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JIMMY CARTER'S AND JAMES MILLER'S  
REVENGE: THE REASONS AND THE  
CONSEQUENCES FOR PRESIDENTIAL  
AND CONGRESSIONAL POWER OF  
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“EARMARKS”

*Joseph White*

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*Joseph White*<sup>†</sup>

ABSTRACT

At the end of 2010, the United States Senate and House of Representatives appeared to abandon a fundamental aspect of Congress's power of the purse. By adopting a "moratorium" on "earmarks" in appropriations bills, as well as on analogous specific details in tax and other legislation, both chambers appeared to give the President, or at least the presidential branch represented by White House staff and OMB, dominance over policy decisions that long have been considered central to Congress's role. Is this change substantive or cosmetic, why did it occur, and will this be the new normal? This Article recounts how the politics of distributing benefits to individual states and districts developed over the past half century. What from the perspective of Congress seemed like presidential imperialism was rebuffed. But the executive branch's strategies forced Congress to make the politics of distribution more visible. That in turn activated attitudes in U.S. politics that view Congress as inherently corrupt and that inherently disadvantage Congress in a battle for public opinion. Congressional minority parties sought to mobilize this sentiment against the majority party. After they captured the House and Senate in 2006, congressional Democrats sought to blunt the criticism with procedural reforms. Both opposition to the Democrats and opposition to government per se then united congressional Republicans around the more radical measures adopted in 2010. Now, although some Republicans with experience in budgeting believe the moratorium is damaging Congress, they also cannot see a way to return to previous practice.

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INTRODUCTION

“Shortly after he took office,” Scott Frisch and Sean Kelly wrote, “Jimmy Carter announced his intention to launch a comprehensive review of the design and funding of water projects and declared his intention to request—via the FY 1978 Supplemental Appropriations Bill—that Congress not fund nearly twenty water projects that had been authorized by Congress.”<sup>1</sup> This set off a pitched battle with his own party in Congress, with a temporary compromise in 1977 succeeded by a veto when Congress funded the projects again in the next year’s Energy and Water Appropriations bill. President Carter vetoed the bill, and although he won his fight against congressional efforts to override the veto, the battle was widely viewed as nearly irreparably damaging his relationships with Congress. The distinguished presidency scholar Charles O. Jones wrote that “no action is more frequently cited as typifying the problems that the president had with Congress.”<sup>2</sup>

In 1988, Office of Management and Budget (OMB) Director James C. Miller III, as part of a Reagan administration campaign against “pork,” issued a directive that agency leaders ignore report language that instructed them to spend on projects not included in the President’s budget.<sup>3</sup> He “failed dramatically.”<sup>4</sup> Congressional responses were typified by a Republican Senate Appropriations aide who said,

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1. For the most extensive report on the conflict, see SCOTT A. FRISCH & SEAN Q. KELLY, *JIMMY CARTER AND THE WATER WARS: PRESIDENTIAL INFLUENCE AND THE POLITICS OF PORK 2* (2008).
  2. Charles O. Jones, *Keeping Faith and Losing Congress: The Carter Experience in Washington*, 14 *PRESIDENTIAL STUD. Q.* 437, 437 (1984). Note that both Frisch and Kelly, and Jones argue that there were reasons why the attack on water projects made sense for Carter; nevertheless, the battle was widely viewed as an example of why Carter was a relatively unsuccessful President.
  3. ROB PORTER & SAM WALSH, *EARMARKS IN THE FEDERAL BUDGET PROCESS*, HARV. L. SCH. FED. BUDGET POL’Y SEMINAR 10 (Robert Allen & Robert Brown eds. 2008), available at [http://www.law.harvard.edu/faculty/hjackson/Earmarks\\_16%28rev%29.pdf](http://www.law.harvard.edu/faculty/hjackson/Earmarks_16%28rev%29.pdf).
  4. *Id.*

“No one liked what Miller did . . . He was bringing a questionable constitutional judgment into the appropriations process. Even if he were right, we would just write it into the law. That’s just more work for us.”<sup>5</sup> Miller withdrew his order to the agencies after congressional threats of retaliation.<sup>6</sup>

If President Obama wanted to eliminate a similar list of water projects, he could do it, and Congress would have no recourse. He would not need to veto; he could simply not include the projects in his own proposed budget. This is the result of the policies against “earmarks” that were adopted by congressional Republicans after the 2010 election. Under these rules, much of the report language that Director Miller wanted agencies to ignore should not exist. It would be out of order and an ethics violation to create it.

In short, Congress has abandoned part of its power of the purse, handing it to the President. In this Article I seek to explain what happened and why it happened and suggest what that illustrates about the drift of power from Congress to the President.

## I. THE NEW RULES

The rules of the U.S. House of Representatives Republican Conference, as adopted on November 15, 2012, concluded with the following language:

Standing Orders for the 113th Congress

Earmark Moratorium

It is the policy of the House Republican Conference that no Member shall request a congressional earmark, limited tax benefit, or limited tariff benefit, as such terms have been described in the Rules of the House.<sup>7</sup>

The definition of an “earmark” in the Rules of the House is:

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5. Confidential interview with a member of the staff of the Senate Appropriations Committee. Between 1983 and 2008, I conducted more than 300 interviews with participants in aspects of federal budgeting, for a variety of projects. More than a hundred of those interviews, including the one quoted here, provided information about “pork-barrel” politics. In 2013–14 I conducted eighteen more interviews about the rise and decline of earmarking. Unattributed quotes below are from either the recent or earlier interviews. All interviews were conducted under the condition that I neither quote nor attribute any material without direct written permission.
  6. Porter & Walsh, *supra* note 3, at 11.
  7. *Rules of the House Republican Conference for the 113th Congress*, Republican National Committee, [www.gop.gov/113th-rules/](http://www.gop.gov/113th-rules/) (last visited Nov. 13, 2014).

a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity or targeted to a specific State, locality or Congressional district, other than through a statutory of administrative formula-driven or competitive award process.<sup>8</sup>

This moratorium interacts with a series of other provisions that were added to the House Rules in 2007. Rule XXI Section 9(a)–(d) makes it out of order to consider any bill or joint resolution unless the accompanying report includes either a list of all earmarks and the other benefits included or a certification by the chair of the reporting committee that none are included.<sup>9</sup> Similar restrictions are applied to amendments and conference reports. Then Rule XXIII, the House Code of Official Conduct, says that legislators who request any of these suspect provisions must “provide a written statement to the chair and ranking minority member of the committee of jurisdiction”<sup>10</sup> stating their names; “in the case of a congressional earmark, the name and address of the intended recipient or, if there is no specifically intended recipient, the intended location of the activity”<sup>11</sup>; the purpose of the provision; and “a certification that the Member, Delegate, or Resident Commissioner or spouse has no financial interest in such congressional earmark or limited tax or tariff benefit.”<sup>12</sup> Each committee is required to maintain the record of these statements, for public inspection.<sup>13</sup> Moreover, the rules forbid conditioning “the inclusion of language to provide funding for a congressional earmark” or other limited benefit in any bill, resolution, etc., “on any vote cast” by the recipient.<sup>14</sup> In other words, it is an ethics violation for committee or party leaders to engage

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8. RULES OF THE HOUSE OF REPRESENTATIVES, 113th Cong., R. XXI(9)(e) [hereinafter 113th House Rules], *available at* <http://clerk.house.gov/legislative/house-rules.pdf> (last visited Nov. 13, 2014). The policies about limited tax and tariff benefits also deserve attention, but that analysis will not be included here.

