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Omnibus Earmarks Out: President Bush Should Cancel Congress's Pork Spending

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Now that it appears the 3,417-page omnibus appropriations bill (H.R. 2764) will be signed into law, the question remains whether the American people must endure the estimated 11,331 earmarks, worth approximately \$20 billion, in this year's spending bills. Earlier this year, President Bush and Democratic congressional leaders pledged to cut the number of pork projects in half—from the 2005 peak of 13,492 to 6,746.¹ While Congress brazenly broke its pledge to the American people, the President's hands are not necessarily tied. Indeed, the President said in a press conference this morning, "I am instructing the budget director to review options for dealing with the wasteful spending in the omnibus bill." The President has several options to bring some merit and accountability to fiscal year 2008's appropriations, including perhaps cancelling many of Congress's most egregious earmarks.

The Earmark Problem. In the past, lawmakers would fund government grant programs and then let federal agencies distribute the funds to state or local governments through statutory formulas or to specific groups through competitive application processes. Today, however, Congress actually determines, within legislation, who will receive government grants by "earmarking" grant money to specific recipients. Earmarks are known as "pork projects." Since 1996, the number of annual earmarks has leapt from 958 to 11,331.²

Earmarking is a corrupting process. It effectively gives individual lawmakers their own pot of tax dollars to distribute to organizations of their choosing.

So rather than file an application, many federal grant seekers today have to make a political donation. Lobbyists promote their matchmaker role, effectively auctioning government grants to the highest bidder. As a result, the FBI has launched several corruption investigations to determine whether lawmakers based earmark decisions on personal profit.

Because they are outside the competitive application process, earmarks are distributed with little or no government oversight or accountability. Most earmarks are not fully audited, and the result has been cases of earmarked funds being embezzled by their recipients.

Eliminating earmarks would not reduce FY 2008 grant spending, but it would ensure that grants are distributed by merit rather than politics and would stifle the enormous appetite for federal largesse. Worthy projects should have no trouble securing funding based on merit; only the unworthy projects would lose funding.

Immediate Ways to Reform Fiscal Year 2008 Earmarks. President Bush should consider three options for keeping his pledge to rein in pork projects:

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www.heritage.org/Research/Budget/wm1757.cfm

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1. *Cancel non-binding earmarks by executive order.*

Most earmarks are not written into the actual appropriations bills that are signed into law. Rather, they are included in conference reports, which are explanatory statements that accompany the legislation to the President's desk. Because they are not technically part of the bill, the Executive Branch is not legally bound to implement conference reports. The President could simply direct agencies to ignore the earmarks listed in the conference reports. The funds would still be spent, but the agencies would have the discretion to distribute the funds by merit rather than congressional diktat.

It is not clear whether the President has that option this year. The appropriations bills' texts contain several sections stating that a certain amount of a program's budget "shall be available for projects and in the amounts specified in the explanatory statement described in section..." This may effectively make many of the earmarks in the conference reports legally binding. The White House, as well as Members of Congress, should investigate whether that is the case. If they determine the conference reports' earmarks remain non-binding, then President Bush should issue an Executive Order cancelling all 11,331 earmarks and requiring that all government grants be distributed by merit or statutory formula.

2. *Flexibly address vague earmarks.* Even if the Bush Administration is bound by the earmarks in the conference reports, the vagueness of many earmarks provides some flexibility, allowing for funding to be based on merit rather than politics. Even though lawmakers may intend for earmarked funds to go to a specific recipient, the earmark language often lists only the earmark's purpose and excludes the name of this intended

recipient. The federal agency implementing the earmark is bound only to what is explicitly written and therefore is free to provide the grant to the recipient it feels can best carry out the earmark's listed purpose.

For instance, the agriculture bill contains a \$3.7 million earmark that says only: "Formosan Subterranean Termite, New Orleans, LA." One assumes, although it is not technically specified, that the earmark is intended for humans to combat the termite, rather than as a grant to the termites themselves. Yet even then, this language provides complete flexibility in how this money can be used to combat the termites. Agencies could hold a grant competition or find other efficient, merit-based ways to accomplish the termite-eradicating objective. They are not bound by the unwritten intentions of the requesting lawmaker.

