

Calendar No. 692

111TH CONGRESS }
2d Session }

SENATE

{ REPORT
111-365 }

EARMARK TRANSPARENCY ACT

R E P O R T

OF THE
COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 3335

TOGETHER WITH

ADDITIONAL VIEWS

TO REQUIRE CONGRESS TO ESTABLISH A UNIFIED AND SEARCH-
ABLE DATABASE ON A PUBLIC WEBSITE FOR CONGRESSIONAL
EARMARKS AS CALLED FOR BY THE PRESIDENT IN HIS 2010
STATE OF THE UNION ADDRESS TO CONGRESS



DECEMBER 14, 2010.—Ordered to be printed

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EARMARK TRANSPARENCY ACT

DECEMBER 14, 2010.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 3335]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 3335) to require Congress to establish a unified and searchable database on a public website for congressional earmarks as called for by the President in his 2010 State of the Union Address to Congress, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

I. PURPOSE AND SUMMARY

S. 3335, the Earmark Transparency Act aims to improve congressional and public oversight of federal spending by creating a single database and central website to house and provide comprehensive information on congressional earmarks.

II. BACKGROUND AND NEED FOR THE LEGISLATION

The growth of the Internet has revolutionized efforts to bring increased transparency to government finances, providing Americans with real-time, comprehensive information about their government. With a click of a computer mouse, anybody can easily obtain the voting records of his or her representatives, the budgets of every federal agency and, in some cases, entire federal contracts. Technology has made it cheaper and easier for the government not only to collect, but to present in a simple and searchable format, enor-

mous quantities of data that would have previously been unavailable to taxpayers. The Committee has strongly supported this trend and has pressed forward numerous proposals in recent years to disseminate information on government finances and the legislative process to the public.

In 1995, for example, the Committee originated critical provisions of the *Lobbying Disclosure Act of 1995*, which requires lobbyists to register and make public information on the interests they represent.¹ It revisited that law in 2006 and 2007, authoring even broader disclosure requirements—including a mandate for a searchable electronic database—that became part of the Honest Leadership and Open Government Act of 2007 (HLOGA).²

As the Supreme Court recognized in upholding a predecessor to the 1995 Act, making information about the legislative process available to the public is critical to the proper functioning of our Republic:

[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.³

The Committee has pursued its interest in ensuring accountability through increased transparency in other areas within its jurisdiction as well. In 2006, the Committee passed and the President signed the *Federal Funding Accountability and Transparency Act of 2006*,⁴ which created a public website, USA Spending.gov, to provide information on all recipients of federal grants and contracts. Prior to the launch of USA Spending.gov, taxpayers seeking complete information on federal spending found it necessary to search through multiple federal websites, some of which were password protected. Since the implementation of the 2006 law, anyone can access one central website to search for federal funding information, using a simple search engine modeled on popular websites such as Yahoo! and Google.

S. 3335, the Earmark Transparency Act, would further the Committee's transparency efforts by creating a comprehensive public website offering detailed information on every congressional earmark, and every request for an earmark. Although Congress has made some initial efforts to make information regarding a Member's earmark requests more publicly available, additional information could be provided and advances in technology could further improve transparency. Like a Member's voting record, the earmark record is an important source of information for voters, revealing the kind of work the Member has performed on behalf of his or her district or State.

Earmarks are projects that receive federal funding, primarily at the request of one or more Members of Congress, typically for work

¹ Public Law 104–65, which incorporated provisions of S. 1060, the bill considered by the Committee.

² Public Law 110–81. HLOGA incorporated provisions of a bill (S. 2128) reported a year earlier by the Committee during the 109th Congress.

³ *United States v. Harris*, 347 U.S. 612, 625; 74 S.Ct. 808, 816 (1954).

⁴ Public Law 109–282.

done inside a requesting Member's district or State. Earmarks may direct spending to a particular entity, or may take the form of a targeted tax or tariff measure that benefits one or a few entities. According to the non-partisan Taxpayers for Common Sense, there were 9,499 appropriations earmarks worth \$15.9 billion in Fiscal Year 2010 and 11,286 earmarks worth \$19.9 billion allocated in 2009.⁵

Because earmarks can benefit only one or a narrow range of beneficiaries, they are seldom the subject of Congressional hearings or debate as bills move through the Congressional process, and therefore the legislative record for most earmarks is sparse. While most earmark requests are submitted by requesting Members to the relevant committees of jurisdiction early in the legislative process, House and Senate Rules only require certain information on earmark requests to be made available to the public, and it can be difficult even for Members of Congress to examine each project before votes are cast on bills that authorize or appropriate earmarks.

