

**Article One: Restoring Capacity and Equipping Congress to Better
Serve the American People
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on the Modernization of Congress
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Chairman Kilmer, Vice Chair Graves, and Members of the Committee, thank you for the opportunity to testify today on a critically important topic. My name is John Hudak and I am a Senior Fellow in Governance Studies and the Deputy Director of the Center for Effective Public Management at the Brookings Institution. The views discussed in this testimony are my own and do not reflect any official position of the Brookings Institution or any of its subunits.

The balance of the power among the branches is a fundamental part of the structure of our democratic government. The Framers ensured that specific powers rested with certain institutions of government and those institutions would have checks on the powers of others.

Article I, Sections 8 and 9 of the Constitution detail one of Congress's most important authorities: spending power. Congress is charged to pass laws to fund government operations and make significant choices over the amount of money that is spent, by which institutions, and under what conditions.

As the size of the government—and its budget—grew over the course of the nation's history, and especially starting in the 20th century, Congress's ability to make spending decisions was limited by resource constraints. Congress has remained relatively the same size throughout most of the 20th Century, and while the size and capacity of staff have varied, the number of individual spending decisions that the federal government makes has far outpaced the ability of the legislative branch to manage in a granular way. In response, Congress delegated powers over many specific spending decisions to the executive branch, while maintaining authority over the broader outlines of appropriations authority in departments, agencies, offices, and programs. To some extent, this was a sensible response. The executive branch is far larger in staff and maintains greater subject area expertise across agencies.

However, I would argue Congress has made a mistake in terms of the extent it has transferred power to the executive. Excessive congressional delegation has crippled the legislative branch's

ability to exercise one of its most fundamental powers. In the process, the executive has grown strong and the Congress has weakened.

In the past 20 years, the undermining of congressional power—and simultaneous empowerment of the executive—has exceeded practical necessity. Instead, congressional choices have led to an untenable scenario that requires significant reform. Specifically, this has happened in three ways: the breakdown in the appropriations process, the weakening of congressional oversight, and the decision to ban earmarks.

In recent years, Congress has opted to fund the government via omnibus legislation. This effort essentially changes little from program to program, account to account from the previous fiscal year, plus or minus some arbitrary percentage. And that behavior is not restricted to one branch or to one party. Democrats and Republicans, House and Senate, either at the same time or at different times over more than a decade have relied on omnibus spending legislation to finance the operations of the government. What is lost in this process is the ability of Congress to make necessary changes to funding levels in programs based on need, success, failure, policy crisis, changing demographics, changing policy environments, or even requests from state and local governments. And while governing by omnibus does not directly transfer power to the executive branch, it amounts to a dereliction of duty by Congress and a failure to uphold the spirit of the powers vested in Article I of the Constitution.

The appropriations process is one of challenging negotiations among members of one chamber and between the chambers. However, historically and currently, the appropriations process can be one of bipartisanship. Yes, subcommittee markups involve contentious amendments on hot-button issues that deeply divide the parties. But many formal amendments and other provisions inserted into appropriations legislation prior to their release find broad bipartisan support. Why? Because partisan labels mask a common bond held by the 435 members of the US House and 100 Senators: they are sent to Washington to represent the needs of their constituents. A significant part of that need is met by the distribution of appropriations to specific projects or to broader areas of policy such as agriculture, healthcare, small businesses, trade, the environment, law enforcement, border security, and the national defense.

Although specific needs may vary from between the Sixth district of Washington or the 14th district of Georgia, the residents of those districts depend heavily on appropriations choices made by the United States Congress, regardless of the party of their representative. What's more, constituents across this country expect Congress, via its spending power, to be nimble to changes in need and policy realities. Omnibus appropriations legislation cripples Congress's ability to meet those expectations.

The appropriations process is inherently connected to Congress's oversight authority. In fact, while oversight is not an enumerated power, it is implied throughout Article I, and the most significant check Congress has on individual units of the executive branch comes via spending authority. The ability to grant or withhold funding is a profound power that Congress wields over executive branch actors and institutions. That power can be used directly to enact changes

or through softer means to motivate transparency, accountability, appearances before committees, and changes in the direction of policy. The Framers were wary of an unchecked executive, like that of Britain, and expected Congress to ensure that the administration of government was effective and without corruption, malice, or arbitrariness. That can only be achieved when Congress conducts regular, rigorous oversight.

By failing to conduct the appropriations process in a manner consistent with its constitutional obligations, Congress also foregoes a significant portion of its oversight authority. That is not to say that the Appropriations Committees fail to hold hearings, request documents and testimony, or investigate wrongdoing in agencies. However, Congress neuters itself when it fails to use its spending authority to respond to the results of oversight inquiries.

Omnibus appropriations legislation that does meager work changing funding levels within agencies and programs telegraphs to the executive branch that oversight is a secondary or tertiary concern of Congress. Those actions—or that inaction—does not induce rampant misconduct in the executive branch. However, it does convey to specific actors that there will be a limited examination of behaviors and actions and that waste, fraud, and abuse; politicization; or deviation from congressional intent will be much harder for Congress to identify.

And while legislators of one party often criticize the actions of the administration of the other, that concern is myopic. The threat to congressional authority is not the president; the threat is the presidency. The ability of the presidency to seize and then withhold the powers ceded by Congress knows no political label.