Similarly, the energy and water bill includes a \$5 million Army Corps of Engineers earmark, requested by Senator Richard Shelby (R-AL), that says only "Tuscaloosa"—no specifics are listed beyond the city's name. Typically, agencies coordinate with lawmakers to discover exactly what is intended. However, the Administration is under no legal obligation to obey any additional instructions that are not in the conference report. It is possible that the Army Corps of Engineers could rent an airplane and drop 5 million \$1 bills over the city of Tuscaloosa (giving new meaning to an "airdropped earmark") and still be in legal compliance with the earmark. More realistically, the Army Corps of Engineers could determine on its own the best use of these funds in Tuscaloosa.

Alternatively, the Administration may simply refuse to implement earmarks that are not suffi-

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1. The Web site of House Speaker Nancy Pelosi (D-CA) states: "The second [transparency and accountability commitment] is cutting the amount of earmarks in half—the total FY 2008 earmarks will be half of the earmark total included in the FY 2006 bill under the Republican-controlled Congress," at www.speaker.gov/legislation?id=0045. The Office of Management and Budget's Web site states: "On January 3, 2007 President Bush called on Congress to cut the number and cost of earmarks by at least half," at www.earmarks.omb.gov.
 2. Earmark data from 1996 is calculated by Citizens Against Government Waste, at www.cagw.org. The current 11,331 estimate is derived from Taxpayers for Common Sense's estimate of 2,161 earmarks in the defense appropriations bill, at www.taxpayer.net/budget/fy08appropschart.html, plus publicly reported estimates of 9,170 earmarks in the omnibus bill.

ciently specific and instead direct that these billions be escrowed in the federal treasury, drawing interest for taxpayers. Congress will argue that the President cannot impound the funds under a 1970s Supreme Court ruling, but he can rightfully insist that Congress has a duty to be clear about how our money is spent. Saving billions of dollars is certainly worth fighting over, and courts may uphold the executive branch's right to refuse implementation of excessively vague laws.

3. **Ban “phone-marking.”** Lawmakers who do not have all their earmarks incorporated into legislation often call agencies directly and demand funding for their pet projects. “Phone-marking” is effective because most agencies do not want to anger the lawmakers who vote on their agency budgets. Yet because phone-marks never appear in legislation, they are kept secret from the American people, rendering them even less accountable than regular earmarks. They thus violate the pledges of transparency made by Democratic congressional leadership. Phone-marking is also against the law; lawmakers are effectively asking agencies to set aside the statutory laws for distributing government grants in favor of their own personal whims.

The Office of Management and Budget has already issued guidelines asking agencies to resist phone-marks.³

President Bush should go further and mandate by Executive Order that agencies refuse to implement phone-marks and instead use federal

statutes to distribute all non-earmarked grants. Additionally, President Bush can sign an Executive Order mandating that every agency keep a list of every grant that is not distributed by the merit- or formula-based standards in the program's underlying statutes.

Government watchdog organizations may also file Freedom of Information Act (FOIA) requests to all federal agencies, seeking lists of all contacts between lawmakers and agencies where earmarks or any other spending projects are discussed. This information could help watchdog groups connect the dots between lawmaker-to-agency contacts and federal grants.

Conclusion. In the November 2006 elections, the American people sent a loud and clear message that they are tired of runaway spending, pork, and corruption.⁴ Despite promising reform, the Democratic congressional majority produced an omnibus spending bill that includes the second highest number of pork projects of any bill in American history.⁵ The estimated \$20 billion of FY 2008 pork is not a trivial amount; it is equal to the entire federal personal income tax liability for the states of Iowa, New Hampshire, New Mexico, West Virginia, and Delaware combined.⁶ President Bush also pledged to rein in earmarks and has several options to follow through on that promise. Taxpayers will be watching with interest.

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3. Office of Management and Budget, “Memorandum for the Heads of Departments and Agencies,” Memorandum 07-10, February 15, 2007, at www.whitehouse.gov/omb/memoranda/fy2007/m07-10.pdf.
4. CNN's 2006 election exit poll revealed that 41 percent of voters listed corruption/ethics as “extremely important”—the highest total for any issue. See www.cnn.com/ELECTION/2006/pages/results/states/US/H/00/epolls.0.html.
5. The FY 2005 omnibus appropriations bill (P.L. 108-447) contained 11,108 earmarks, according to Heritage Foundation calculations based on earmark data from Citizens Against Government Waste, at www.cagw.org. The new FY 2008 omnibus bill contains an estimated 9,170 earmarks.
6. Individual Income Tax Returns: Selected Income and Tax Items by State, ZIP Code, and Size of Adjusted Gross Income, Tax Year 2005.