Incremental gains have been made in recent years to increase the amount of earmark information available to the public. In 2007, the HLOGA added a new Rule XLIV to the Standing Rules of the Senate, requiring every bill coming before the full Senate to be accompanied by a list describing all earmarks in the bill. The list has to include: (1) the name of the sponsoring Member of Congress; (2) the name and location of the intended recipient, or the location of the activity; (3) the purpose of the earmark; and (4) a certification that neither the sponsoring Members nor their family members would benefit financially from the earmark.⁶ The House of Representatives adopted similar rules for earmark disclosure in the 110th Congress, now incorporated into House Rule XXI.

But even with the new Senate and House rules, important information on earmarks can be difficult to obtain or to examine in a timely fashion. For example, some descriptions only contain the mere name of a project and recipient. A detailed justification is needed. Earmarks can provide funding to important projects in states and localities, but more information should be provided to the public as to how federal dollars are being spent.

Additionally, while the rules require disclosure of committee-approved earmarks, information on requested earmarks is *ad hoc* and incomplete. For example, the Senate Appropriations Committee requires Members requesting earmarks to post information on their earmark requests on the websites of their personal offices.⁷ However, disclosure rules vary across committees, and data made available is scattered across hundreds of web sites.

S. 3335 would fix these problems by establishing a bicameral system of disclosure of all earmark requests. Five days after any request is made, the requesting Member would be required to fill out an electronic form describing the earmark and providing other basic information. Relevant committees would then fill in any re-

⁵Information provided by Taxpayers for Common Sense, "TCS FY2010 Earmark Analysis: Apples-to-Apples Increase in Earmarks," February 17, 2010, http://taxpayer.net/search_by_category.php?action=view&proj_id=3192&category=Earmarks&type=Project.

⁶Senate Report 111-229, pages 150 and 171.

⁷See Joint Press Release from House and Senate Appropriations Committee Chairmen, House and Senate Appropriations Committees Announce Additional Reforms in Committee Earmark Policy; January 6, 2009, available at <http://appropriations.senate.gov/news.cfm?method=news.view&id=c0413de1-f04e-4bb9-801d-987bab16f7ac0>.

remaining gaps, providing information pertaining to the earmark's passage through that committee. This information would go on a publicly accessible and fully searchable website and be made available in bulk for researchers and others. Bulk data allows anyone interested in examining the raw data to download all of it at once, and to manipulate it in ways not provided for on the website. The website would also make all key documents accompanying each request available, providing taxpayers with unprecedented access to information on earmarks.

There are several reasons why this legislation is urgently needed.

To begin with, many earmarks have no records associated with them beyond the minimal information offered in committee reports. As for those about which information is available, the records are currently decentralized and lacking in any uniformity; those looking for earmark data currently must search through more than 550 different websites administered by 435 Members of the House of Representatives, 100 Senators and numerous committees in both chambers. Some of these websites prominently post earmark information, while others remain silent on the issue. As a result, even if the average person wanted to attempt it, obtaining a comprehensive set of earmark data from public sources would be virtually impossible.

There is likewise no uniform process for permanently archiving information on earmarks, creating an *ad hoc* and incomplete historical record. While many committee records remain accessible to the public, those of individual Members—which, under current practice, contain much of the available earmark data—can disappear from public view when a Member leaves office if the Member does not individually decide to make the records available in a public place.

The difficulty of finding earmark data was illustrated in a recent study by Scott Frisch and Sean Kelly of California State University Channel Islands.⁸ When information on request data proved difficult to uncover, researchers were forced to dig through the archives of former subcommittee chairmen of the Appropriations Committee. Only after an intensive research effort did they discover memoranda and charts outlining the request process for certain congressional committees. The difficulty these researchers encountered in retrieving information on earmarks underscores the near impossibility of the same task for the average citizen.

The American public is entitled to understand the entire earmark process, and not simply view the end result. Complete earmark records should include information on *requests*, whereas the current system provides only a final list of approved earmarks. Just as all legislative bills are made publicly available immediately after they are introduced, all earmark requests should be made public as well. Opening up the process in such a way encourages public involvement, bringing increased accountability to the system.