9. *Id.* at R. XXI.

10. *Id.* at R. XXIII.

11. *Id.*

12. *Id.*

13. *Id.* at R. XXIII(17).

14. *Id.* at R. XXIII(16).

in quid pro quos in which they expect members to vote for their bills in return for benefits provided to their districts.<sup>15</sup>

The moratorium in the House Republican Conference rules is enforced not only by peer pressure on Republicans but also through the ethics provisions. Democrats could request earmarks, but the Republicans are refusing to accept the disclosure forms—thereby putting any Democrat who makes a request in technical violation of the Rules of the House. As a result, the Democratic staff and leadership of the House Appropriations Committee have advised their members not to submit requests.

The rules about “limited tax benefits” and “limited tariff benefits” may not be good public policy,<sup>16</sup> but they do not raise significant questions about the distribution of power between Congress and the President. Presidents do not have authority to create exceptions to tax law, so these rules do not cede power to the President. But presidents and the rest of the executive branch do have authority to decide what to spend where, within the broad terms of appropriations. The language “primarily at the request of a Member”<sup>17</sup> means that an item included in the President’s budget request or agency congressional justifications is not out of order. Therefore, the power conceded by Congress in foregoing earmarks flows to the President.

The House rules alone would be enough to concede power to the President because they apply to conference reports. But the Senate has adopted its own, largely parallel, measures.<sup>18</sup> Senate Rule XLIV defines “congressionally directed spending,” with the same disclosure requirements for each stage of the legislative process as in House Rule XXI.<sup>19</sup> This includes the requirements that senators certify their lack of

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15. *Id.* at R. XXIII(16). See SANDY STREETER, CONG. RESEARCH SERV., RL34462, HOUSE AND SENATE PROCEDURAL RULES CONCERNING EARMARK DISCLOSURE (2008), for a more extensive overview of the rules changes in both House and Senate in 2007.
  16. This provision would make it more difficult to ease the passage of tax legislation such as the Tax Reform Act of 1986 by providing “transition rules”; whether that is a good or bad thing depends on one’s opinion of the legislation that is passed and whether one sees unacceptable biases in who benefits from the exceptions.
  17. 113th House Rules, *supra* note 8, at R. XXI.
  18. STANDING RULES OF THE SENATE, 113TH CONGRESS, S. Doc. 113-18, 67-69 (Jan. 24, 2013), available at <http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf> (last visited Nov. 13, 2014).
  19. *Compare id.* at 67-69 with 113th House Rules, *supra* note 8, at R. XXI. There are some small differences in the processes for points of order and responsibility for certifications. The Senate language refers specifically to committee chairmen as certifying the lists, and one interview respondent emphasized that Senate chairs therefore have some flexibility in defining what an earmark is. Nevertheless, as discussed below, there appear to be some clear and restrictive understandings.

pecuniary interest in a request.<sup>20</sup> Both Senate Republicans and Democrats have separately adopted moratoria on requests.

These developments in congressional procedure raise three logical questions. First, does this story involve powers that have historically been held by Congress and that are potentially of constitutional import? Certainly a substantial number of members and institutional staff from within Congress believe so. Second, are the changes in rules actually reflected in practice? The answer is an unqualified yes. Third, how did this happen, and could the development be reversed? The political developments toward first regulation and then the moratorium are a complicated story, which I can only sketch out in this space. The fact that the moratorium has not been included in House or Senate Rules may suggest it is especially likely to be reversed, but the path to that reversal seems quite difficult.

These changes in the ability of Congress to formally direct spending to states and districts eliminates neither congressional interest in, nor all the ways that legislators may affect, the geographic distribution of federal benefits. Almost any government activity is likely to be of more interest in certain parts of the country than others. Western legislators will pay more attention to policies about public lands, which are a much larger portion of Western states; urban legislators will have disproportionate interest in supporting urban mass transit; and representatives of communities with large military bases will be especially interested in the educational Impact Aid program. So support for programs in general, rather than projects in particular, is shaped by geographic politics. When programs operate through formulae, such as the distribution of highway funds, the process of developing those formulae is rife with distributional conflict.<sup>21</sup>

In addition, if a project is large enough to have impact beyond one state, it is not an “earmark” in the terms of the rule. That is particularly relevant to large military procurements. The C-17 cargo plane, for example, involves significant manufacturing in Arizona, California, Connecticut, Georgia, and Missouri. Congress, for a number of years, insisted on buying new planes, over administration objections, and the earmark moratorium would not prevent that.<sup>22</sup> A veteran aide explained that if you look at the F-35 fighter jet, that is built by “five

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20. STANDING RULES OF THE SENATE, *supra* note 18, at R. XLIV(6); *see also id.* at R. XLIV(8)(e).

21. The politics of formulae are especially prominent in the Senate because most formulae allocate by state. *See* Frances E. Lee, *Bicameralism and Geographic Politics: Allocating Funds in the House and Senate*, 29 LEGIS. STUD. Q. 185 (2004); *see also* FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999).

22. *See* John M. Donnelly, *C-17's Backers Seek One More Lift*, CQ WKLY., June 21, 2010, at 1490–92.

companies, with Lockheed as the prime contractor. . . . It probably covers every state and 2/3 of the districts.” So buying more F-35s is not an earmark. “If they said, ‘instead of building this tail rudder in the Netherlands it should be in my district,’ that’s an earmark.” But “the Lockheed Martins aren’t involved in the debate about earmarking because it had no material effect on them.”<sup>23</sup> In fact, Lockheed gets a trivial share of its funding from earmarks.<sup>24</sup>

Nevertheless, in military and many other categories of spending, a great many projects, procurements, and grants qualify as “congressionally directed spending” under the new rules. To the extent legislators care about or believe their voters care about specific allocations to their districts or states, the new policies make them more dependent on favor from the executive branch.

## II. LEGISLATIVE POWER AND DISTRIBUTIVE BENEFITS

The constitutional provision that “[n]o Money may be drawn from the Treasury but in Consequence of Appropriations made by law”<sup>25</sup> does not give Congress sole control of spending. After all, laws require the President’s signature. It does mean that the President cannot independently spend.

The Framers feared an executive could use financial inducements to suborn legislators, as is seen by the Article 1, Section 6 ban on appointment of legislators to executive offices with executive benefices.<sup>26</sup> Editorialists and presidents have continually criticized Congress for attention to details that they claimed were beneath the legislature’s dignity.<sup>27</sup> In his 1988 State of the Union address, in the course of

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23. Confidential interview, *supra* note 5.

24. Lockheed in Fiscal Year 2010 received \$17,200,000 in earmarks. Michael S. Rocca & Stacy B. Gordon, *Earmarks as a Means and an End: The Link between Earmarks and Campaign Contributions in the U.S. House of Representatives*, 75 J. POL. 241, 247 (Jan. 2013) (citing Center for Responsive Politics and Taxpayers for Common Sense Data, *available at* [www.opensecrets.org](http://www.opensecrets.org)). To put that in perspective, Lockheed was awarded more than \$37 billion in federal contracts for fiscal year 2013—more than 2,000 times the earmarking figure from FY2010. *See* Aerospace & Defense Intelligence Report, *Top-100 Defense Contractors 2013*, <http://www.bga-aeroweb.com/Top-100-Defense-Contractors-2013.html> (last visited Feb. 19, 2015).

