The Constitutional Case Against Congressional 'Earmarks'

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Originally Published in
Perspective, Vol. 15, No. 4 (April, 2008)

Republished by Lonang Institute
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INTRODUCTION

By a vote of 71 to 29, the United States Senate, on March 13, 2008, rejected an effort led by Arizona Senator John McCain - the presumptive Republican nominee for President - to place a one-year moratorium on the Congressional practice of earmarking. While the Speaker of the House, Nancy Pelosi (D-CA), and the House Minority Leader, John Boehner (R-OH), have voiced support of such a ban, no one expects the House to press for one in light of the overwhelming Senate rejection.

Although both of the remaining contenders for the Democratic presidential nomination - Senators Hillary Clinton (D-NY) and Barack Obama (D-IL) - supported Senator McCain's call to take an election-year break from pork-barrel spending, only a "small band of GOP senators" joined him, the Associated Press reported.

Indeed, lawmakers from both sides of the aisle opposed McCain's reform effort, insisting that the practice of inserting "earmarked" spending into legislation is "a birthright power of the purse awarded Congress by the Founding Fathers," the Associated Press reported.

In a sharp rejoinder published on *National Review Online* the same day as the defeat of the moratorium, Senator Tom Coburn (R-OK) - the most principled and consistent Congressional foe of earmarking - wrote that "the actual writings of the Founding Fathers ... clearly demonstrate that our Country's Founders would have abhorred, not supported, the secretive practice of parochial earmarking."

Before examining the merits of these contradictory constitutional claims, one must first take a closer look at the current Congressional earmarking process.

CONGRESSIONAL EARMARKS

While people may quibble over the exact definition of an earmark, there is no question of its etymology. Since the 16th century, the word earmark means a cut or mark in the ears of sheep or cattle, serving as a sign of ownership. While it is generally unknown when and how the word became used to refer to a provision in legislation that directs funds to be spent on specific projects, often to be carried out by a named company or other entity, there is no question of its suitability.

Theoretically, earmarks are supposed to be submitted by individual legislators and judged on their merits by an appropriate congressional subcommittee before they find their way into a general appropriations bill. More often, however, these individual requests are used by party leaders and appropriations chairmen as favors handed out in exchange for votes on key pieces of legislation.

Additionally, earmarks that rnight be vulnerable if brought to a floor vote are often hidden in bills, the pages of which are so voluminous that to find them is like the proverbial search for a needle in a haystack. Indeed, earmarks are often protected from any scrutiny whatsoever because they are buried in lengthy omnibus appropriation bills that are made available just before a scheduled vote or not at all.

Further, earmarks are often not considered by the entire House or Senate, because they are inserted into bills at the conference phase when House and Senate leaders iron out their differences to

harmonize legislation previously voted on without the earmarks. Once an earmark is placed in such a jointly arrived-at bill, the only way that any member of either house of Congress is able to vote against an earmark is to vote against the entire bill.

Likewise, when legislation arrives at the President's desk, he may not veto individual earmarks, but must veto either the entire bill or let it pass. While Senator McCain has promised the American people that if elected President he will veto "the first earmarked, pork barrel bill that comes across my desk," he hasn't said what he will do with the second, third, and fourth bills that come his way from a Congress composed overwhelmingly of members who believe that they have a constitutional right to mandate that money be spent on a specific project as designated by an individual member of that body.

Once an earmark passes through the Oval Office, it becomes a mandate, not subject to the discretion of any executive officer. It must be spent as designated in the bill. Since earmarks are controlled by the most senior, the most powerful members of Congress, they carry the mark of ownership in the same way as an earmark on sheep or cattle, although less powerful members of Congress may lay claim to such ownership in their home districts come re-election time.

UNCONSTITUTIONAL EXERCISE OF AN ENUMERATED LEGISLATIVE POWER

Article I, Section 1 of the United States Constitution "vest[s]" in Congress only those "legislative powers herein granted." Thus, as a legislative body, Congress is one of "enumerated," not "plenary" powers. That is, before Congress may enact a bill into law, it must affirmatively demonstrate that every provision of that bill is the product of an exercise of some power written in the Constitution.

According to those members of Congress who support the practice of earmarking, the power to mandate that federal tax revenues be spent on individual projects, such as a teapot museum or a swimming pool, is authorized by Article I, Section 8, Clause 1, which states, in pertinent part, that "Congress shall have Power ... to provide for the ... general Welfare of the United States ... "

In the early history of the country, however, it was understood that the power "to provide for the general welfare" did not include the power to appropriate money to be spent on individual projects selected by Congress, much less specific projects designated by individual Congressional leaders no matter how powerful.

As Associate Supreme Court Justice Joseph Story - whose ardent federalist view of the general welfare clause was an expansive one - wrote in his Commentaries on the Constitution: "[T]he object to which an appropriation is to be made must be general and not local, its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot."

Today, however, members of the House and Senate do not assess whether a particular earmark serves a national interest or merely a local one. Indeed, Representative Mike Simpson (R-ID) and Senator Larry Craig (R-ID) issued a joint report in 2006 supporting the continued use of earmarks on the ground that they "were very beneficial for Idahoans," without regard to whether those earmarks could be justified in the national interest.

Furthermore, when particular earmarks for local projects - such as a swimming pool in Benning,

California, a Teapot Museum in Sparta, North Carolina, and the infamous "Bridge to Nowhere" from Ketchikan, Alaska (population 8,900) to the remote island of Gravina (population 50) - are exposed, their Congressional sponsors make no effort to justify them as in the national interest.

In his *National Review Online* article, Senator Coburn, a former OCPA trustee, quoted from several writings of Thomas Jefferson, the founder and leader of the Republican (now Democrat) party who agreed with his federalist foe, Joseph Story: Congress was not authorized to fund "local projects" from federal revenues.