In his State of the Union Address on January 27, 2010, President Obama called on Congress to do just this. He asked for legislation

⁸Frisch, Scott A., and Sean Q. Kelly, California State University Channel Islands, "Inside the Earmark Favor Factory: Exploring Earmark Requests," A paper prepared for the Politics of Federal Spending Conference, University of California, Merced, May 27-29, 2010.

to not only create an earmark transparency website, but for one that includes earmark request information:

Tonight, I'm calling on Congress to publish all earmark requests on a single website before there's a vote, so that the American people can see how their money is being spent.⁹

Making the case further, the White House provided a fact sheet to accompany the speech providing additional details on why earmark transparency is so important. Among its observations:

Many Members and others disclose earmarks on various individual websites. That has helped contribute to a significant drop in earmarks since 2008, but the practice is far from uniform across Congress, and often too difficult to access prior to votes. It's time for a comprehensive, bipartisan, state-of-the-art disclosure database that allows Americans to examine the details of every proposed earmark before a vote is taken—one that is fully searchable and otherwise user-friendly.¹⁰

Detailed financial information is essential in a democracy because it provides citizens with a means to hold their government accountable. An informed electorate can direct how their taxes are spent or not spent, and help prevent abuses. But the absence of spending information concentrates power in the hands of federal officials, away from public view. For this reason, the founders required in the Constitution that Congress make financial statements publicly available. Article 1, Section 9, lays out the governing principle:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; *and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.*

The Earmark Transparency Act builds upon this principle by extending transparency into the area of earmarks, both for proposed and approved projects. Taxpayers have the right to see where their money is being spent. Transparency requirements were built into the fabric of the Constitution to protect against the urge by government officials to spend public money in secret, which can lead to waste, fraud, abuse and mismanagement. S. 3335 would be consistent with the spirit of this constitutional responsibility by requiring that all data be published within five days of an earmark request. This near real-time information would give citizens more information on earmarks than has ever been available.

During Committee consideration of S. 3335, some Members raised concerns about some of the bill's mandates.

First, some suggested that a bill to create an earmark transparency website constitutes a change in the Standing Rules of the Senate, and therefore should officially be handled as a rules change. According to this objection, because rule XLIV already re-

⁹Remarks by President Barack Obama in his State of the Union address, January 27, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

¹⁰Fact sheet distributed by the White House to accompany the State of the Union Address, "Rescue, Rebuild, Restore—A New Foundation for Prosperity: Cracking Down on Special Interests," January 27, 2010.

requires disclosure of some earmark information, any additional requirements for disclosure should amend current practice.

However, the disclosure required by S. 3335 is not a *change*, actually or effectively, in Senate Rules, but rather a *complement to* Rule XLIV. The primary reason for this lies in the way that each affects the legislative process. Rule XLIV is designed not only to ensure earmark transparency, but to control the legislative process governing any bills that contain one or more earmarks. If a bill does not contain the required disclosures, any Member may raise a procedural point of order against the provision of a bill containing undisclosed earmarks, and have the provision stricken. The Senate is allowed to waive the disclosure rules only by a vote of 60 Senators.

Unlike rule XLIV, S. 3335 would not have any direct impact on the legislative process. It would simply increase the disclosure requirements, requiring that the additional information be made public within five days of a Member's earmark request. Legislation would be allowed to proceed on both the floor of the Senate or the House of Representatives in the exact manner it would without the passage of S. 3335. Therefore, it is unnecessary to amend Senate Rules since the purpose of the legislation is merely to disclose additional information and compile it onto a public website.

Further, since this bill was designed to bring comprehensive transparency to the earmarking process in both houses of Congress, the Committee believes it best to address the matter as a change in law rather than as separate changes to the rules of both chambers. Transparency would suffer if the House of Representatives and the Senate disclosed earmark data in different ways, and so the disclosure practices of both should be governed by a single legislative solution.

Second, some have raised concerns about the technical feasibility of creating a website capable of displaying information on earmarks according to the requirements of S. 3335. These concerns have included questions about the ease in which a website can "aggregate" non-numeric data fields and the possibility of storing earmark data for periods of time longer than three years.

The Committee has concluded that the technical requirements of this bill are feasible and fall well within the capabilities of current technology. The Office of the Secretary of the Senate—which would be responsible for administering the provisions of S. 3335 within the Senate—agreed with this assessment, in a letter dated June 22, 2010, stating that the requirements of the bill were not beyond its technical capability as long as appropriate resources were provided to fulfill the bill's mandates. The letter read: "Although this is a complex technical system with several broadly defined requirements, it is technically feasible to implement the requirements of S. 3335."¹¹ Since the letter was written, the Committee has revised the bill to eliminate several of the most complicated technical requirements referenced in the letter.