Finally, one of the most significant decisions Congress has made to cede spending authority to the executive branch involved the banning of earmarks in the early days of the 112th Congress. In 2011, the House and subsequently the Senate, chose to end the practice of legislative earmarks. Politically, this came in response to concerns about bloated budgets and deficit spending. The 2010 midterms focused significant attention on these issues, and many candidates for office pledged to end the practice.

Earmarking was painted as a coven for corruption—a practice reserved for the funding of needless projects to benefit the friends, supporters, and donors of Members of Congress. This conversation was laden with hyperbole. Earmarking was abused by a handful of members in the past. Those practices led to resignations, retirements, and defeats. In response to such abuses in the late-2000s, Congress chose to institute tighter rules around the practice. Those rules included restrictions on what members could request and for whom. The rules also enacted unprecedented levels of transparency in an effort to dissuade members from engaging in the types of bad acts that made headlines at the time. It also empowered media, researchers, and others to examine earmarking practices—effectively providing public oversight to complement congressional oversight.

Those rules—imperfect, but a step in the right direction—were deemed insufficient to sustain the practice, and politics rather than prudence ultimately won the day. However, the debate about an earmark ban was not a partisan exercise. Legislators on both sides of the aisle opposed the ban, recognizing this was less about corruptive elements within Congress. Instead, those legislators argued there was a separation of powers issue that would weaken the legislative branch and strengthen the executive.

The opposition was accurate. Senate Majority Leader Harry Reid (D-Nev.) stated “I have been a fan of earmarks since I got here the first day...if there needs to be more transparency than what we had, then fine, do it. But it is wrong to have bureaucrats downtown make decisions in Nevada that I can make better than they can make.”

Sen. James Inhofe (R-Okla.) agreed with his colleague across the aisle, noting “Article I, Section 9 says, clearly, we are the ones who are supposed to make these spending determinations in Congress. Now there are a lot of spending determinations that are made that I bitterly oppose. But if you say that you end all—they call them ‘earmarks’ ...then that means all that is going to be done by Barack Obama in the White House. It will go to the Executive.”

The late Sen. Richard Lugar (R-Ind.) described an earmark ban as, “surrendering of Constitutional authority to Washington bureaucrats and the Obama Administration.” These senators were correct. Legislators understand the needs of their districts and their states, oftentimes better than bureaucrats, and the ability of legislators to deliver on those needs is not an obscene abuse of office; it is a constitutional obligation and constituent expectation.

It must be noted that the ability to engage in earmark-style behavior has not ended with the moratorium. Instead, that behavior has been pushed deeper into the dark, via backdoor and informal efforts. What the earmark ban did was decrease transparency of earmark-style behavior, increasing the risks of problems while simultaneously limiting the ability to identify bad acts.

The earmark ban was not only bad policy, but the bases for which it was justified was off the mark. One reason for the earmark ban was the false claim that it led to exploding deficits. In reality, legislative earmarking accounted for less than one percent of federal spending. Earmarking did not grow the size of the federal spending pie; it simply influenced the size of the slices. An earmarking system can be implemented with strict adherence to a chairman’s mark and with other rules that ensure overall spending does not increase, but that individual spending decisions change.

Another part of the justification for the earmark ban was that politics, rather than need, entered into the practice in corruptive ways. Surely politics affected legislative earmarking, as it affects any spending decision. However, the political nature of earmarks is not synonymous with corruption. Delivering pork to a state or a district both serves the needs of a constituency as well as the political needs of an elected official. Legislators brag endlessly about the good job they are doing for their constituents. Why? Because constituents want them to be doing a good

job. Part of that job includes the return of tax revenue back to the district in the form of appropriations.

However, the earmark ban did not rid federal spending of politics; it simply transferred political considerations from one branch to another. In my 2014 book, *Presidential Pork: White House Influence over the Distribution of Federal Grants*, I examine all project-based federal spending decisions from 1996-2011—a dataset that includes over \$1 trillion dollars in grant aid distributed via more than 3.7 million individual grants. The data show that presidents are election-driven individuals, and the executive branch gives disproportionate sums of grants to swing states, particularly in advance of presidential elections. A web of bureaucrats and appointees understand presidential preferences and the president's political preferences are folded into spending decisions. Not every spending decision is made in response to politics—the vast majority is based on recipient need. However, politics affects the distribution of a non-trivial portion of the federal budget, and Congress has made choices over which branch will engage in earmarking. Right now, as in the past, presidential earmarks are happening, while Congress officially refuses to engage in the practice.

The politicization of federal grant funding is real, and it does not simply exist in the legislative branch. Presidents engage in pork-barrel politics, too. And when Congress cedes further authority over spending decisions to the executive branch, it also ensures that presidential politics replaces congressional politics in making determinations over portions of the federal largesse.

Taking back power from the executive branch is often a challenge that requires overriding a presidential veto, which in a polarized Congress is increasingly difficult. However, a return to normal appropriations, an increase in legislative oversight (particularly via spending authority), and earmark reform that both returns the practice while strengthening its integrity requires no presidential sign-off. In fact, each step rests solely within the purview of Congress, and it would allow legislators to increase capacity, better represent their constituents, uphold their oath, and recommit to the spirit and letter of Article I of the Constitution.