25. U.S. CONST. art. 1, § 9, cl. 7.

26. U.S. CONST. art. 1, § 6.

27. For an excellent review of the controversy over earmarks, the merits of the case, and the development of congressional procedures with regard to distributive benefits, see SCOTT A. FRISCH & SEAN Q. KELLY, *CHEESE FACTORIES ON THE MOON: WHY EARMARKS ARE GOOD FOR AMERICAN DEMOCRACY* (2011). Another fine and shorter overview of the terms and issues involved in earmarking is Porter & Walsh, *supra* note 3.



demanding an item veto, President Reagan mocked Congress for specifying funding for cranberry research, blueberry research, studies of crawfish, and the commercialization of wild flowers.<sup>28</sup> Yet from a congressional perspective, the issue is not whether there will be programs with local benefits but who will decide which localities benefit. If the President decides, then he has a substantial tool with which to influence legislators and so get his way in Congress.

Sometimes we might think the President used this power for a good cause. On behalf of President Johnson, James Webb, Administrator of NASA, informed House Minority Leader Charlie Halleck that if he supported a vote on the Civil Rights Act of 1964, Purdue University would get some nice research grants.<sup>29</sup> Webb not only made the deal but also promised the grants in a series of steps. He explained to Johnson that “I can implement it on an installment basis. In other words, the minute he kicks over the traces, we stop the installment.”<sup>30</sup> But there is no reason to assume what the President wants is good.

Congress chooses the level of detail at which it controls spending. During the Federalist era, appropriations were quite general. When the Jeffersonians took over, appropriations became exceedingly specific.<sup>31</sup> With the growth of government even in the nineteenth century, it became impossible for Congress to be quite as specific as it was in 1804. But legislative and appropriations practice developed in ways that maintained the ability of Congress to direct benefits *when it so chose*. It could do so in three possible ways:

(1) *In Legislative Language*. This had most authority but also could be inconveniently inflexible. For example, conditions might change making a specific project or activity less desirable, or simply less expensive;

(2) *In Report Language Accompanying the Legislation*. Report language is not, as the Government Accountability Office (GAO) explains, binding on the executive.<sup>32</sup> Nor is an agency’s explanation, in its justifications to the Appropriations committee, of how it will divide up lump sums made available in appropriations acts. However, as GAO also explains, this principle of interpretation “merely says that the restrictions are not *legally binding*. The practical wisdom of making the expenditure is an entirely

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28. Ronald Reagan, President of the United States, State of the Union Address (Jan. 25, 1988) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=36035>).

29. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 559 (Alfred A. Knopf ed. 2012).

30. *See id.* at 560.

31. *See* LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801–1829*, at 108–16 (1951).

32. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 6–7 (3rd ed. vol. 2, 2004).

separate question. An agency that disregards the wishes of its oversight or appropriations committees will most likely be called upon to answer for its digressions before those committees next year. An agency that fails to 'keep faith' with the Congress may find its next appropriations reduced or limited by line-item restrictions"<sup>33</sup>; or

(3) *In Less Public Instructions by Leaders in Congress to Agency Officials, or Deals Between These Parties*. Agency leaders' reason for following these instructions is essentially the same as for obeying report language. The key legislator would normally be the chair of the relevant appropriations subcommittee—though the chair might often act as agent for colleagues. A veteran House Appropriations aide explained to me in the 1980s that “[i]n the old days, the subcommittee chair knew he had failed if something showed up in a bill . . . . On the Park Service, the report used to say, ‘the increase is for the Service’s highest priority programs. Then Mrs. Hansen [Julia Hansen of Washington, the Interior subcommittee chair] used to write a letter to the Director: Dear Mr. Director, these are your highest priorities.”<sup>34</sup>

Congressional direction could then be applied to two different situations. In the first, the policy itself consists largely of choosing and locating projects. This is the classic “pork-barrel”<sup>35</sup> of public works such as levees for rivers; dams for power, irrigation, and other purposes; dredging and maintaining harbors; roads and bridges and tunnels (and at one time canals).<sup>36</sup> Other examples include military construction such as facilities on bases, as well as government buildings such as courthouses and post offices. Some appropriations bills were mainly lists of projects. Hence for the Public Works (later, Energy and Water) appropriations bills, members brought constituents to hearings, and both members and constituents testified about why, say, the Yazoo–Mississippi Delta Levee Board should receive more funding. The executive agencies that operate public works programs, especially the

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33. *Id.*

34. Confidential interview, *supra* note 5.

35. The term “pork-barrel” has strong negative connotations, and I do not mean to endorse those connotations by using it. Nevertheless, the term is so common that it is used in most academic research on the phenomenon considered here—only recently being somewhat supplanted by “earmarking.” See JOHN A. FERREJOHN, *PORK-BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947–1968* (1974); LINDA R. COHEN & ROGER G. NOLL, *THE TECHNOLOGY PORK BARREL* (1991); ROBERT M. STEIN & KENNETH N. BICKERS, *PERPETUATING THE PORK BARREL: POLICY SUBSYSTEMS AND AMERICAN DEMOCRACY* (1995).

36. I distinguished “classic” from “new wave” pork-barrel spending in Joseph White, *Making Connections to the Appropriations Process*, in *THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON 164–88* (Paul S. Herrnson, Ronald G. Shaiko & Clyde Wilcox eds., 2nd ed. 2004).

Army Corps of Engineers, were once described as reporting to Congress rather than the President—although in the case of the Corps, critics doubted it was responsible to anyone.<sup>37</sup>

In the second situation, a policy might involve so many relatively small, discreet decisions that most would be made by the federal agencies, as with Great Society categorical grant programs, or the choices about geographic distribution involve discretionary purchases as part of agency operations—for example, defense procurement or R&D.<sup>38</sup> Benefits could be distributed geographically by choosing what to buy or by quiet agreements to award a grant.

Although they have always had significant influence due to their direct supervision of the bureaucracy, presidents have sought more control over distributive benefits.<sup>39</sup> Conflicts can also involve serious policy disagreements, such as over environmental protection and total federal spending. It was on these grounds that President Carter confronted Congress over water projects.

### III. IMPLEMENTING THE NEW RULES

The effect of the new rules is most visible if one looks at the programs that were the arena of the classic “pork-barrel.” For example, one can compare the Military Construction section of the Veterans Affairs and Military Construction Appropriations for 2013<sup>40</sup> and 2009,<sup>41</sup> or the Corps of Engineers or Bureau of Reclamation sections of the Energy and Water bill for the same years.<sup>42</sup>

In 2009, and for decades before, the bill or report would list projects. For each, it would report how much the President requested, how much the House bill provided, the Senate figure, the conference figure—depending on the stage of the process. There would be presidential proposals that were not funded, presidential figures that

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37. See ARTHUR MAASS, *MUDDY WATERS: THE ARMY ENGINEERS AND THE NATION'S RIVERS* (1951).

38. See the discussion in FRISCH & KELLY, *supra* note 27. For one of many sources on military spending, see generally BARRY S. RUNDQUIST & THOMAS M. CARSEY, *CONGRESS AND DEFENSE SPENDING: THE DISTRIBUTIVE POLITICS OF MILITARY PROCUREMENT* (2002) (detailing the connection between congressional organization and defense contract distribution).

39. See *generally*, JOHN J. HUDAK, *PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS* (2014) (discussing presidential controls on federal spending and the practice of presidential earmarks).