This view was also shared by the Sunlight Foundation, a non-profit organization dedicated to government transparency. In a let-

¹¹Letter from Nancy Erickson, Secretary of the Senate, to the Honorable Robert F. Bennett, Ranking Member, Senate Committee on Rules and Administration regarding comments on S. 3335, June 22, 2010. This letter is available upon request at the Senate Committee on Homeland Security and Governmental Affairs.

ter dated July 26, 2010, the Sunlight Foundation discussed the absence of any technical barriers to implementing the bill, citing the organization's success in creating similar websites at a low cost.

We understand that you are concerned that it may not be technically feasible to satisfy the bill's requirement to create a website that allows the public to search and aggregate earmarks by any of more than twenty data-points listed in the legislation, especially data-points that include lengthy and non-standardized information such as justification for the project and supplemental documents. In fact, it is possible to aggregate calculations by values derived from fields that include attachments or lengthy text descriptions by sorting by phrases contained in those fields. For example, a query for all the earmarks with the phrase "ethanol", binned by congressman, is certainly achievable. There are several free and open source search engines for a variety of programming languages that support this kind of free text search and aggregation. Our Subsidyscope and Elena's Inbox projects required searches to be performed on non-standard text fields in a manner similar to what would be required by the Earmark Transparency Act. For those projects, we had a choice of versatile, free software options to perform the advanced query, filter and aggregation operations we required. The software we chose used a standards-based web interface that allowed it to communicate with any programming language.¹²

III. LEGISLATIVE HISTORY

On May 11, 2010, Senators Coburn, Gillibrand, McCain, Bennet, Ensign, Feingold, Corker and Udall (Colorado), introduced S. 3335, which was referred to the Senate Committee on Homeland Security and Governmental Affairs. The Committee considered the bill on July 28, 2010. The Committee adopted by voice vote a substitute amendment offered by Senators Coburn and McCain, and then ordered the bill favorably reported by a roll call vote of 11-5. The vote for the record only, including votes by proxy, was favorable by a vote of 12-5.

Senators Lieberman, Carper, Landrieu, McCaskill, Kaufman, Collins, Coburn, Brown, McCain, Voinovich, and Ensign voted in favor of reporting the bill. Senators Levin, Akaka, Pryor, Tester, and Burris voted against reporting the bill. Senator Graham asked to be recorded in favor of the bill by proxy.

Members present for the vote on the substitute amendment were Senators Lieberman, Levin, Akaka, Carper, Pryor, Landrieu, McCaskill, Tester, Burris, Kaufman, Collins, Coburn, Brown, McCain, Voinovich, and Ensign.

The substitute amendment makes several changes to the original bill.

First, the substitute expands the timeline available to the Secretary of the Senate for implementation of S. 3335, increasing the time from six months to 18 months after enactment. In addition,

¹²Full text of the Sunlight Foundation's letter can be found on its website at <http://blog.sunlightfoundation.com/2010/07/28/baby-steps-on-the-earmark-transparency-act/>.

it would provide an additional six-month extension to the Secretary to implement several highly technical provisions.

Second, the substitute streamlines the number of data elements required to be disclosed for each earmark, reducing the number from 23 to 16.

Third, the substitute clarifies the responsibilities of committees to provide data to the Office of the Secretary of the Senate for use on the website. It requires individual Members to provide 13 of the 16 data elements, leaving three elements for committee chairmen. This change responds to the criticism raised by some Members that the bill as introduced put too much of the burden for information collection on committees, when in fact much of the information resides with the individual Members making the earmark requests.

Fourth, the substitute removes the word “aggregate” and replaces it with “sort.” This clarifies the intent of the legislation to require that the website allow users to sort information by any data element, eliminating confusion over the term “aggregate.”

Finally, the substitute provides for a source of funding by authorizing, at a Member’s discretion, any Senate personnel office with a surplus budget allotment in his or her Official Personnel and Office Expense Account to transfer those funds to the Office of the Secretary of the Senate for use in implementing S. 3335.

IV. SECTION-BY-SECTION ANALYSIS

Section 1—Short title

Section 1 establishes the short title of the Act as the “Earmark Transparency Act.”

Section 2—Definitions

Section 2 defines the following key terms used throughout the bill.

“Earmark” is any congressionally directed spending item, limited tax benefit or limited tariff benefit. This definition is identical to the definition used in current Senate Rule XLIV, paragraph 5, as established by P.L. 110–81, the *Honest Leadership and Open Government Act*.