UNCONSTITUTIONAL EXERCISE OF EXECUTIVE POWER

Not all earmarks are local in purpose or effect. Some may very well be justifiable, such as improved family housing at Mountain Home Air Force Base in Mountain Home, Idaho. But is a member of Congress the one who should determine that money be appropriated to support housing at a military base in his home district, or is that a decision for the Department of Defense, which has jurisdiction over all of the nation's military bases?

According to Senator Craig and Representative Simpson, in their joint report of 2006, the decision whether to fund a project that directly benefits Idahoans belongs to their elected representatives, not to a member of the executive branch. As Representative Alan Mollohan (D-WV) has contended with respect to the federal funding of higher education: "Nobody knows their constituents or their academic institutions or their programs better than the members of the House or Senate who represent these organizations ... We are in a better position to evaluate the merits of these programs than any executive agency."

Even Representative Ron Paul (R-TX), a strong constitutionalist, has gone on record in support of the Congressional practice of assigning to individual recipients millions of dollars for special projects on the ground that the money is going to be spent anyway and, if so, he will see to it that it is spent wisely.

But the constitutional question is not who is in a better position to know the merits of a potential recipient of the taxpayer's money, but who is authorized to "spend" that money. According to Article I, Section 8, Clause 1, Congress is authorized to provide, not spend, for the general welfare. The power of the purse is just that - to make funds available for spending, but not to make the spending decision.

Whether or not money appropriated by Congress is to be spent is an executive decision, and the executive power is vested by Article II, Section l of the Constitution in the President of the United States, not in Congress. Indeed, Article II, Section 3 prescribes that the President, not Congress, "shall take care that the Laws be faithfully executed."

To be sure, Congress may limit the President's authority by not appropriating funds to enforce a particular statutory provision, and the President would be bound by that limitation. But requiring the President to spend money that Congress has appropriated would be an encroachment upon the discretionary power not to act which is inherent in the very nature of executive power.

Yet, the very purpose of an earmark is to wrest that discretionary power from the President, and to

do so not by the exercise of legislative power - *i.e.*, the enactment of a rule governing the President - but by legislative fiat in favor of a particular company, organization, or individual.

FORBIDDEN TITLE OF NOBILITY

The very hallmark of an earmark is that it mandates that a specified amount of money be paid to a specified entity for a specified project. Earmarking, by its very nature, is an invitation to corruption. As Andrew Roth reported in *National Review Online* on November 6, 2007, New York "Senators Chuck Schumer and Hillary Clinton earmarked $1 million for a museum in New York commemorating the Woodstock Festival. A few weeks later, the recipients of the earmark donated $29,000 to the senators' campaigns."

William LaJeunesse of FOX News reported that in July 2007 Senator Coburn openly challenged Senator Ben Nelson (D-NE) to remove a $7.5 million earmark for an Omaha company in which Senator Nelson's son was an executive officer. According to Coburn, Nelson's then 33-year-old son became the company's marketing director in 2004, and the company executives and PAC, in turn, had contributed $18,000 to Nelson's campaign fund. Indeed, Coburn's investigation of the Omaha company indicated that it had, since 2000, given more than $160,000 to political candidates, during which time the company had obtained "$40 million, or roughly 80 percent of company revenues, in federal tax money through congressional earmarks." Not surprisingly, locals call the Omaha company "the company that Congress built."

Senator Nelson's earmarking beneficence to his son's company in Omaha pales in comparison with Congressman John Murtha's (D-PA) 33-year effort on behalf of his hometown of Johnstown. As the Wall Street Journal's John R. Wilke has reported, in the past four years alone Murtha has poured more than $600 million worth of earmarks into his congressional district. As Murtha bluntly put it to a visitor at a summer 2008 fundraiser, bringing home federal dollars "is the whole god---- reason I went to Washington." It comes as no surprise that many companies set up shop in Johnstown just to get in line for an earmark from Murtha.

This modern system of entitlements mirrors that of the English practice in the 18th century of special grants of political and economic privileges to individual favorites of the king or queen. Queen Elizabeth knighted Sir Walter Raleigh and with his knighthood came not only a seat in the upper house of the English Parliament, but also a land grant in the New World. As St. George Tucker would observe two centuries later, with the noble title came political and economic power: "[P]ersonal distinctions cannot be supported without power, or without wealth; these are the true supporters of the arms of nobility; take them away, the shield falls to the ground, and the pageantry of heraldry is trodden under foot."

It is against this backdrop of an endemic connection between a noble title and special privileges that Alexander Hamilton could write in Federalist Number 84 about the ban on "titles of nobility" found in Article I, Sections 9 and 10: "Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people."

Oddly this cornerstone has been entirely forgotten, the ban on titles of nobility being treated as a quaint novelty of a monarchial past completely unrelated to a society without a formal peerage. But the constitutional ban on titles of nobility was not addressed just to ensure that the United States of America would not establish a birthright class hierarchy as it then existed in England. Rather, the prohibition against titles of nobility was designed to rid the nation of the special political and economic privileges that came with the title, lest the government be transformed from one of the people, by the people, and for the people to one of the special interests, by the special interests, and for the special interests.

CONCLUSION

While the fight being waged in Congress over earmarks has not yet brought about their elimination or even temporary suspension, opposition to the practice is growing among current members of Congress. Yet, the practice will continue until the American people demand that their elected representatives honor their oath to support the Constitution of the United States, a pledge that can only be fulfilled by eliminating the pernicious and corrupting earmarks. Eliminating the current practice of Congressional earmarking would be a dramatic step forward to restoring our constitutional republic.

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