40. H.R. Rep. No. 112-491, at 13 (2013).

41. H.R. Rep. No. 110-775, at 16 (2009).

42. H.R. Rep. No. 112-462, at 21, 66–67 (2013); H.R. Rep. No. 110-921, at 12, 57 (2009).

were cut, presidential figures that were funded exactly, some that were increased, and items that were not suggested by the President at all.

In the tables for 2013, the last two possibilities have nearly disappeared.<sup>43</sup> There are hardly any items that were not proposed by the President, and hardly any increases over the President's figure. Those would be "earmarks" as defined in the rules. The only exceptions would be projects that cross state lines, so are for more than one senator. Such projects, however, are quite rare.

The change is not as visible in the bills that were never lists of projects in the same way, yet it is significant nonetheless. Members still request more spending for various items in the defense appropriations, for example. The result was explained to me by one subcommittee staffer:

Throughout the Spring we also get the request letters from members. We keep a huge database. And then with the new rules we have to pull out the earmarks. That puts a real burden on the staff. I get a request to buy more all-terrain vehicles. I have to look to see if it's in his state and then, if a manufacturer is, whether there are other manufacturers who are not.<sup>44</sup>

As mentioned above, legislators may form coalitions to support spending that benefits enough districts to avoid the restriction. They will also claim credit in ways described below. But a large portion of spending decisions is no longer directed in the bills and reports.

Anti-spending advocates assert that earmarking continues. Examples that they publicize, however, are suspect. For example, Citizens Against Government Waste objected to the fact that \$50 million was allocated to the National Guard Counter-Drug Program in the FY 2012 Department of Defense Appropriations Act. They argued that "this corresponds to nine earmarks totaling \$22.9 million in the FY 2010 DOD bill."<sup>45</sup> It does not, however, allocate money to any particular project. Their claim is tantamount to saying that if an account has been earmarked in the past, then any allocation to it now must be secretly earmarked. CAGW made similar claims about spending for programs ranging from Department of Defense ("DOD") cancer research and alternative energy research to the Heritage Partnership Program of the National Park Service.<sup>46</sup> These programs

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43. See, e.g., H.R. Rep. No. 110-921, at 202 (2009).

44. Confidential interview, *supra* note 5.

45. Citizens Against Government Waste, *2012 Congressional Pig Book Summary*, at 1 (2012), available at <http://cagw.org/sites/default/files/pdf/2012-pig-book.pdf>.

46. See *id.* at 12.

might be good ideas or not, but the appropriations and report language did not direct spending to specific states.

Anti-earmark advocates also assert that earmarking continues on back-channels, through letters and phone calls to the agencies—“letter-marking,” or “phone-marking.” Interests certainly are lobbying the executive branch, but that in itself suggests diminished influence by Congress.<sup>47</sup> Appropriations staff and members emphasize that letter-marking or phone-marking have been inhibited by White House and OMB measures to discipline the agencies. In 2008, President Bush issued Executive Order 13,457, which required that agencies “not consider the views of a House, committee, Member, officer, or staff of the Congress” about any earmark unless it were submitted in writing and that all such submissions, subject to potential waiver from OMB, be posted on agency websites.<sup>48</sup> Interviewees within Congress say this has somewhat inhibited contact.<sup>49</sup> Moreover, the broader breakdown of congressional budgeting means that the incentive for cooperation has diminished. In the past, agency officials had to worry that the next appropriations bill could include language to punish noncooperation. The earmarking ban prevents one form of such language: direct instructions to spend money. It does not prevent punishments such as cutting the agency’s travel budget in half, or slicing 10 percent from the Office of the Secretary. At present, however, there is little need to fear such language in next year’s bill. Budgetary gridlock means funding is normally in continuing resolutions, which include few new details.

Senators and representatives still issue press releases to claim credit, but their efforts are less direct. For example, Rep. Niki Tsongas (D-MA) boasted that she won an amendment requiring that DOD

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47. My interviews over the years showed a growing move within lobbying firms toward targeting the executive rather than just Congress—partly because support from agencies could help with Congress; partly to ensure the agencies cooperated with any congressional instructions; and partly because there are only so many people in Congress to lobby. Nevertheless, my sources report a clear further shift in emphasis toward lobbying the executive after adoption of the earmarking restrictions.

48. Exec. Order No. 13,457, 3 C.F.R. 175 (2009). The Obama administration was reported in late 2011 to be circulating a draft memorandum reiterating the position about reporting contacts. See Kevin Bogardus, *Obama Administration Draft Memo Could Shed Light on “Lettermarking,”* THE HILL, Nov. 9, 2011, <http://thehill.com/business-a-lobbying/192497-obama-administration-draft-memo-could-shed-light-on-lettermarking>. However, no such memorandum is listed on the White House website, <http://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda>.

49. This restriction itself could be considered a striking extension of executive power. However, note that Executive Order 13,457 also included language in essence reiterating the 1988 OMB instruction that report language be ignored. That part does not appear to have been obeyed. *Id.*; Porter & Walsh, *supra* note 3, at 10.

furnish athletic footwear to recruits, putting in effect the buy-American requirement for military purchasing, rather than giving them a cash allowance to buy whatever shoes they wish. New Balance does make a 100 percent American shoe in the district.<sup>50</sup> Yet it is not the only American manufacturer, so the provision did not guarantee any amount of business. Steven Pearce (R-NM) won an amendment that would expand the types of nuclear waste that could be processed by a plant in his district; but that was not actually an appropriation of funds.<sup>51</sup>

Senator Richard Durbin (D-IL) emphasized that the defense authorization bill “includes \$225 million in funding for Industrial Mobilization Capacity (IMC) to help arsenals keep their work rates competitive. This funding helps Rock Island Arsenal and other arsenals compete more effectively for public-private partnerships and other business . . . .”<sup>52</sup> Yet this did not guarantee funding for Rock Island. He took credit for “fully fund[ing] the budget request . . . to extend the DOD-VA pilot program at Lovell Federal Health Care Center . . . .”<sup>53</sup> Yet he could not claim credit for funding something the administration did not request.<sup>54</sup>

#### IV. WHY CONGRESS CEDED POWER

The story of why Congress came to cede power involves multiple steps. Earmarks had to become more visible in order to become more controversial. Republicans who were disposed to criticize them as corrupt supported what has been termed an explosion of earmarking before reversing field and banning the process. A series of responses to presidential attacks protected congressional power until, suddenly, they did not. Any account must be viewed as a more-or-less plausible interpretation, rather than absolute truth. Nevertheless, I would claim that the broad outlines are fairly clear.

We should first consider the general conditions under which Congress might cede power to the President. These include:

- (1) Situations in which legislators or those who influence them (e.g., voters, other elites) believe presidential initiative is vital to address a condition, and congressional response too slow. That is

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50. Walter Pincus, “*En Bloc,*” *the New Earmarks*, WASH. POST, June 20, 2013, at A17.

51. *Id.*

52. Press Release, Office of Sen. Dick Durbin, Defense Appropriations Bill Makes Critical Investments in Ill. Priorities (July 17, 2014), *available at* <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=c032fd19-8ed4-45e7-b5f7-a9c7fcc15c6a>.

53. *Id.*

54. *Id.*

a core reason in the national security field and can affect the power of the purse in such situations. It does not appear relevant, however, to the earmarking dispute.