“Request,” is a formal request from a Member of Congress to a committee for an earmark, irrespective of the form in which the request is made or whether the request is actually granted.

“Requestor” is a Member of Congress who submits a request. The Committee intends that, in cases in which the same earmark has more than one requestor, each Member’s request will be treated as a separate request.

“Searchable website” is a website that is fully searchable across the data elements required by section 3 and provides both simple and advanced search capabilities, as well as bulk access to earmark data. This means allowing anyone so interested to download all earmark data at once and permitting that data to be manipulated according to the various elements. The website would have the web address of earmarks.congress.gov and would be prominently displayed on the official websites of the Senate and the House of Representatives.

Section 3—Congressional earmark database

As reported, section 3(a) requires the Secretary of the Senate, the Senate Sergeant at Arms, and the Clerk of the House to develop a single searchable website containing 16 data elements on each earmark, much of which is already provided under current disclosure arrangements. The database must be available to the public at no cost to access and will include the following information about each earmark:

1. the fiscal year in which the earmark would be funded;
2. the bill number on which the request is made;
3. the amount of the initial request made by requestor;
4. the amount approved by the committee to which the request was made;
5. the amount approved in final legislation (if approved);
6. the name of the federal department or agency through which the entity will receive the funding;
7. the name of the requestor or requestors;
8. the requestor's State or District;
9. the name of any beneficiary designated to receive appropriations;
10. the type of organization (public, private non-profit, or private for-profit entity);
11. the address of any beneficiary;
12. the project name;
13. the project description;
14. the justification explaining how the congressionally directed spending item would benefit taxpayers;
15. the percentage of the project's total funding derived from non-Federal sources; and
16. a copy of all documents provided by the requestor to a committee of Congress relevant to each request.

Section 3(b) requires that the website include all information beginning with earmarks requested one year after the enactment of the Act.

Section 3(c) further details search capability requirements of the website. Specifically, the website shall: provide a permanent and unique identification number for each request and for each requestor; provide that all search results return permanent web links; and include information from all relevant sources including bills, conference reports, amendments, manager's amendments, and committee reports. This final requirement should be construed to mean that all earmarks contained within any bill, conference report, amendment, manager's amendment or committee report should be reported on the website. It is not intended to mean that information related to an earmark, and required in the bill, should be collected from "all relevant sources."

In addition to a unique identification number for each request, a unique identification number for each awarded earmark will almost certainly be necessary. Multiple earmark requests are often credited for a single earmark award, and earmark awards may differ from requests in terms of project name, project description, named entity receiving funding, and so on. A field added to each earmark request can indicate its relationship to any awarded earmark by the awarded earmark's number, and a field for each

awarded earmark can indicate its relationship to the earmark requests that produced it, each by its number.

The use of standard identifiers, such as for Members of Congress-requestors, beneficiaries, address information, and so on, is encouraged. Providing regularly updated bulk access to data in machine processable formats will maximize the accessibility of earmark information to the public and Congress.

Section 3(d) also requires requests to be made available on the website no later than five days after submission by a requestor to a committee of Congress.

Under section 3(e), the responsibility to provide the required information to the Secretary of the Senate and the Clerk of the House rests with the individual Member requesting the earmark, with the exception of the following information, which must be submitted by the chair of each committee to which a request is made: the amount approved by the committee, the amount approved in the final legislation (if any), and the name of the federal department or agency that will receive the funding.

Section 3(f) provides, in general, that the Act shall be implemented not later than 18 months after the date of enactment of this Act. However, section 3 also allows for implementation of the search capabilities of the website required by section 3(c) not later than two years after the date of enactment. Section 3(f) also provides that any funds that remain unobligated or unspent at the end of fiscal year 2010 or 2011 from the Official Personnel and Office Expense Account of any Senator who agrees to a transfer may be transferred from such account to the Secretary of the Senate for purposes of paying for the costs associated with the website established by this Act.

V. REGULATORY IMPACT AND EVALUATION

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. The Congressional Budget Office states that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandate Reform Act and would not affect the budgets of state, local, or tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 2, 2010.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3335, the Earmark Transparency Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 3335—Earmark Transparency Act

S. 3335 would require the Clerk of the House and the Secretary of the Senate to create a Web site within 18 months that would include all Congressionally directed spending items, limited tax benefits, and limited tariff benefits. The legislation also would establish many uniform reporting requirements for this information, including the name of the beneficiary, the amount requested, and the amount approved in the final bill. Finally, the legislation would allow any Senator to transfer unspent funds from fiscal years 2010 and 2011 from Official Personnel and Office Expense Accounts to the office of the Secretary of the Senate to pay for the cost of the Web site.

