powers.” *Id.* at No. 33, at 201 *et seq.* Hamilton saw this broad power as necessary so that the federal government could raise sufficient tax revenue to deal with the expenses of “wars and rebellions,” but he did not foresee a substantial need to support the federal government’s “domestic” expenses, which he characterized as “insignificant in comparison with those which relate to the national defense.” *Id.* at No. 34, at 208-209. In his Report on Manufactures, written in 1791, only three years after the Constitution was ratified, Hamilton suggested that the spending power under the General Welfare clause was limited to matters that were “general and not local:” “The only qualification of the generality

²Robert Novak, *Busting a Budget Ploy*, W. POST, Nov. 12, 2007 at A21. The Labor-Health and Human Services appropriations bill was ultimately folded into the consolidated appropriations bill signed by President Bush on December 27, 2007.

³Taxpayers for Common Sense (2005-08-222) “\$315 Million Bridge to Nowhere: (PDF).”

of the Phrase in question which seems to be admissible is this — That the object to which an appropriation of money is to be made be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.” See Hamilton, *Report on Manufactures*, 5 Dec. 1791, *Papers* 10:302-4 at http://press-pubs.uchicago.edu/founders/documents/al_8_1s21.html. Over time an expansive view, generally attributed to Hamilton, has prevailed over that of Madison, and has almost certainly gone beyond anything advocated by Hamilton.

During the past century, the courts have accorded substantial discretion to congressional expenditure decisions, first by restricting the standing of taxpayers to sue, *Frothingham v. Mellon*, 262 U.S. 447 (1923), *Flast v. Cohen*, 392 U.S. 83 (1968), and then by providing a generous interpretation of the term “general welfare,” *Helvering v. Davis* 301 US 619, 640 (1937). It is now generally accepted that Congress has broad discretion “to spend money to improve the general public welfare in one way and not another,” and courts have allowed Congress wide latitude in this regard. *United States v. Butler*, 297 U.S. 1, 68 (1936), *Mathews v. DeCastro*, 429 U.S. 180, 185 (1976), *Sabri v. United States*, 541 U.S. 600 (2004). However, the pivotal case which recognizes this congressional discretion, *Helvering v. Davis* 301 U.S. 619, 640 (1937), also describes outer limits.

In *Helvering v. Davis*, the Court dealt with a constitutional challenge to the expenditure of tax receipts to support a key New Deal initiative, the provision of Social Security benefits. Justice Cardozo’s opinion held that such expenditures were comfortably within the “penumbra” of discretion accorded to Congress by the “general welfare” clause, but his opinion also recognized that this discretion is not unlimited:

The line must still be drawn between one welfare and another, *between particular and general*. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion however is not confided to the courts. The discretion belongs to Congress, *unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment*.

Helvering v. Davis, *supra* at 640 (Emphasis supplied).

In a book published contemporaneously with the *Helvering v. Davis* litigation, President Roosevelt’s Agriculture Secretary, fellow New Deal strategist, and later Vice President Henry Wallace addressed the conceptual scope of the term “general welfare:”

Most Congressmen, of necessity, have to serve their constituents. Most of them, therefore, feel that their interest in a particular class or region must be greater than their interest in the welfare of the entire United States, although, of course, many of them rationalize their position by the thought that if their class or region prospers, the whole United States will therefore prosper.

Henry A. Wallace, *WHOSE CONSTITUTION? AN INQUIRY INTO THE GENERAL WELFARE*, Reynal & Hitchcock, NY 1936, at 263.

The current practice of enacting piñata appropriations measures certainly appears to fall outside the penumbra of discretion identified in *Helvering v. Davis* and fall squarely inside the concept of self-serving rationalization identified by Henry Wallace. There is nothing about earmarks for AFL-CIO affiliated organizations, for a political benefactor’s Woodstock Museum, for a Bridge to Nowhere, and, in the 2008 consolidated appropriation, for 9,800 separate earmarks, which appears to rise above the local and the particular.

In addition, current earmarking practices undercut the Constitution’s finely tuned separation of powers. They do this in two ways, first by undermining the President’s “executive power” under Article II, Section 1, and second by compromising the President’s authority to veto legislation under Article I, Section 7.

Earmarks undercut the President’s executive power by funding specific projects in a manner that intrudes on the executive prerogative to administer government departments and programs. In designating earmarks, members of Congress effectively micro-manage the administration of funding for the benefit of projects or persons which have come to their personal attention, perhaps by individual merit or perhaps by political affinity.

Just as the system of checks and balances requires that the President's executive authority to expend funds is limited to expenditures authorized by Congress, it also requires that the appropriations authorized by the Congress be implemented and administered through the executive authority vested in the President. Current earmarks micromanage major expenditures in derogation of the President's executive authority and by their sheer number and variety make coherent executive oversight virtually impossible.

Current earmarking practices also circumvent the President's veto power. The Presentment Clause in Article I, Section 7 provides that every act of Congress, except adjournment, "shall be presented to the President" for his approval or disapproval. In THE FEDERALIST, No. 73, Hamilton describes the significance of this Presidential veto power:

The propriety of the [veto] does not turn upon the supposition of superior wisdom or virtue in the executive, but upon the supposition that the Legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of the government; and a spirit of faction may sometimes pervert its deliberations

FEDERALIST PAPERS, No. 73, at 443.

Earmarks effectively bypass the President's veto power. When thousands of earmarks are written into a single comprehensive appropriations measure, the President must sign the legislation in order to proceed with significant national interests and let localized earmarks go unchallenged.

In cases involving constitutional separation of powers the Supreme Court has taken a very literal approach to defining and limiting the powers provided to each branch. In *Buckley v. Valeo*, the Court found legislation allowing Congress to appoint members of the new Federal Election Commission to be unconstitutional, noting: "...the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley v. Valeo*, 424 U.S. 126, 129 (1976).

Where Congress attempted to create a new mechanism whereby a vote of either House of Congress could nullify an executive branch decision to allow a particular deportable alien to remain in the United States, the Court took an equally literal approach:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial ...The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

I.N.S. v. Chadra, 462 U.S. 919, 951 (1983).

In the FEDERALIST PAPERS, Hamilton observed that "the love of power may sometimes betray [the Legislature] into a disposition to encroach upon the rights of other members of the government..." FEDERALIST PAPERS, No. 73 at 443. To the extent the practice of earmarking undermines the separation of powers it encroaches upon the rights of the Executive Branch.

Defenders of earmarks will argue that they fall within the broad discretion which courts have generally accorded to congressional decisions to tax and spend and that earmarked expenditures are predominantly directed to good and meritorious causes. But these arguments are not persuasive where the exponential growth of earmarks has focused on individual districts and designated beneficiaries without providing the same benefits "throughout the Union." Separately, earmarks impinge upon both the "executive power" and the veto power of the President For all of these reasons, current earmarking appropriations appear to go beyond the substantial powers and discretion accorded to Congress by the Constitution.