(2) Situations in which legislators want to do something that they believe constituents could punish them for doing. So long as there is some agreement between Congress and the President on what good policy would be, they might cede power to him so they avoid blame for enacting it. This logic partially explains measures such as limitations on amendments to trade legislation, and the Defense Base Closure and Realignment Act of 1990.<sup>55</sup> Some legislators would give this reason for ceding power to earmark; but in general there is less faith that the President can be trusted to do what is right. It seems especially unlikely that a Republican Congress would give a Democratic President power on these grounds.

(3) Situations in which legislators can reduce blame for doing something they consider necessary, yet retain substantial ultimate control. This is the fundamental logic for creation of the President's budget. Congress got the President to propose which interests to disappoint in order to keep total spending within some desired figure. Congress could then either accept figures constituents disliked, and blame the President, or change some of them, getting blame for cutting something else but credit for helping the beneficiaries. Either response is better for congressmen than having to disappoint constituents purely on their own responsibility.<sup>56</sup> This logic also, however, does not apply to the earmark restrictions.

The earmarking situation, instead, involves other dynamics. First, some legislators simply did not believe in the power Congress ceded. In this case they viewed their institution itself as fundamentally suspect, not identifying with its powers and purpose. Second, one party in Congress saw political advantage, in its quest to control the federal government, from being seen to abandon this power. Third, generalized public distrust in Congress made it difficult for the opposing party to forthrightly resist the pressure. When they adopted their opponents' rhetoric as part of electoral competition, the Democrats made it more difficult for themselves to resist the campaign to abandon congressional power.<sup>57</sup> Last, a few and mostly irrelevant "scandals" added to the sense that congressional power was illegitimate.

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55. Pub. L. No. 101-510.

56. Joseph White, *Presidential Power and the Budget*, in *FEDERAL BUDGET AND FINANCIAL MANAGEMENT REFORM 1*, 4 (Thomas D. Lynch ed., 1991).

57. Something similar happened in the 1980s as the Democrats attacked President Reagan for his budget deficits, thereby committing themselves

The core reasons why Congress at least temporarily abandoned some of its power, therefore, involved fundamental aspects of American politics. Congress is divided, and its members often attack the institution. This puts it at a distinct disadvantage compared to the President. The public in general distrusts Congress as an institution; in fact, it distrusts legislative processes. As Hibbing and Theiss-Morse wrote, reporting on a combination of survey and focus group data, their respondents believed “governmental decisions are not rendered in a procedurally just fashion,”<sup>58</sup> because some interests have more access than others. “Overprofessionalization and inequitable representation swirl together in the minds of the people,” and “people do not distinguish between essential modern democratic processes and perceived abuses of those processes.”<sup>59</sup> In the public’s view, “interest groups are invariably evil, and Congress’s members are evil for being in any way associated with them.”<sup>60</sup> The earmark process, which serves discrete interests and is dominated by long-serving appropriators and specialized staffs, is a perfect target for the distrust they describe. Ira Katznelson argues in his interpretation of the New Deal that distrust of legislatures and greater trust in executives was so strong, in that time of crisis, that support for constitutional democracy, as opposed to rule by a strong leader, was in serious doubt.<sup>61</sup> If factions within Congress turn against Congress, its role will be difficult to preserve.

President Reagan had his own showdown with Congress over more classic direction of spending when he vetoed the Surface Transportation and Uniform Relocation Assistance Act of 1987, highlighting its

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to policies of deficit reduction that made it difficult for them to make a positive case for government. See JOSEPH WHITE & AARON WILDAVSKY, *THE DEFICIT AND THE PUBLIC INTEREST: THE SEARCH FOR RESPONSIBLE BUDGETING IN THE 1980S* (1989).

58. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* 146 (1995).

59. *Id.* at 146.

60. *Id.* at 147.

61. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 12 (2013) (“Parliamentary democracies were widely thought to be weak and incapable when compared to the assertive energies of Fascist Italy, Nazi Germany, imperial Japan, and the Communist USSR. At the heart of this concern was a widespread belief that legislative politics, a politics polarized by competing political parties and ideological positions, made it impossible for liberal democracies to achieve sufficient dexterity and proficiency to solve the big problems of the day. This problem seemed especially acute in the United States, whose government reflected the most radical separation of powers between the executive and legislative branches of government in the world.”). Katznelson makes clear that this preference for the executive was as strong among elites as among the public. *Id.*



inclusion of 121 “demonstration projects.”<sup>62</sup> “I haven’t seen this much lard since I handed out blue ribbons at the Iowa State Fair,” the President proclaimed.<sup>63</sup> His veto, however, was overridden.<sup>64</sup> As with the Carter water project conflict, under current rules the President would have won without a fight. The process that led to the 2011 moratoria truly began, however, when the processes of less visible relationships between legislators and agencies broke down during the Reagan administration.

One reason was that tight presidential budgets excluded spending that could have been taken for granted before. In 1989, a senior House Appropriations aide commented that

requests are being made for things they never did before because [representatives] did not have to. One of the first letters this year was 68 members who were opposed to the budget for the Corps requesting that no money be spent for dredging for ports with less than 25,000 tons of commercial shipping. That means no dredging for recreational boating, which was a big issue on the Great Lakes. They have to fight for what they have expected for years.<sup>65</sup>

The Office of Management and Budget also pressured agencies not to make agreements with Congress contrary to the President’s Budget. This forced appropriators to put language into the reports, leading to OMB Director Miller’s failed initiative. Putting instructions in reports or even the law, however, made them more visible, raising the chance they would become targets for criticism.

During the 1980s also, new interests began lobbying for discreet benefits, especially universities that sought new facilities. This was encouraged by the creation of appropriations lobbying firms, which would promote their services to potential clients and so generate demand. Then they would use their successes for marketing to other universities and local governments.<sup>66</sup> This brought more visibility and negative publicity to earmarks as the Association of American Universities criticized them on the grounds that they violated peer review.

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62. See U.S. Dept. of Transp., *President Ronald Reagan and the Surface Transportation and Uniform Relocation Assistance Act of 1987*, <http://www.fhwa.dot.gov/infrastructure/rw01e.cfm> (last updated Oct. 15, 2013).

63. *Id.*

64. *Id.*

65. Confidential interview, *supra* note 5.

66. See ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009), for a good account of how this business developed, though with some highly questionable judgments about the consequences.

Nevertheless, many AAU members pursued them anyway, and they proliferated in tandem with the criticism of them as a violation of good government.<sup>67</sup>

As demands increased, some House subcommittee chairs held out, much to the frustration of their Senate counterparts; and earmarking was limited to a small subset of accounts.<sup>68</sup> But the subset grew over time as claimants discovered new pots of money. Thus, by the end of the 1980s, there was new controversy about distributive politics, mostly around the supposed violations of peer review. These controversies would not have been as significant, however, if they had not been in the context of a titanic clash over budget deficits.

The deficit issue dominated federal decision-making from 1980 to 1997.<sup>69</sup> One major division involved the extent to which the deficit was a revenue problem or a spending problem. The expression “pork barrel” was a useful weapon in this conflict, because it connotes greasy politics and the idea that some spending is fundamentally corrupt. The notion of spending as corruption has been part of the ideology of budget balance since the founding of the republic.<sup>70</sup> The argument is that politicians spend to buy our votes and run deficits in a way honest, ordinary Americans could not.