Based on information from the House and Senate as well as the experiences of other agencies and the Office of Management and Budget in creating similar information systems, CBO estimates that this effort would cost \$4 million over the 2011–2015 period, assuming appropriation of the necessary amounts. Most of the initial costs would be for coordinating consistent procedures for collecting information by the House and the Senate. Additional personnel or contract support would be needed to process and verify information, respond to inquiries, resolve data errors, enhance system capabilities, and explain how to use the system. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 3335 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

The bill does not repeal or amend any statute or part thereof.

VIII. ADDITIONAL VIEWS

SENATOR CARL LEVIN AND SENATOR DANIEL K. AKAKA

S. 3335, the Earmark Transparency Act proposes to create a single database and central website to provide information on congressional earmarks. While the intent of the act is laudable and transparency in government is a goal we should all share, the bill as written is far too complex and burdensome.

The Bill requires that 16 data points be collected and made available on a publically accessible website in a searchable format. The Federal Funding Accountability and Transparency Act of 2006, on which this bill was modeled, required a database that only included five basic data points for each federal contract or grant. As a result of that act, the Office of Management and Budget created the usaspending.gov website. Even with just five required data points, there are serious questions as to the validity of information available on the website. According to a September 8, 2010 press release from the Sunlight Foundation, “more than \$1.3 trillion in federal reporting data from 2009 is broken.” These inaccuracies represent 70% of the data reported that year.

Currently, Senate Rule XLIV provides for the disclosure of each congressionally directed spending item, limited tax benefit, and limited tariff benefit on a publicly accessible congressional website in a searchable format. The Senate Appropriations Committee additionally requires that Senators post each request they make on their publically accessible websites. In a July 16th letter, the Chairman and Ranking Member of the Rules Committee wrote a joint letter to the Homeland Security and Governmental Affairs Committee suggesting that S. 3335 be modified to keep the data required “to a workable set” based on the disclosure requirements of the existing Senate rules. S. 3335 goes far beyond the existing disclosure requirements.

Some of the disclosure items required by this bill would be particularly difficult to administer. In a July 27, 2010 letter, the Secretary of the Senate indicated that “it is not possible to meaningfully sum or aggregate non-numeric data or non-quantitative numeric data.” While the bill has been revised to require that the public be able to “sort” these data elements, it is uncertain how this addresses the problem. The letter goes on to state that if the statute is enacted “we would work with our oversight committees to interpret the requirement” to mean something else entirely.

One of the required items to be searchable under this bill are copies “of all documents provided by the requestor to a committee of Congress relevant to each request.” In the July 27 letter, the Secretary of the Senate asserts that while “any documents that do not exist in electronic format could be scanned,” but then states that “it does not appear possible that these documents would be

fully searchable” as required by the bill. Additionally, some of the documentation which would be required to be provided may contain sensitive information which is prohibited from public disclosure. The Secretary states that she has no role, expertise or capacity to screen out information which is prohibited from public disclosure.

This legislation places a legal burden on the Secretary of the Senate, the Sergeant of Arms and the Clerk of the House to create a website without ensuring they have the resources necessary to do so. According to the CBO, the bill is estimated to cost \$4 million between 2011 and 2015. The bill provides that it would be funded by “any funds that remain unobligated or unspent at the end of fiscal year 2010 or 2011” from the office expense accounts of Senators. As it is unknown how many Senators may have unobligated funds or may use them for this purpose. In fact, unobligated funds would not be available until 6 months after the database is supposed to be fully implemented.

There are also a number of technical problems remaining in the language of the act. For example:

- The bill would require the disclosure of the bill number within 5 days of the time that the request is made. In the case of the National Defense Authorization Act, the bill number is not known until the bill is reported out of committee, some weeks or months after requests have been made.
- The bill would require the disclosure of the percentage of non-Federal funding for the project. The percentage of non-Federal funding depends on the amount of Federal funding, an amount that cannot be known until after Congress has acted on the funding request.
- The bill states that the system must include information from all relevant sources, including bills, conference reports, amendments, managers’ amendments, and committee reports. However, it doesn’t say who is responsible for providing such information.

For these reasons we believe further revisions are needed for this bill. In the next Congress, the bill should be referred concurrently to the Committee on Homeland Security and Governmental Affairs as well as the Committee on Rules and Administration to ensure that these issues can be resolved before bringing this bill to the floor.

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