Therefore, in the late 1980s, ideologically conservative groups like Citizens Against Government Waste and Taxpayers for Common Sense campaigned to make earmarks, the public part of supposedly “pork-barrel” spending, more of a political issue. In the 1990s, they started publishing lists of earmarks such as Citizens Against Government

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67. See JAMES D. SAVAGE, *FUNDING SCIENCE IN AMERICA: CONGRESS, UNIVERSITIES, AND THE POLITICS OF THE ACADEMIC PORK BARREL* (1999), for an excellent overview of the rise of academic earmarking. See DANIEL S. GREENBERG, *SCIENCE, MONEY, AND POLITICS: POLITICAL TRIUMPH AND ETHICAL EROSION* (2001), for a more extensive overview of funding for research and higher education. See Dan Greenberg, *Academic Pork Has Accomplished a Lot of Good*, *CHRONICLE OF HIGHER EDUCATION* (Mar. 25, 2008), <http://chronicle.com/blogPost/academic-pork-has-accomplished-a-lot-of-good/5810>, for a good statement of why the earmarks could be justified.
68. James D. Savage, *Saints and Cardinals in the Appropriations Subcommittees and the Fight Against Distributive Politics*, 16 *LEGIS. STUDIES Q.* 329 (1991).
69. See WHITE & WILDAVSKY, *supra* note 57, for the origins and buildup of the gridlock over deficits. A variety of other works chronicled subsequent battles during the 1990s. See GEORGE HAGER & ERIC PIANIN, *MIRAGE: WHY NEITHER DEMOCRATS NOR REPUBLICANS CAN BALANCE THE BUDGET, END THE DEFICIT, AND SATISFY THE PUBLIC* (1997); GEORGE HAGER & ERIC PIANIN, *BALANCING ACT: WASHINGTON'S TROUBLED PATH TO A BALANCED BUDGET* (1998).
70. JAMES D. SAVAGE, *BALANCED BUDGETS AND AMERICAN POLITICS* 4 (1988).

Waste's "Pig Book" (the actual title).<sup>71</sup> In fact, we do not know how much of the growing number of visible earmarks in the 1980s and early 1990s represented a real increase in congressional directions to the executive and how much was the old process becoming more visible. But some of it was new, and the campaign against earmarks tapped into a deep well of public sentiment.

Once the "pork barrel" had been redefined as "earmarks," there were a series of developments.

\* Beginning in the 1990s, there was a substantial increase in both the amount and dollar value of earmarks. Counts by the anti-government interest groups, Congressional Research Service, and OMB used different definitions and data bases.<sup>72</sup> Yet by any accounting, spending for earmarks rose between the early 1990s, the first available data point, and FY 2006, after which it fell but still remained higher than in the early 1990s.<sup>73</sup> The number of earmarks increased much more rapidly than the value, especially from the mid-1990s on.

\* The number and total value of earmarks did decline a couple of times due to heightened criticism. This happened especially in 1995, for the fiscal 1996 appropriations, and 2006, for the fiscal 2007 appropriations.

\* Many Republicans had campaigned against earmarking in the 1994 election that captured Congress, but House and Senate Republicans chose to increase earmarking after their somewhat disastrous budgetary clash with President Clinton in 1995–1996. Part of the reason was belief that projects would help vulnerable

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71. See *The Congressional Pig Book*, CITIZENS AGAINST GOV'T WASTE, <http://cagw.org/reports/pig-book/2012> (last visited Feb. 19, 2015), for access to annual editions.

72. The definitions reflected institutional attitudes. Thus, for OMB, if the President's Budget included an item, it was not an earmark. *Guidance to Agencies on Definitions of Earmarks*, OFFICE OF MGMT. AND BUDGET, [https://earmarks.omb.gov/earmarks-public/earmarks\\_definition.html](https://earmarks.omb.gov/earmarks-public/earmarks_definition.html) (last visited Feb. 24, 2015). For CRS, spending that was directed to particular constituencies or purposes, whether by the President or Congress, was an earmark. Memorandum, CONG. RESEARCH SERV., EARMARKS IN APPROPRIATION ACTS: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005 (Jan. 26, 2006), available at <http://fas.org/sgp/crs/misc/m012606.pdf>.

73. See Richard B. Doyle, *The Rise and (Relative) Fall of Earmarks: Congress and Reform, 2006–2010*, 31 PUB. BUDGETING & FIN. 1 (2011), for a good comparison of sources. See Cong. Research Serv., *supra* note 72; CAROL HARDY VINCENT & JIM MONKE, CONG. RESEARCH SERV., R40976, Earmarks Disclosed by Congress: FY2008-FY2010 Regular Appropriations Bills (2010), for CRS data.

members win reelection, although claiming credit could be awkward for members who had campaigned on anti-spending platforms.<sup>74</sup> Republican leaders also concluded they were going to lose to President Clinton on spending totals, so they might as well spend on items their members wanted.

Probably the most important reason was that Republican leaders decided members who got specific things for their districts would be more easily convinced to vote for bills that, otherwise, had aspects they disliked. This was true of both Republicans who thought the totals were too large and Democrats who thought they were too small. In the House, the key figure was Tom DeLay (R-TX), as first Majority Whip and then Majority Leader. The challenge, as one senior aide termed it, was “when you have a 6-vote majority, and never want to lose, how do you do that?” In a number of cases, he cut deals<sup>75</sup> with John Murtha (D-PA), who had a set of rust belt Democrat allies and, in the words of another GOP aide, “could swing some votes for the bill even if it had some restrictions on regulations or underfunded some accounts.”<sup>76</sup> The first aide reported that DeLay “said he could bank 100% on Murtha, who would deliver 30 votes if he said he would.”

\* Earmarking therefore expanded on a pretty much nonpartisan basis. The majority party received a bit more per member, but not dramatically more.<sup>77</sup> This widened distribution of earmarks, which one Republican appropriator called “democratization” in an interview and might also be called “institutionalization,” increased expectations on the part of members and required creation of new procedures to process requests. These procedures, such as online submission forms, made it easier to submit requests and so may have attracted more. By 2005 or so, there were roughly 40,000 requests per year. Only a small portion could be

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74. As was expressed to me by some Republicans in interviews at the time.
75. Confidential interview, *supra* note 5. See also Jonathan Allen, *The Earmark Game: Manifest Disparity*, CQ WKLY, Oct 1, 2007, at 2836, 2845, tbl. (describing John Murtha’s “influence,” “primacy,” and respect throughout the earmarking process and obtaining the most number of earmarks in 2007).
76. Confidential interview, *supra* note 5. FRISCH & KELLY, *supra* note 27, discuss this period at 141–43. The role of Representative Murtha is also described in Allen, *supra* note 75.
77. Allen, *supra* note 75, at 2837 (describing this pattern starting at 2007). It was much the same as was reported in my interviews at other times. For some bills in the House there was an explicit division, 60% for the majority and 40% for the minority. For others it was closer to 50/50. *Id.* at 2848, t.1. In some cases the minority share was allocated to the Democratic subcommittee leaders to allocate, subject to oversight meant to ensure the projects could be defended.

funded, and the volume of requests largely explains why the total earmarks rose more quickly than total spending.<sup>78</sup>

\* As anti-spending groups used earmarks to symbolize their cause, the uproar was fed by a few scandals. One, involving Republican lobbyist Jack Abramoff, had little to do with earmarks and appropriations but was mentioned in stories about earmarks anyway.<sup>79</sup> Republican Congressman Randy “Duke” Cunningham, however, was convicted of accepting bribes in return for his efforts to steer earmarks and contracts from his position on the defense appropriations subcommittee.<sup>80</sup> These events were one reason why “Democrats highlighted earmarking scandals in their successful 2006 campaign to win back control of Congress,” pushing a narrative that linked earmarks to a Republican “culture of corruption.”<sup>81</sup> They thereby amplified the conservative anti-earmarkers’ core theme.<sup>82</sup> Specific earmarks, such as the “Bridge to Nowhere” in Alaska were also attacked.<sup>83</sup>

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78. Allen, *supra* note 75, at 2837. In 2007, there were 7,000 earmarks in the House-passed spending bills, although there were 33,000 requests. *Id.* Note that with 12 bills, and 435 members of the House, this works out to 1.34 items per member per bill, which may sound less extreme.
79. See Susan Schmidt & James V. Grimaldi, *The Fast Rise and Steep Fall of Jack Abramoff*, WASH. POST (Dec. 29, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/28/AR2005122801588.html>.
80. George E. Condon Jr., *Disgraced Congressman Randy “Duke” Cunningham Is a Free Man Again*, NAT’L J. DAILY (July 11, 2014), available at <http://www.nationaljournal.com/congress/disgraced-congressman-randy-duke-cunningham-is-a-free-man-again-20140710>.
81. Tom Hamburger & Richard Simon, *Rep. Lewis a Leader of Earmark Pack*, L.A. TIMES, Feb. 14, 2008, <http://articles.latimes.com/2008/feb/14/nation/na-earmarks14> (explaining that the Democrats emphasized Republican earmarks throughout the 2006 campaign); Steven T. Dennis, *House Adopts Budget, Earmark Rules*, CQ WKLY., Jan. 8, 2007, at 125 (using the phrase “culture of corruption”).
82. See, e.g., Timothy R. Homan, *Defense Earmarks Squander \$1.6 Billion a Year*, FISCAL TIMES, May 7, 2014 (“Earmarks are the gateway drug to the culture of corruption and spending in Washington;’ Sen. Ted Cruz (R-TX) said at a news conference . . .”).
83. FRISCH & KELLY, *supra* note 27, at 152 (mentioning Abramoff, Cunningham, the trial of Senator Ted Stevens, and this bridge). Senator Stevens, longtime Senate Appropriations Committee Chairman who was accused in October 2008 of taking improper gifts, was railroaded. In order to convict Stevens, prosecutors engaged in a “narrative of legal bungling” and took a variety of “missteps,” including concealing exculpatory evidence. John Bresnahan & Josh Gerstein, *Report Blasts Prosecutors in Ted Stevens Case*, POLITICO, Mar. 5, 2012, <http://www.politico.com/news/stories/0312/74056.html>. On the substantive merits of the bridge from the town of Ketchikan to Gravina Island, see Becky

Some of the supposed cases were exaggerated. The Bridge to Nowhere was not an absurd idea. It was nowhere because there was no bridge to it. The purpose of the bridge was to make it somewhere. But the bribery scandals did involve one legitimate point. Defenders of the congressional role in distributing benefits say legislators are just doing their job, helping their districts. That is why they normally boasted about their earmarks. So if legislators do things they do not want known—like steer benefits toward campaign contributors—that does not fit the argument for why serving their districts is legitimate.

#### V. “REFORM,” OR, THE ANTI-EARMARK BIDDING WAR

The Democrats’ capture of Congress began a process in which Democrats and earmark defenders (such as members of the Appropriations committees) adopted more modest measures, were criticized, and were pushed for more radical restrictions—ending with the moratoria adopted when the Republicans regained control of Congress in 2010.<sup>84</sup> The Senate moved less willingly than the House.

The reforms began with House Democrats adopting, in a series of stages, rules that made both earmarks and (just as important) requests for earmarks much more visible. This could be justified on the grounds above—that legislators should only be asking for items they could defend to their constituents, so there was no excuse for secrecy.<sup>85</sup> Some of the most fervent earmark critics had claimed to object to the process because of its lack of transparency, but these reforms did not change their position.<sup>86</sup> Making all earmarks visible, however, revealed more clearly than before that a far disproportionate share of funding was going to legislative leaders, appropriators, allies of powerful leaders (e.g., the Murtha group), and vulnerable members from both parties.<sup>87</sup>

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Bohrer, *Alaska Officials May Find Use for “Bridge to Nowhere,”* SEATTLE TIMES (June 30, 2013), [http://seattletimes.com/html/localnews/2021302981\\_bridgenowherexml.html](http://seattletimes.com/html/localnews/2021302981_bridgenowherexml.html).

84. For more detailed accounts of reforms while the Democrats controlled Congress, see Doyle, *supra* note 73, at 1. FRISCH & KELLY, *supra* note 27; Streeter, *supra* note 15.
85. Although secrecy may not seem legitimate, it had some merits. If requests were not publicized, members could tell constituents they would forward a request, but only forward the ones they believed were most plausible and/or most wanted. In short, they could screen requests but blame the mysterious committee for disappointing constituents. Once the requests became public, members could be blamed for not forwarding every request they received so reportedly felt they had to make more requests.
86. FRISCH & KELLY, *supra* note 27, at 163 (quoting Senator Tom Coburn, who defined the evils of earmarking entirely in these terms yet continued attacking earmarking as corrupt after the reforms).
87. Allen, *supra* note 75. The results were used to argue, for example, that there was a racial disparity, with districts represented by minorities being

It thus, according to appropriations staff, appears to have increased dissatisfaction among the members who were not favored and fed into the distrust of special favors and professionalization described by Hibbing and Theiss-Morse.

While the 2006 election forced Democrats to seek to address their own claims (and some real ones) about the problems with earmarking, it also changed the dynamic within the Republican Party. Republicans had been divided between fervent anti-earmark members and members who thought delivering for their constituencies was part of the job. After the election, the former group argued “that the increase in earmarks during the 12 years that the Republicans controlled Congress was a leading reason why they are now in the minority.”<sup>88</sup>

Congressional Republican politics and competition with the Democrats both gave this side the upper hand.

The basic dynamic seems to fit with how a senior aide described the strategic situation for John Boehner (R-OH), who became Majority Leader in 2006 after Representative DeLay had to step down due to indictment on campaign finance charges. Boehner won narrowly as a reform candidate, upsetting Whip Roy Blunt (R-MO).<sup>89</sup>

This senior aide related the following:

What Boehner realized was the leadership was in big trouble. DeLay had had his issues . . . . Members had seen the leadership pushing for pork, [Speaker] Hastert especially. Blunt represented that to some extent, and Boehner looked around and said this earmark ban might play with the reformists in the conference who think we have lost our way. So he used it as a rallying cry. Before that he wasn't someone who had been crusading against earmarks for years, publicly decrying them.<sup>90</sup> But it became something that he in 2006 could run for the leadership and win because he could be the reformist. And there was still a lot of earmarking going on in 2007–08. And more reformists coming in. And then in 2009 they knew they were going to be voting against the bills because

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disadvantaged. *Id.* There were many reasons why this was not due to racial bias, such as that inner-city districts rarely include defense contractors. Nevertheless the discussions of this pattern in the Allen article indicate how the data could increase divisions. The politics of distributing constituency benefits in fact had always favored the same members, though perhaps with less attention to vulnerable members, roughly in order of how important they were to passing the legislation.

88. David Clarke, *Earmarks: Here to Stay or Facing Extinction?*, CQ WKLY., Mar. 16, 2009, at 613.
89. See Jonathan Weisman, *In an Upset, Boehner Is Elected House GOP Leader*, WASH. POST, Feb. 3, 2006, at A01.
90. Boehner could, however, criticize earmarks with little fear of being called a hypocrite, as he is widely reported to be among the few members who did not request them.

they had too much spending, so using earmarks was an easier way of criticizing the bills. If you're arguing about 6% or 8% more for Labor/H [the Labor/HHS appropriations bill], you're arguing on Democratic terms, about helping kids. With earmarks you didn't have to fight about the merits of funding education, you could fight on "wasteful spending."

House Republican leadership therefore had strong and consistent incentives to push for an earmark ban, and did so.<sup>91</sup>

The debate over different reforms from 2007 through 2010 was complicated and not entirely partisan. Republican Appropriators, especially, tended to object to eliminating earmarks. One could look at public statements at any given time and infer that Republicans were divided and might not, if they took power, go through with their promise or threat to ban earmarks.<sup>92</sup> House Republican leaders strongly endorsed the moratorium, but Senate Republican leaders were less consistent.

Nevertheless, the GOP clearly was becoming more and more committed to the moratorium. The rise of the Tea Party activated the portion of the Republican base that was most fervently convinced government spending is corrupt and that was represented in some primary contests.<sup>93</sup> President Obama himself (behaving as presidents often do) attacked congressional earmarking. In the wake of what was widely perceived as a Tea Party victory in the 2010 election, House

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91. At this writing, the press releases from the time are on Speaker Boehner's website. See, e.g., *Now Will Speaker Pelosi Join Republicans in an Earmark Freeze?*, SPEAKER BOEHNER'S PRESS OFFICE (Mar. 23, 2008), <http://www.speaker.gov/general/broken-earmark-process-full-display-another-house-democrat-exposed> (pointing out that then-Speaker Pelosi had not joined Republicans in an effort to reform earmarking, though other Democrats had).

92. For an excellent analysis of the factions within Congress, see Kerry Young, *An Earmark by Any Other Name*, CQ WKLY., Nov. 22, 2010, at 2698–2700; Liriel Higa, *110th House Committees: Appropriations*, CQ WKLY., Nov. 13, 2006, at 2990–91; David Clarke, *Steering Away From Earmark Rules*, CQ WKLY., Oct. 12, 2009, at 2275; David Clarke, *Having It Both Ways on Federal Spending*, CQ WKLY., Jan. 4, 2010, at 8; David Clarke & Edward Epstein, *Earmark Bans Get a Frosty Reception*, CQ WKLY., Mar. 15, 2010, at 634; Edward Epstein, *Earmarking in an Anti-Earmark World*, CQ WKLY., May 3, 2010, at 1068. For a strong pro-earmark statement by one of the most conservative senators, framed in terms of the dangers of leaving the power to a liberal President, see James M. Inhofe, *Eliminating Earmarks Is a Phony Issue*, NAT'L REV. ONLINE, Nov. 12, 2010, 7:00 AM), available at <http://www.nationalreview.com/corner/253159/eliminating-earmarks-phony-issue-james-m-inhofe>.

93. See, e.g., Melissa Attias, *Earmarks That Once Were Delicacies Now Are Poison*, CQ WKLY., June 28, 2010, at 1542 (noting that some Republican House members who once bought into earmarking now argue that earmarking was "hijacked by spending interests").



Republicans did what they said they would do; and the Senate, fairly meekly, followed along.

### CONCLUSION: PROSPECTS FOR REVERSAL

In the course of my interviews about earmarking in 2013–2014, I encountered a number of Republican ex-legislators and senior Republican staff involved with appropriations who consider the earmarking ban bad for Congress and for their members. They did not see why it is in their interest to cede power to the President. They believed that the most fundamental reason for budgetary gridlock is the ideological distance between Republicans in Congress and the President but also that even if Speaker Boehner wanted to pass appropriations, it was made more difficult by the fact that it was now much harder to give members—even appropriators—reason to vote for a bill. In 2013, one such individual explained that

it is very hard to get Democrats in the House or Republicans in the Senate to vote for the bills, in at least half of the subcommittees. There, earmarks could help because politicians are pretty good at finding reasons for saying either yes or no. So in a giant Interior bill you could say, this does cut EPA by 3%, it helps reduce regulation, and I get this project that is important for my district. Or, I get this dredging for Charleston. So it provides ammunition to justify a vote. It's not the solution but it would help.<sup>94</sup>

These sentiments also were reflected in numerous reports in the public press.<sup>95</sup> Yet, in spite of reports of hidden sentiment in favor of loosening the ban, nothing of the sort has occurred. In November 2014, Rep. Mike Rogers (R-AL) proposed to the House Republican Conference that earmarking to state and local governments be allowed; he was defeated by a wide margin, with Speaker Boehner saying the idea would pass “over my dead body.”<sup>96</sup> Republican politicians can certainly see that support for earmarks remains highly unpopular

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94. Confidential interview, *supra* note 5.

95. *See, e.g.*, Sam Stein & Ryan Grim, *Harry Reid Wants to Revive Earmarks and Says a Top House Republican Does Too*, HUFF. POST (June 26, 2014, 12:59 AM), [http://www.huffingtonpost.com/2014/06/26/harry-reid-earmarks\\_n\\_5531388.html](http://www.huffingtonpost.com/2014/06/26/harry-reid-earmarks_n_5531388.html) (pointing out that “Congress may be warming up to earmarking” again); Frank Oliveri, *Cardinals With Clipped Wings*, CQ WKLY., Oct. 21, 2013, at 175054 (reporting on Republican House appropriators wanting to allow earmarks again); Katy O'Donnell, *House GOP Wistful for Days of Earmarks*, NAT'L J., May 15, 2012.

96. Associated Press, *House GOP: Give Up Gavel If Seeking New Office*, N.Y. TIMES Nov. 14, 2014, 2:33 PM, <http://www.nytimes.com/aponline/2014/11/14/us/politics/ap-us-house-gop-chairmen.html>.

among their base, as was evidenced when Senator Thad Cochran, who had chaired the Senate Appropriations Committee in 2005–2006 and is now chair again, was nearly denied renomination for his seventh term by an opponent who attacked him for earmarking.<sup>97</sup> My interview respondents who wanted earmarking restored had no suggestions about how that would be accomplished.

A Democratic House might end the earmark moratorium, and then the Senate might return to its instincts and go along. But a Democratic House does not look all that likely at the moment. Moreover, its members might not want to immediately attract attacks by returning to “corrupt” practices. One could never be sure of what will happen. But for the moment, Congress has abandoned a share of its power of the purse, and the way back to power is not visible.

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97. On the attacks about earmarking, see Richard Fausset, *Federal Largess in Mississippi Helped a GOP Senator, Until It Hurt Him*, N.Y. TIMES, June 18, 2014, at A14. Cochran won only after a massive infusion of funds from national Republican elites such as the Chamber of Commerce, and appeals for votes from voters who were very much not part of the GOP base, such as African Americans, who did not want his tea party opponent to win. See Alexander Burns, *How Thad Cochran Bounced Back from Disaster*, POLITICO (June 25, 2014), <http://www.politico.com/story/2014/06/how-thad-cochrans-campaign-pulled-it-off-108276.html>.